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Presidential Documents

Title 3—

The President

Executive Order 13478 of November 18, 2008

Amendments To Executive Order 9397 Relating To Federal Agency Use of Social Security Numbers

By the authority vested in me as President by the Constitution and laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* It is the policy of the United States that Federal agencies should conduct agency activities that involve personal identifiers in a manner consistent with protection of such identifiers against unlawful use.

Sec. 2. *Amendments to Executive Order 9397.* Executive Order 9397 of November 22, 1943, is amended:

(a) in paragraph 1 by:

(i) striking ''shall'' and inserting in lieu thereof ''may'';

(ii) striking ''exclusively'';

(iii) striking ''Title 26, section 402.502'' and inserting in lieu thereof ''title 20, section 422.103''; and

(iv) striking ''the 1940 Supplement to'';

(b) by striking ''Bureau of the Budget'' in paragraph 5 and inserting in lieu thereof ''Office of Management and Budget'';

(c) by renumbering paragraph 6 as paragraph 8;

(d) by inserting immediately following paragraph 5 the following new paragraphs:

''6. This order shall be implemented in accordance with applicable law and subject to the availability of appropriations.

''7. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person.''; and

(e) by striking ''Board'' each place it appears and inserting in lieu thereof in each such place ''Administration''.

Sec. 3. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
November 18, 2008.

[FR Doc. E8–27771
Filed 11–19–08; 8:45 am]
Billing code 3195–W9–P

Federal Register
Vol. 73, No. 225
Thursday, November 20, 2008

Presidential Documents

Title 3—

The President

Executive Order 13479 of November 18, 2008

Transformation of the National Air Transportation System

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* It is the policy of the United States to establish and maintain a national air transportation system that meets the present and future civil aviation, homeland security, economic, environmental protection, and national defense needs of the United States, including through effective implementation of the Next Generation Air Transportation System (NextGen).

Sec. 2. *Definitions.* As used in this order the term ''Next Generation Air Transportation System'' means the system to which section 709 of the Vision 100—Century of Aviation Reauthorization Act (Public Law 108–176) (Act) refers.

Sec. 3. *Functions of the Secretary of Transportation.* Consistent with sections 709 and 710 of the Act and the policy set forth in section 1 of this order, the Secretary of Transportation shall:

(a) take such action within the authority of the Secretary, and recommend as appropriate to the President such action as is within the authority of the President, to implement the policy set forth in section 1 of this order and in particular to implement the NextGen in a safe, secure, timely, environmentally sound, efficient, and effective manner;

(b) convene quarterly, unless the Secretary determines that meeting less often is consistent with effective implementation of the policy set forth in section 1 of this order, the Senior Policy Committee established pursuant to section 710 of the Act (Committee);

(c) not later than 60 days after the date of this order, establish within the Department of Transportation a support staff (Staff), including employees from departments and agencies assigned pursuant to subsection 4(e) of this order, to support, as directed by the Secretary, the Secretary and the Committee in the performance of their duties relating to the policy set forth in section 1 of this order; and

(d) not later than 180 days after the date of this order, establish an advisory committee to provide advice to the Secretary and, through the Secretary, the Committee concerning the implementation of the policy set forth in section 1 of this order, including aviation-related subjects and any related performance measures specified by the Secretary, pursuant to section 710 of the Act.

Sec. 4. *Functions of Other Heads of Executive Departments and Agencies.* Consistent with the policy set forth in section 1 of this order:

(a) the Secretary of Defense shall assist the Secretary of Transportation by:

(i) collaborating, as appropriate, and verifying that the NextGen meets the national defense needs of the United States consistent with the policies and plans established under applicable Presidential guidance; and

(ii) furnishing, as appropriate, data streams to integrate national defense capabilities of the United States civil and military systems relating to the national air transportation system, and coordinating the development of requirements and capabilities to address tracking and

other activities relating to non-cooperative aircraft in consultation with the Secretary of Homeland Security, as appropriate;

(b) the Secretary of Commerce shall:

(i) develop and make available, as appropriate, the capabilities of the Department of Commerce, including those relating to aviation weather and spectrum management, to support the NextGen; and

(ii) take appropriate account of the needs of the NextGen in the trade, commerce, and other activities of the Department of Commerce, including those relating to the development and setting of standards;

(c) the Secretary of Homeland Security shall assist the Secretary of Transportation by ensuring that:

(i) the NextGen includes the aviation-related security capabilities necessary to ensure the security of persons, property, and activities within the national air transportation system consistent with the policies and plans established under applicable Presidential guidance; and

(ii) the Department of Homeland Security shall continue to carry out all statutory and assigned responsibilities relating to aviation security, border security, and critical infrastructure protection in consultation with the Secretary of Defense, as appropriate;

(d) the Administrator of the National Aeronautics and Space Administration shall carry out the Administrator's duties under Executive Order 13419 of December 20, 2006, in a manner consistent with that order and the policy set forth in section 1 of this order;

(e) the heads of executive departments and agencies shall provide to the Secretary of Transportation such information and assistance, including personnel and other resources for the Staff to which subsection 3(c) of this order refers, as may be necessary and appropriate to implement this order as agreed to by the heads of the departments and agencies involved; and

(f) the Director of the Office of Management and Budget may issue such instructions as may be necessary to implement subsection 5(b) of this order.

Sec. 5. *Additional Functions of the Senior Policy Committee.* In addition to performing the functions specified in section 710 of the Act, the Committee shall:

(a) report not less often than every 2 years to the President, through the Secretary of Transportation, on progress made and projected to implement the policy set forth in section 1 of this order, together with such recommendations including performance measures for administrative or other action as the Committee determines appropriate;

(b) review the proposals by the heads of executive departments and agencies to the Director of the Office of Management and Budget with respect to programs affecting the policy set forth in section 1 of this order, and make recommendations including performance measures thereon, through the Secretary of Transportation, to the Director; and

(c) advise the Secretary of Transportation and, through the Secretary of Transportation, the Secretaries of Defense, Commerce, and Homeland Security, and the Administrator of the National Aeronautics and Space Administration, with respect to the activities of their departments and agencies in the implementation of the policy set forth in section 1 of this order.

Sec. 6. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
November 18, 2008.

[FR Doc. E8–27777
Filed 11–19–08; 8:45 am]
Billing code 3195–W9–P

Rules and Regulations

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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1465

RIN 0578–AA50

Agricultural Management Assistance Program

AGENCY: Commodity Credit Corporation, United States Department of Agriculture.

ACTION: Interim final rule with request for comment.

SUMMARY: The Natural Resources Conservation Service (NRCS) is amending the regulations for the Agricultural Management Assistance program (AMA). Section 2801 of the Food, Conservation, and Energy Act of 2008 (2008 Act) amended the Agricultural Management Assistance program (AMA) by: Expanding the program's geographic scope to include Hawaii; and providing $15 million in mandatory funding for each of fiscal years 2008 through 2012. NRCS issues this interim final rule with request for comment to incorporate statutory changes resulting from the 2008 Act and to make administrative changes to improve program efficiency.

DATES: *Effective Date:* The rule is effective November 20, 2008. *Comment date:* Submit comments on or before January 20, 2009.

ADDRESSES: You may send comments (identified by Docket Number NRCS–IFR–08002) using any of the following methods:

- Government-wide rulemaking Web site: go to *http://www.regulations.gov* and follow the instructions for sending comments electronically.
- Mail: Director, Financial Assistance Programs Division, Natural Resources Conservation Service, Agricultural Management Assistance Program Comments, P.O. Box 2890, Room 5237–S, Washington, DC 20013.
- Fax: (202) 720–4265
- Hand Delivery: Room 5237–S of the USDA South Office Building, 1400 Independence Avenue, SW., Washington, DC 20250, between 9 a.m. and 4 p.m., Monday through Friday, except Federal Holidays. Please ask the guard at the entrance to the South Office Building to call: (202) 720–4527 in order to be escorted into the building.
- This interim final rule may be accessed via Internet. Users can access the NRCS homepage at *http://www.nrcs.usda.gov/*; select the *Farm Bill* link from the menu; select the *Interim final* link from beneath *the Final and Interim Final Rules Index* title. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA TARGET Center at: (202) 720–2600 (voice and TDD).

FOR FURTHER INFORMATION CONTACT: Director, Financial Assistance Programs Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013–2890; Phone: (202) 720–1844; Fax: (202) 720–4265; or e-mail: *AMA2008@wdc.usda.gov*.

SUPPLEMENTARY INFORMATION:

Regulatory Certifications

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this interim final rule is a non-significant regulatory action under Executive Order 12866.

Regulatory Flexibility Act

NRCS has determined that the Regulatory Flexibility Act is not applicable to this interim final rule because NRCS is not required by 5 U.S.C. 553, or any other provision of law, to publish a notice of proposed rule making with respect to the subject matter of this rule.

Environmental Analysis

The National Environmental Policy Act (NEPA) applies to ''major Federal actions'' where the agency has control and responsibility over the actions and has discretion as to how the actions will be carried out (40 CFR part 1508.18). Accordingly, any actions that are directed by Congress to be implemented in such manner that there is no discretion on the part of the agency are not required to undergo an environmental review under NEPA. The lack of discretion over the action by the agency undermines the rationale for NEPA review—evaluation of the environmental impacts of the proposed action and consideration of alternative actions to avoid or mitigate the impacts. Where Congress has directed that a specific action be implemented and an agency has no discretion to consider and take alternative actions, NEPA review would be moot.

For AMA, Congress has mandated the addition of Hawaii to the list of States to which the Secretary is authorized to provide financial assistance. The Secretary of Agriculture is, therefore, required to make this addition to the program. There is no discretion on the part of the agency to take this action. For this reason, an environmental review of these changes under NEPA is not required.

Civil Rights Impact Analysis

NRCS has determined through a Civil Rights Impact Analysis that the issuance of this interim final rule will not have a significant effect on minorities. Copies of the Civil Rights Impact Analysis may be obtained from Director, Financial Assistance Programs Division, U.S. Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS), P.O. Box 2890, Washington, DC 20013–2890.

Paperwork Reduction Act

Section 2904 of the 2008 Act requires that implementation of programs authorized by Title II of the 2008 Act be made without regard to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) Therefore, NRCS is not reporting recordkeeping or estimated paperwork burden associated with this interim final rule.

Government Paperwork Elimination Act

NRCS is committed to compliance with the Government Paperwork Elimination Act, which requires Government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. To better accommodate public access, NRCS has developed an online application and information system for public use.

Executive Order 12988

This interim final rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The provisions of this interim final rule are not retroactive. Furthermore, the provisions of this interim final rule preempt State and local laws to the extent such laws are inconsistent with this interim final rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR parts 11 and 614 must be exhausted.

Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994

USDA classified this interim final rule as ''not major'' under Section 304 of the Department of Agriculture Reorganization Act of 1994, Public Law 104–354. Therefore, a risk assessment is not required.

Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, NRCS assessed the effects of this rulemaking action on State, local, and Tribal governments, and the public. This action does not compel the expenditure of $100 million or more by any State, local, or Tribal governments, or anyone in the private sector, and therefore, a statement under section 202 of the Unfunded Mandates Reform Act is not required.

Discussion of Program

The conservation provisions of AMA are administered and implemented under the general supervision and direction of the Chief of NRCS, who is a Vice President of the Commodity Credit Corporation (CCC). Accordingly, where NRCS is mentioned in this rule it also refers to the CCC's funds, facilities, and authorities where applicable. While NRCS has leadership for the conservation provisions of AMA, other agencies have authority for different aspects of the program. The Agricultural Marketing Service (AMS) has responsibility for the organic certification cost-share program and the Risk Management Agency (RMA) has responsibility for the insurance cost-share program for mitigation of financial risk.

Through AMA, NRCS provides technical and financial assistance to participants in eligible States to address issues, such as water management, water quality, and erosion control by incorporating conservation practices into their agricultural operations. Producers may construct or improve water management structures or irrigation structures; plant trees for windbreaks or to improve water quality; and mitigate risk through production diversification or resource conservation practices, including soil erosion control, integrated pest management, or organic farming.

Section 524(b) of the Federal Crop Insurance Act, as amended by Section 133 of the Agricultural Risk Protection Act of 2000, authorized AMA to provide assistance to producers in States that historically had low participation in the Federal Crop Insurance Program. The Farm Security and Rural Investment Act of 2002 (2002 Act) made amendments to AMA to specify the eligible States and provide additional clarity to the assistance to be made available. The AMA regulation (7 CFR part 1465) was published in the **Federal Register** on April 9, 2003.

Section 2801 of the 2008 Act amended AMA to include Hawaii as an eligible State, and to authorize $15 million in funding each year from fiscal year (FY) 2008 through FY 2012. NRCS has evaluated seven years of program implementation and identified opportunities to improve program administration and alignment with other financial assistance programs administered by the Agency. The revisions to the AMA regulation, described below, reflect the changes mandated by the 2008 Act and opportunities to improve program administration for greater efficiency.

Summary of Provisions

Section 1465.1, Purposes and Applicability

Section 1465.1, ''Purposes and Applicability,'' sets forth the purpose, scope, and objectives of AMA. Through AMA, NRCS provides technical and financial assistance to producers in statutorily-designated States. Section 2801 of the 2008 Act expanded AMA's geographic scope to include the State of Hawaii. In response, NRCS revises § 1465.1 to add Hawaii to the list of States eligible for AMA assistance and replaces ''15'' with the number ''16'' when referring to the number of eligible States. AMA is now available in Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Maine, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

Section 1465.2, Administration

Section 1465.2, ''Administration,'' describes the role of NRCS and provides a brief overview of the Agency's administrative responsibilities. NRCS amends § 1465.2 to reflect the 2003 decision made by USDA to have NRCS administer the AMA natural resource conservation provisions and to clarify NRCS's relationship with the Commodity Credit Corporation (CCC). Prior to FY 2004, NRCS and the Farm Service Agency (FSA) jointly administered the AMA natural resource conservation provisions. A 2003 decision made by USDA transferred all administrative responsibilities to NRCS. Therefore, § 1465.2 is revised to remove reference to Farm Service Agency (FSA) and reflect that NRCS has the responsibility for issuing payments for conservation practices. NRCS also revises § 1465.2(c) to clarify that lower delegations of authority can be overridden by the Chief, if necessary, to uphold the purposes of AMA. This addition is consistent with other NRCS natural resource conservation programs.

Section 1465.3, Definitions

Section 1465.3 sets forth definitions for terms used throughout this regulation. Several new definitions have been added or revised to align AMA terms with terms used by other NRCS conservation programs. The following existing definitions are revised: ''Applicant,'' ''Conservation district,'' ''Conservation practice,'' ''Contract,'' ''Indian Tribe,'' ''Liquidated damages,'' ''Participant,'' ''Producer,'' ''State Conservationist,'' and ''Technical assistance.'' NRCS also replaces several existing terms with terms more reflective of AMA's purposes. The term,''Cost-share payment'' is replaced with ''Payment,'' to reflect the breadth of the types of costs that may be considered in determining payments. The term ''Indian trust lands'' is replaced with the term ''Indian land'' to broaden the scope and align AMA with other NRCS conservation programs. Finally, the term ''Conservation plan'' is replaced with the term ''AMA plan of operations (APO)'' to align AMA with other NRCS conservation programs that identify a plan of operations. NRCS adds the following terms and definitions to the AMA regulations to be consistent with related conservation programs: ''Agricultural land,'' ''Agricultural operation,'' ''Beginning farmer or rancher,'' ''Historically underserved producer,'' ''Joint operation,'' ''Legal entity,'' ''Limited resource farmer or rancher,'' ''Livestock,'' ''Natural Resources Conservation Service (NRCS),'' ''Nonindustrial private forest land,'' ''Operation and maintenance (O&M) agreement,'' ''Person,'' ''Resource concern,'' ''Socially disadvantaged farmer or rancher,'' ''Structural

practice,'' and ''Technical Service Provider (TSP).'' The terms, ''Unit of concern'' and ''State Technical Committees'' are removed since they are no longer used in the AMA regulations.

Specifically, the following definitions have been amended:

NRCS adds the definition of ''agricultural land'' to better define the land where AMA assistance will be provided. Agricultural land is cropland, grassland, rangeland, pasture, and other agricultural land, on which agricultural and forest-related products or livestock are produced and resource concerns may be addressed. Agricultural lands include cropped woodland, marshes, incidental areas included in the agricultural operation, and other types of agricultural land used for the production of livestock.

NRCS adds the definition of ''agricultural operation'' to closely align AMA's definitions with definitions used by other NRCS conservation programs. Section 1465.3 defines an ''agricultural operation'' as ''a parcel or parcels of land whether contiguous or noncontiguous, which the producer is listed as the operator or owner/operator in the Farm Service Agency (FSA) record system, which is under the effective control of the producer at the time the producer applies for a contract, and which is operated by the producer with equipment, labor, management, and production, forestry, or cultivation practices that are substantially separate from other operations.''

NRCS replaces the term, ''conservation plan'' with ''AMA plan of operations'' to ensure consistency across NRCS programs. Prior to this regulation, AMA participants developed and implemented an AMA plan of operations. The addition of this term and associated definition clarifies what constitutes an AMA plan of operations and clarifies existing processes and documentation procedures. An AMA plan of operations, which is part of the AMA contract, identifies the location and timing of conservation practices that the participant agrees to implement.

NRCS revises the definition, ''applicant,'' to simplify the definition and incorporate the 2008 Act's references to ''person'' and ''legal entity.'' The term, ''applicant,'' is defined as follows: ''a person, legal entity, or joint operation that has an interest in an agricultural operation, who has requested in writing to participate in AMA.''

NRCS adds the definition, ''beginning farmer and rancher'' in accordance with Section 2708 of the 2008 Act which seeks to expand conservation program participation among farmers and ranchers who have been historically underserved. The definition of ''beginning farmer and rancher'' reflects the definition provided defined in 1201(a) of the Food Security Act of 1985. Generally speaking, a ''beginning farmer or rancher'' is an individual who has not operated a farm or ranch, or who has operated a farm or ranch for not more than 10 consecutive years. This requirement applies to all members of an entity, who will materially and substantially participate in the operation of the farm or ranch. NRCS also revises the ''conservation district'' definition to reflect the 2008 Act's definition. A conservation district means ''any district or unit of State, Tribal, or local government formed under State, Tribal, or territorial law for the express purpose of developing and carrying out a local soil and water conservation program.'' Such district or unit of government may be referred to as a ''conservation district,'' ''soil conservation district,'' ''soil and water conservation district,'' ''resource conservation district,'' ''natural resource district,'' ''land conservation committee,'' or similar name.

NRCS revises ''conservation practice'' to clarify what is meant by conservation treatment. Specifically, a conservation practice means ''one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management, and other improvements that achieve program purposes.''

NRCS revises the definition of ''contract'' in an effort to make definitions consistent across other programs. A contract is ''a legal document that specifies the rights and obligations of any participant in the program. An AMA contract is a binding agreement for the transfer of assistance from USDA to the participant to share in the costs of applying conservation practices.''

The term, ''historically underserved producer,'' merges the terms ''beginning farmer or rancher,'' ''limited resource farmer or rancher,'' and ''socially disadvantaged farmer or rancher'' into one definition to simplify terms within this regulation.

NRCS revises the definition of ''Indian Tribe'' to ensure the definition incorporates Alaska Native village corporations, as established pursuant to the Alaska Claims Settlement Act (43 U.S.C. 1601 *et seq.*).

NRCS replaces the term and definition, ''Indian trust land,'' to make it consistent with the term and associated definition, ''Indian land,'' which is used by other NRCS conservation programs. The ''Indian land'' definition encompasses lands which are also held in fee title by Indian tribes or Tribal members. Specifically, ''Indian land'' is ''an inclusive term describing all lands held in trust by the United States for individual Indians or Tribes, or all lands, titles to which are held by individual Indians or Tribes, subject to Federal restrictions against alienation or encumbrance, or all lands which are subject to the rights of use, occupancy and/or benefit of certain Tribes.''

NRCS adds the term, ''joint operation,'' to maintain consistency across all NRCS conservation programs. A joint operation is ''a general partnership, joint venture, or other similar business arrangement, in which the members are jointly or severally liable for the obligations of the organization.''

NRCS adds the term, ''legal entity,'' to maintain consistency across all NRCS conservation programs. As defined by 7 CFR 1400, ''a legal entity is an entity created under Federal or State law that: (1) Owns land or an agricultural commodity, product, or livestock; or (2) produces an agricultural commodity, product, or livestock.''

NRCS adds the term and associated definition ''limited resource farmer,'' in accordance with Section 2708 of the 2008 Act which seeks to expand conservation program participation among farmers and ranchers who have been historically underserved. The definition of ''limited resource farmer'' reflects the definition used in the Environmental Quality Incentive Program's regulation, 7 CFR part 1466. Generally speaking, a limited resource farmer is a person with direct or indirect gross farms sales not more than $155200 in each of the previous two years, who has a total household income at or below the national poverty level for a family of four, or less than 50 percent of the county median household income in each of the two previous years.

NRCS revises the definition, ''liquidated damages,'' to make the definition consistent with the definition used by other NRCS conservation programs; however, the overall meaning of the term remains the same as the original regulation's definition. Liquidated damages is ''a sum of money stipulated in the AMA contract that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the contract. The sum represents an estimate of the expenses incurred to service the contract and reflects the difficulties of proof of loss and the inconvenience or non-feasibility

of otherwise obtaining an adequate remedy.''

NRCS adds the term, ''livestock,'' to maintain consistency across NRCS conservation programs. *Livestock* means ''all animals produced on farms and ranches, as determined by the Chief.'' NRCS adds the term, ''Natural Resources Conservation Service,'' to define the USDA agency that has responsibility for administering AMA.

NRCS adds the term, ''nonindustrial private forest land,'' to further define land eligible for AMA assistance. Nonindustrial forest land is rural land that has existing tree cover or is suitable for growing trees; and is owned by any nonindustrial private individual, group, association, corporation, Indian Tribe, or other private legal entity that has definitive decisionmaking authority over the land.

NRCS adds the term ''operation and maintenance agreement'' to describe the document that, in conjunction with the AMA plan of operations, specifies the participant's operation and maintenance responsibilities for conservation practices installed with AMA assistance.

NRCS revises the definition of ''participant,'' to make it consistent with other NRCS conservation programs. A participant is ''a person, joint operation, or legal entity who is receiving payment or is responsible for implementing an AMA contract's terms and conditions.''

NRCS replaces the term, ''cost share payment'' with the term, ''payment'' to more adequately describe how participants will be compensated. *Payment* means the ''financial assistance provided to the participant based on the estimated costs incurred in performing or implementing conservation practices, including costs for: planning, design, materials, equipment, installation, labor, maintenance, management, or training, as well as the estimated income foregone by the producer for the designated conservation practices.''

NRCS adds the term, ''person,'' to maintain consistency across all NRCS conservation programs. As defined by 7 CFR part 1400, a person is ''an individual, natural person and does not include a legal entity.''

NRCS expands upon the definition of ''producer,'' to include persons or entities involved in forestry management.

NRCS adds the term, ''resource concern,'' to maintain a consistency of terms across NRCS conservation programs. A resource concern is ''a specific natural resource problem that represents a significant concern in a State or region and is likely to be addressed successfully through the implementation of the conservation practices by producers.''

NRCS adds the term, ''socially disadvantaged farmer or rancher,'' in accordance with Section 2708 of the 2008 Act which seeks to expand conservation program participation among farmers and ranchers who have been historically underserved. A socially disadvantaged famer or rancher is one ''who has been subjected to racial or ethnic prejudices because of their identity as a member of a group without regard to their individual qualities.''

NRCS revises the definition, ''State Conservationist,'' to clarify that the former State Conservationist of Hawaii has become the director of the Pacific Islands.

NRCS adds the term, ''structural practice,'' to better define a conservation practice that involves establishing, constructing, or installing a site-specific measure to conserve and protect a resource from degradation, or improve soil, water, air, or related natural resources in the most cost-effective manner.

NRCS revises the term, ''technical assistance,'' to further clarify the nature of technical assistance under AMA, as well as the types of land where AMA technical assistance is available.

NRCS adds the term and definition, ''Technical Service Provider (TSP)'' to clarify that participants may receive technical assistance from an individual, private-sector entity, or public agency certified by NRCS to provide technical services, in lieu of or on behalf of NRCS.

Section 1465.4, National Priorities

NRCS inserts a new § 1465.4, entitled ''National Priorities,'' and redesignates the subsequent sections accordingly. The new § 1465.4 provides that NRCS establishes national priorities to guide funding allocations to States, selection of AMA contracts, and implementation priority for AMA conservation practices. This new section also states that the national priorities are reviewed periodically by NRCS to ensure that the program is addressing priority conservation concerns. This addition improves AMA consistency with related conservation programs administered by NRCS.

Section 1465.5, Program Requirements

Section 1465.5, ''Program requirements,'' sets forth land and applicant eligibility. Throughout the Section the terminology is revised to make it consistent with the terms used in § 1465.3, ''Definitions.''

Specifically, NRCS revises paragraph (a), replacing the term, ''cost share'' payment with the term, ''payment,'' to more adequately reflect the type of payments a participant may receive. NRCS also replaces the term, ''conservation plan,'' with the term, ''AMA plan of operations,'' to describe the specific document that contains the conservation practice implementation schedule.

NRCS revises paragraph (c)(2), which requires that the applicant provide written evidence of ownership or legal control for the life of the contract and its associated O&M agreement, which is consistent with additions in §§ 1465.3 and 1465.22. NRCS also revises paragraph (c)(4) to clarify that additional information required by NRCS is for the purposes of assessing a proposed project's merits and to assist in monitoring contract compliance.

Section 1465.5 is revised to incorporate existing program requirements that previously have not been included in the AMA regulations because they apply via other statutory provisions. In particular, NRCS revises § 1465.5(c)(6) to clarify that AMA participants are subject to AGI limitations, 7 CFR Part 1400 and amendments to Section 1001D of the Food Security Act of 1985 as authorized by Section 1604 of Title I of the 2008 Act. The AGI and program eligibility requirements also necessitate that NRCS obtain from legal entities a list of members, including members in embedded entities, along with their social security numbers, and percent interest in the legal entity. Specifically, text has been added to § 1465.5, ''Program requirements,'' that requires participants to ''supply other information, as required by NRCS, to determine payment eligibility as established by 7 CFR 1400, Adjusted Gross Income (AGI).'' This revision also makes AMA consistent with other NRCS conservation programs.

Paragraph (c) is revised to further clarify that applicants must provide a list of all members of the legal entity and embedded entities along with members' social security numbers and percentage interest in the entity. In the event an applicant uses a unique identification number rather than a social security or tax identification number, the unique identification number must be used universally for any and all AMA contracts. The original subparagraph 1465.5(c)(4) has been removed as it is redundant with § 1465.5(c)(6), and subparagraph 1465.5(c)(5) has been redesignated as § 1465.5(c)(8). Subparagraph 1465.5(c)(10) is added to clarify that a participant must develop and agree to comply with an APO and to describe the

Agency expectation regarding the O&M agreement.

NRCS adds new program requirements in paragraph (c)(9) to improve program administration and ensure that AMA program goals are met. A provision is added that requires AMA participants to be in compliance with terms of all other USDA-administered agreements to which they are a party. In this manner, NRCS ensures that a participant who receives NRCS conservation program benefits is meeting existing responsibilities prior to receiving additional assistance.

Sections 1465.5(d)(2)(i) through § 1465.5(d)(2)(iii) are redesignated as § 1465.5(d)(2)(A), § 1465.5(d)(2)(B), and § 1465.5(d)(2)(C), respectively. In an effort to make AMA consistent with other programs, the language contained within paragraph (d)(2) that addresses enrolling public land is slightly revised, although the overall intent of the language remains the same.

Section 1465.6, AMA Plan of Operations

NRCS inserts a new section § 1465.6, entitled ''AMA plan of operations,'' which describes the AMA plan of operations as the document that contains the information related to practices and activities to be implemented under AMA. Section 1465.6 specifies the requirements for the APO and that participants are responsible for implementing the APO. This addition brings AMA into alignment with other NRCS conservation programs. Subsequent sections are redesignated accordingly.

Section 1465.7, Conservation Practices

Section 1465.7, ''Conservation practices,'' describes how NRCS determines eligible conservation practices. Specifically, § 1465.7(a) is revised to clarify that NRCS will identify and provide public notice of the conservation practices eligible for payments under the program. This revision improves AMA consistency with related NRCS conservation programs. The reference to ''State Technical Committees'' providing advice on the types of conservation practices eligible for payment is removed, since State Technical Committees are permitted only to provide advice on conservation programs, authorized by Title XII of the Food Security Act of 1985. AMA is authorized by the Federal Crop Insurance Act; therefore, State Technical Committees are not authorized to provide advice on AMA.

Subpart B—Contracts

Section 1465.20, Application for Participation and Selecting Applications for Contracting

Section 1465.20, ''Application for participation and selecting applications for contracting,'' describes the processes for submitting and selecting applications. This Section remains the same; however, the term, ''national priorities,'' is inserted in paragraphs (c) and (d) to account for the policy outlined in § 1465.4, ''National priorities.'' The reference to ''State Technical Committees'' providing advice on AMA ranking criteria is removed, since State Technical Committees are permitted only to provide advice on conservation programs, authorized by Title XII of the Food Security Act of 1985. AMA is authorized by the Federal Crop Insurance Act; therefore, State Technical Committees are not authorized to provide advice on AMA.

Section 1465.21, Contract Requirements

Section 1466.21, ''Contract requirements,'' identifies elements contained within an AMA contract and the responsibilities of the participant who is party to the AMA contract. Specifically, paragraph (a) is revised to change the term ''cost-share payments'' to ''payments,'' and clarify that costs related to technical services may be included in the contract. This revision does not change current program practice.

Under § 1465.21(b)(2), contract duration is revised from 3 to 10 years to a minimum duration of one year after completion of the last practice, and a maximum of 10 years. This provides the flexibility needed for establishing agreement lengths based on conservation concerns and other factors, and aligns AMA with other conservation programs administered by NRCS.

Overall, § 1465.21(b) is restructured to account for additions to the section and to make the formatting consistent throughout the AMA regulations, although with the exception of replacing the terms, ''contract and conservation plan'' with ''APO,'' the text has not changed. Accordingly, subparagraphs 1465.21(b)(3)(i) through 1465.21(b)(3)(iv) are redesignated as 1465.21(b)(3)(A) through 1465.21(b)(3)(D).

Section 1465.22, Conservation Practice Operation and Maintenance

Section 1465.22, ''Conservation practice operation and maintenance,'' addresses the participant's responsibility for operating and maintaining conservation practices. Section 1465.22 is divided into logical content paragraphs and revised to be consistent with the O&M agreement definition in § 1465.3. NRCS revised § 1465.22 to clarify that the O&M agreement is part of the AMA contract. The O&M agreement specifies the terms and conditions under which the participant must operate and maintain the conservation practices installed with AMA assistance. This section also clarifies that NRCS may periodically inspect conservation practices to ensure that they are being maintained for the conservation practice lifespan as detailed in the O&M agreement. In the event that NRCS finds that a participant is not operating and maintaining practices for the specified lifespan during the contract duration, NRCS may request a refund of payments in accordance with the AMA contract. NRCS has created an O&M agreement to articulate the Agency's expectation that the participant is responsible for maintaining each conservation practice. NRCS has developed this O&M agreement for two reasons: (1) To increase transparency of a participant's contract responsibilities; and (2) To ensure these conservation practices are maintained for the length in time in which they were designed and created.

NRCS adds § 1465.22(d) to clarify to the participant that conservation practices installed before contract approval, but included in the application in order to obtain ranking points, must be operated and maintained as specified in the contract and O&M agreement. This addition is consistent with other NRCS conservation programs' policies.

Section 1465.23, Payments

The Section title is revised from ''Cost-share payments'' to ''Payments'' to reflect the variety of costs that are considered in establishing program payments. Accordingly, the term ''cost-share payment'' is replaced by ''payment'' throughout the Section. This section addresses payments and payment limitations applicable to a participant. Subparagraphs 1465.23(a)(1), 1465.23(a)(2), 1465.23(a)(3), 1465.23(b), 1465.23(c), and 1465.23(d) are redesignated as 1465.23(a), 1465.23(b), 1465.23(c), 1465.23(d), 1465.23(e), 1465.23(f), and 1465.23(g), respectively, to accommodate additions to the section and to make the formatting consistent throughout the AMA regulations.

Section 1465.23(a) is revised to allow payments of ''up to 75 percent of the estimated cost of an eligible practice

and up to 100 percent of the estimated income foregone'' rather than providing a flat rate of 75 percent. Allowing for a range of payment rates makes it possible to provide reduced rates where participants can implement a conservation practice at a lower cost. This allows the opportunity to distribute AMA funds to more participants. A new section 1465.23(a)(2) is added to allow historically underserved producers to receive the applicable payment rate plus an additional rate that is not less than 25 percent, provided that this increase does not exceed 90 percent. These changes implement the 2008 Act's emphasis on encouraging participation by those who have been historically underserved and are consistent with other related NRCS conservation programs.

Section 1465.23(c) is revised to clarify how conservation practices implemented or initiated prior to AMA contract approval will be handled. Section 1465.23(c)(1) states that payments will not be made for practices applied prior to contract approval. Section 1465.23(c)(2) describes that practices initiated prior to contract approval are not eligible for payment, unless the participant had obtained a waiver in advance from the State or Designated Conservationist. This revision aligns AMA with other NRCS-administered conservation programs.

NRCS revises § 1465.23(e) as follows: § 1465.23(e) is expanded to include the statutory reference of the ''Payment Limitation and Payment Eligibility'' at 7 CFR part 1400. NRCS will attribute payments to each participating person and legal entity using the same protocol outlined in 7 CFR part 1400 for commodity and conservation programs. This is consistent with other conservation programs administered by NRCS. Subparagraphs 1465.23(c)(i) through 1465.23(c)(iv) are removed as the majority of the provisions are addressed by reference to 7 CFR part 1400 in the Section.

Section 1465.23(f) is added to state that payments will not be made for conservation practices on eligible land if payments are already being received for the same practice on the same land under a USDA conservation program. These additions are consistent with other related conservation programs administered by NRCS.

Section 1465.23(h) is added to state that subject to fund availability, the payment rates for conservation practices scheduled after the year of contract obligation may be adjusted to reflect increased costs. NRCS adds this paragraph to enable the Agency to adjust payments to accommodate for inflation, higher fuel costs, and increased labor, which impact the cost of implementing a conservation practice.

Section 1465.24, Contract Modifications, Extensions, and Transfers of Land

Section 1465.24, ''Contract modifications, extensions, and transfers of land,'' addresses contract modifications, changes in land ownership or control of the land, and contract implications if the participant loses control of the land. Specifically, § 1465.24(a) is revised to state that when an AMA contract is revised, the APO also must be revised. The designated conservationist must approve the modified contract. This new language is consistent with modifications made in § 1465.6 and with other conservation programs administered by NRCS.

Language related to contract extensions for up to the 10-year limit is deleted in § 1465.24(b) because contract duration is addressed in § 1465.21(b)(2). New language is included to clarify that participants are responsible for notifying NRCS if they anticipate loss of control of the land. This addition is consistent with other related conservation programs administered by NRCS.

Section 1465.24(c) is revised to clarify contract transfer issues related to division of payments and transferee eligibility. Subparagraphs 1465.24(c)(1) and 1465.24(c)(2) explain the requirements for a transferee to receive payments, the obligations of the transferee to comply with the terms of the contract and O&M agreement, and the rights of the parties in distribution of payments. This revision brings AMA into alignment with related conservation programs administered by NRCS.

Section 1465.24(e) is added to clarify that participants to a contract will be jointly and severally responsible for refunding payments. The language is consistent with related NRCS-administered conservation programs.

Section 1465.24(f) is added to ensure that in the event a conservation practice fails through no fault of the participant, the State Conservationist may issue payments to re-establish the conservation practice, in accordance with established payment rates and limitations.

Section 1465.25, Contract Violations and Terminations

Section 1465.25, ''Contract violations and terminations,'' addresses the procedures that NRCS takes where a violation has occurred or a contract termination is necessary. Section 1465.25 is revised to account for additions to the Section and to make the formatting consistent throughout the AMA regulations. Section 1465.25(a) is revised by removing the term ''reasonable'' as it is too subjective and replaces it with ''60 days, unless otherwise determined by the State Conservationist.'' This language is consistent with related NRCS-administered conservation programs. Subparagraphs 1465.25(a)(1) and 1465.25(a)(2) are redesignated as § 1465.25(a) and § 1465.25(b), respectively.

The terms ''scheme or device'' are added to § 1465.25(b) to be clear that such actions may result in contract violation or termination. This revision is consistent with § 1465.35 and with related conservation programs administered by NRCS. Subparagraphs 1465.25(b)(1), 1465.25(b)(2), 1465.25(b)(3), 1465.25(b)(4), and 1465.25(b)(5) are redesignated as 1465.25(c), 1465.25(c)(2), 1465.25(c)(2)(A), 1465.25(c)(2)(B), and 1465.25(c)(2)(C), respectively.

Section 1465.25(c) is revised as follows: § 1465.25(c) is expanded to clarify that participants who are in violation of AMA contracts may be ineligible for future NRCS-administered conservation program funding. The language is consistent with other NRCS conservation programs. Subparagraph 1465.25(c)(2)(A) is revised to clarify that hardship claims must be well documented and must result from conditions that did not exist prior to application to the program. This revision is consistent with related conservation programs administered by NRCS.

Subpart C—General Administration

Section 1465.30, Appeals

Section 1465.30, ''Appeals,'' references the policies that govern when a producer seeks an appeal to an adverse decision made by NRCS. NRCS has not made any substantive changes to this section, other than formatting. The following formatting changes are made to § 1465.30: § 1465.30(b)(4)(i) through § 1465.30(b)(4)(iii) are redesignated as § 1465.30(b)(4)(A), § 1465.30(b)(4)(B), and § 1465.30(b)(4)(C), respectively.

Section 1465.31, Compliance With Regulatory Measures

No changes have been made in this section.

Section 1465.32, Access to Operating Unit

Section 1465.32, ''Access to operating unit,'' provides notice to applicants, participants, and the public that NRCS has the right to enter an operating unit or tract for the purpose of ascertaining the accuracy of any representations related to contract performance. Section 1465.32 is amended to notify potential AMA applicants that an authorized NRCS representative may enter an agricultural operation for the purposes of eligibility determinations. NRCS will continue to provide the participant notice, prior to entering the property.

Section 1465.33, Equitable Relief

The caption of § 1465.33 is changed from ''Performance based upon advice or action or representatives of NRCS'' to ''Equitable relief'' to be consistent with related NRCS-administered conservation programs. Section 1465.33, ''Equitable relief,'' outlines the policy when a participant relies upon erroneous advice provided by NRCS. Specifically, § 1465.33 is divided into two paragraphs. Paragraph 1465.33(b) is revised to add that any action the participant has taken based on the advice of a certified TSP is the responsibility of that certified TSP. The language clarifies program administration and is consistent with other NRCS conservation programs.

Paragraph 1465.33(c) clarifies that AMA participants who acted in good faith based on erroneous information provided by NRCS or its representatives may be entitled to equitable relief. This revision makes AMA consistent with other conservation programs administered by NRCS.

Section 1465.34, Offsets and Assignments

Section 1465.34, ''Offsets and assignments,'' governs offsets and withholdings, as well as assignment of payments. The term ''person'' is changed to ''participant'' to reflect that this policy applies to persons, joint operations, and legal entities who are party to an AMA contract.

Section 1465.35, Misrepresentation and Scheme or Device

Section 1465.35, ''Misrepresentation and scheme or device,'' outlines the policies governing producers who have erroneously or fraudulently represented themselves. Section 1465.35 is revised to improve transparency related to the participant actions and consequences of engaging in misrepresentation or scheme or device. This revision aligns AMA with other NRCS conservation programs.

Paragraph 1465.35(b) expands on the actions that may be deemed misrepresentation or scheme or device to include any action intended to deprive a tenant or sharecropper of entitled payments. These revisions are consistent with other NRCS conservation programs.

Paragraph 1465.35(c) is added to clarify that if paragraphs § 1465.35(a) or § 1465.35(b) apply to a participant, their interest in all contracts will be terminated and they may be determined ineligible for future funding from any NRCS conservation programs.

Section 1465.36, Environmental Services Credits for Conservation Improvements

Section 1465.36 is added to provide clarity related to environmental credits that may be produced on lands under AMA contracts. It establishes that NRCS asserts no interest in credits earned, but that the Agency retains the authority to ensure that the requirements for AMA-funded improvements are met and maintained consistent with the terms of the contract. Where activities may affect the land covered by an AMA contract, participants are highly encouraged to request a compatibility assessment from NRCS prior to entering into any environmental credit agreements. This provision is consistent with other conservation programs administered by NRCS.

List of Subjects in 7 CFR Part 1465

Conservation contract, Conservation plan, Conservation practices, Soil and water conservation.

■ For the reasons stated in the preamble, the Natural Resources Conservation Service revises Part 1465 of Title 7 of the Code of Federal Regulations to read as follows:

PART 1465—AGRICULTURAL MANAGEMENT ASSISTANCE

Subpart A—General Provisions

Sec.

Subpart B—Contracts

Subpart C—General Administration

Authority: 7 U.S.C. 1524(b).

Subpart A—General Provisions

§ 1465.1 Purposes and applicability.

Through the Agricultural Management Assistance program (AMA), the Natural Resources Conservation Service (NRCS) provides financial assistance funds annually to producers in 16 statutorily designated States to: Construct or improve water management structures or irrigation structures; plant trees to form windbreaks or to improve water quality; and mitigate risk through production diversification or resource conservation practices, including soil erosion control, integrated pest management, or the transition to organic farming. AMA is applicable in Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

§ 1465.2 Administration.

(a) Administration and implementation of the conservation provisions of AMA for the Commodity Credit Corporation (CCC) is assigned to the NRCS, using the funds, facilities, and authorities of the CCC. Accordingly, where NRCS is mentioned in this Part, it also refers to the CCC's funds, facilities, and authorities, where applicable.

(b) NRCS will:

(1) Provide overall management and implementation leadership for AMA;

(2) Establish policies, procedures, priorities, and guidance for implementation;

(3) Establish payment limits;

(4) Determine eligible practices;

(5) Develop and approve AMA plans of operation and contracts with selected participants;

(6) Provide technical leadership for implementation, quality assurance, and evaluation of performance;

(7) Make funding decisions and determine allocations of AMA funds; and

(8) Issue payments for conservation practices completed.

(c) No delegation in this part to lower organizational levels shall preclude the Chief of NRCS from determining any issues arising under this Part or from reversing or modifying any determination made under this Part.

§ 1465.3 Definitions.

The following definitions apply to this part and all documents used in accordance with this part, unless specified otherwise:

Agricultural land means cropland, grassland, rangeland, pasture, and other agricultural land on which agricultural or forest-related products or livestock are produced. Other agricultural lands may include cropped woodland, marshes, incidental areas included in the agricultural operation, and other types of agricultural land used for production of livestock.

Agricultural operation means a parcel or parcels of land whether contiguous or noncontiguous, which the producer is listed as the operator or owner/operator in the Farm Service Agency (FSA) record system, which is under the effective control of the producer at the time the producer applies for a contract, and which is operated by the producer with equipment, labor, management, and production, forestry, or cultivation practices that are substantially separate from other operations.

AMA plan of operations (APO) means the document that identifies the location and timing of conservation practices that the participant agrees to implement on eligible land in order to address the resource concerns and program purposes. The APO is part of the AMA contract.

Applicant means a person, legal entity, or joint operation that has an interest in an agricultural operation, as defined in 7 CFR 1400, who has requested in writing to participate in AMA.

Beginning farmer or rancher means a person or legal entity who:

(1) Has not operated a farm or ranch, or who has operated a farm or ranch for not more than 10 consecutive years. This requirement applies to all members of an entity who will materially and substantially participate in the operation of the farm or ranch.

(2) In the case of a contract with an individual, individually or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch, consistent with the practices in the county or State where the farm or ranch is located.

(3) In the case of a contract with an entity or joint operation, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that each of the members provide some amount of the management, or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

Chief means the Chief of NRCS, United States Department of Agriculture (USDA), or designee.

Conservation district means any district or unit of State, Tribal, or local government formed under State, Tribal, or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a ''conservation district,'' ''soil conservation district,'' ''soil and water conservation district,'' ''resource conservation district,'' ''natural resource district,'' ''land conservation committee,'' or similar name.

Conservation practice means one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management, and other improvements that achieve program purposes.

Contract means a legal document that specifies the rights and obligations of any participant accepted into the program. An AMA contract is a binding agreement for the transfer of assistance from USDA to the participant to share in the costs of applying conservation practices.

Designated conservationist means an NRCS employee whom the State Conservationist has designated as responsible for AMA administration in a specific area.

Historically underserved producer means an eligible person, joint operation, or legal entity who is a beginning farmer or rancher, socially disadvantaged farmer or rancher, or limited resource farmer or rancher.

Indian land is an inclusive term describing all lands held in trust by the United States for individual Indians or Tribes, or all lands, titles to which are held by individual Indians or Tribes, subject to Federal restrictions against alienation or encumbrance, or all lands which are subject to the rights of use, occupancy and/or benefit of certain Tribes. For purposes of this Part, the term Indian land also includes land for which the title is held in fee status by Indian tribes, and the U.S. Government-owned land under the Bureau of Indian Affairs jurisdiction.

Indian Tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) that is eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Joint operation means, as defined in 7 CFR part 1400, a general partnership, joint venture, or other similar business arrangement in which the members are jointly and severally liable for the obligations of the organization.

Legal entity means, as defined in 7 CFR part 1400, an entity created under Federal or State law that:

(1) Owns land or an agricultural commodity, product, or livestock; or

(2) Produces an agricultural commodity, product, or livestock.

Lifespan means the period of time in which a conservation practice should be operated and maintained and used for the intended purpose.

Limited resource farmer or rancher means:

(1) A person with direct or indirect gross farm sales of not more than $155,200 in each of the previous two years (adjusted for inflation using the Prices Paid by Farmer Index as compiled by the National Agricultural Statistics Service), and

(2) Has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous two years (to be determined annually using Commerce Department data).

Liquidated damages means a sum of money stipulated in the AMA contract that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the contract. The sum represents an estimate of the expenses incurred to service the contract and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

Livestock means all animals produced on farms and ranches, as determined by the Chief.

Natural Resources Conservation Service (NRCS) is an agency of the USDA, which has responsibility for administering AMA using the funds, facilities, and authorities of the CCC.

Nonindustrial private forest land means rural land that has existing tree cover or is suitable for growing trees; and is owned by any nonindustrial private individual, group, association, corporation, Indian Tribe, or other

private legal entity that has definitive decision-making authority over the land.

Operation and maintenance means work performed by the participant to keep the applied conservation practice functioning for the intended purpose during the conservation practice lifespan. Operation includes the administration, management, and performance of non-maintenance actions needed to keep the completed practice safe and functioning as intended. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.

Operation and maintenance (O&M) agreement means the document that, in conjunction with the APO, specifies the operation and maintenance responsibilities of the participants for conservation practices installed with AMA assistance.

Participant means a person, legal entity, or joint operation who is receiving payment or is responsible for implementing the terms and conditions of an AMA contract.

Payment means the financial assistance provided to the participant based on the estimated costs incurred in performing or implementing conservation practices, including costs for: Planning, design, materials, equipment, installation, labor, maintenance, management, or training, as well as the estimated income foregone by the producer for the designated conservation practices.

Person means, as defined in 7 CFR part 1400, an individual, natural person and does not include a legal entity.

Producer means a person, legal entity, or joint operation who has an interest in the agricultural operation, according to 7 CFR part 1400, or who is engaged in agricultural production or forestry management.

Resource concern means a specific natural resource problem that represents a significant concern in a State or region and is likely to be addressed successfully through the implementation of the conservation practices by producers.

Secretary means the Secretary of the USDA.

Socially disadvantaged farmer or rancher means a farmer or rancher who has been subjected to racial or ethnic prejudices because of their identity as a member of a group without regard to their individual qualities.

State Conservationist means the NRCS employee authorized to direct and supervise NRCS activities in a State, the Caribbean Area, or the Pacific Island Area.

Structural practice means a conservation practice, including a vegetative practice, that involves establishing, constructing, or installing a site-specific measure to conserve and protect a resource from degradation, or improve soil, water, air, or related natural resources in the most cost-effective manner. Examples include, but are not limited to, animal waste management facilities, terraces, grassed waterways, tailwater pits, livestock water developments, contour grass strips, filterstrips, critical area plantings, tree plantings, establishment or improvement of wildlife habitat, and capping of abandoned wells.

Technical assistance means technical expertise, information, and tools necessary for the conservation of natural resources on land active in agricultural, forestry, or related uses. The term includes the following: (1) Technical services provided directly to farmers, ranchers, and other eligible entities, such as conservation planning, technical consultation, and assistance with design and implementation of conservation practices; and (2) technical infrastructure, including activities, processes, tools, and agency functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

Technical Service Provider (TSP) means an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants or in lieu of or on behalf of NRCS.

§ 1465.4 National priorities.

(a) The Chief, with advice from State Conservationists, will identify national priorities to achieve the conservation objectives of AMA.

(b) National priorities will be used to guide annual funding allocations to States.

(c) State Conservationists will use national priorities in conjunction with State and local priorities to prioritize and select AMA applications for funding.

(d) NRCS will undertake periodic reviews of the national priorities and the effects of program delivery at the State and local level to adapt the program to address emerging resource issues.

§ 1465.5 Program requirements.

(a) Participation in AMA is voluntary. The participant, in cooperation with the local conservation district, applies for practice installation for the agricultural operation. The NRCS provides payments through contracts to apply needed conservation practices within a time schedule specified in the APO.

(b) The Chief determines the funds available for financial assistance according to the purpose and projected cost for which the financial assistance is provided in a fiscal year. The Chief allocates the funds available to carry out AMA in consideration of national priorities established under § 1465.4.

(c) To be eligible to participate in AMA, an applicant must:

(1) Own or operate an agricultural operation within an applicable State, as listed in § 1465.1;

(2) Provide NRCS with written evidence of ownership or legal control for the life of the proposed contract, including the O&M agreement. An exception may be made by the Chief:

(i) In the case of land allotted by the Bureau of Indian Affairs (BIA), Tribal land, or other instances in which the Chief determines that there is sufficient assurance of control; or

(ii) If the applicant is a tenant of the land involved in agricultural production, the applicant shall provide NRCS with the written concurrence of the landowner in order to apply a structural practice(s);

(3) Submit an application form NRCS–CPA–1200, which is located electronically at *http://www.nrcs.usda.gov/programs/AMA/index.html*;

(4) Agree to provide all information to NRCS determined to be necessary to assess the merits of a proposed project and to monitor contract compliance;

(5) Provide a list of all members of the legal entity and embedded entities along with members' tax identification numbers and percentage interest in the entity. Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment;

(6) Supply other information, as required by NRCS, to determine payment eligibility as established by 7 CFR part 1400, Adjusted Gross Income (AGI);

(7) With regard to any participant that utilizes a unique identification number as an alternative to a tax identification number will utilize only that identifier for any and all other AMA contracts to which the participant is a party. Violators will be considered to have provided fraudulent representation and be subject to full penalties of § 1465.25;

(8) States, political subdivisions, and entities thereof will not be persons eligible for payment. Any cooperative

association of producers that markets commodities for producers shall not be considered to be a person eligible for payment;

(9) Be in compliance with the terms of all other USDA-administered conservation program agreements to which the participant is a party; and

(10) Develop and agree to comply with an APO and O&M agreement, as described in § 1465.3.

(d) Land may only be considered for enrollment in AMA if NRCS determines that the land is:

(1) Privately owned land;

(2) Publicly owned land where:

(i) The land is a working component of the participant's agricultural and forestry operation; and

(ii) The participant has control of the land for the term of the contract; and

(iii) The conservation practices to be implemented on the public land are necessary and will contribute to an improvement in the identified resource concern that is on private land; or

(3) The land is federally recognized Tribal, BIA allotted, or Indian land.

§ 1465.6 AMA plan of operations.

(a) All conservation practices in the APO must be approved by NRCS and developed and carried out in accordance with the applicable NRCS technical guidance.

(b) The participant is responsible for implementing the APO.

(c) The APO must include:

(1) A description of the participant's specific conservation and environmental objectives to be achieved;

(2) To the extent practicable, the quantitative or qualitative goals for achieving the participant's conservation and environmental objectives;

(3) A description of one or more conservation practices in the conservation system, including conservation planning, design, or installation activities, to be implemented to achieve the conservation and environmental objectives;

(4) A description of the schedule for implementing the conservation practices, including timing, sequence, operation, and maintenance; and

(5) Information that will enable evaluation of the effectiveness of the plan in achieving the environmental objectives.

(d) An APO may be modified in accordance with § 1465.24.

§ 1465.7 Conservation practices.

(a) The State Conservationist will determine the conservation practices eligible for AMA payments. To be considered eligible conservation practices, the practices must meet the purposes of the AMA as set out in § 1465.1. A list of eligible practices will be available to the public.

(b) The APO includes the schedule of operations, activities, and payment rates of the practices needed to solve identified natural resource concerns.

Subpart B—Contracts

§ 1465.20 Applications for participation and selecting applications for contracting.

(a) Any producer who has eligible land may submit an application for participation in AMA at a USDA service center. Producers who are members of a joint operation shall file a single application for the joint operation.

(b) NRCS will accept applications throughout the year. The State Conservationist will distribute information on the availability of assistance, national priorities, and the State-specific goals. Information will be provided that explains the process to request assistance.

(c) The State Conservationist will develop ranking criteria and a ranking process to select applications, taking into account national, State, Tribal, and local priorities.

(d) The State Conservationist or designated conservationist using a locally led process will evaluate, rank and select applications for contracting based on the State-developed ranking criteria and ranking process.

(e) The State Conservationist or designated conservationist will work with the applicant to collect the information necessary to evaluate the application using the ranking criteria.

§ 1465.21 Contract requirements.

(a) In order for a participant to receive payments, the participant shall enter into a contract agreeing to implement one or more eligible conservation practices. Costs for technical services may be included in the contract.

(b) An AMA contract will:

(1) Incorporate by reference all portions of an agricultural operation receiving AMA assistance;

(2) Be for a minimum duration of one year after completion of the last practice, but not more than 10 years;

(3) Incorporate all provisions as required by law or statute, including participant requirements to:

(i) Not conduct any practices on the agricultural operation that would tend to defeat the purposes of the contract according to § 1465.25;

(ii) Refund any AMA payments received with interest, and forfeit any future payments under AMA, on the violation of a term or condition of the contract, consistent with the provisions of § 1465.25;

(iii) Refund all AMA payments received on the transfer of the right and interest of the producer in land subject to the contract, unless the transferee of the right and interest agrees to assume all obligations, including operation and maintenance of the AMA contract's conservation practices, consistent with the provisions of § 1465.24; and

(iv) Supply information as required by NRCS to determine compliance with the contract and requirements of AMA.

(4) Specify the participant's requirements for operation and maintenance of the applied conservation practices consistent with the provisions of § 1465.22; and

(5) Specify any other provision determined necessary or appropriate by NRCS.

(c) The participant must apply the practice(s) according to the schedule set out in the APO.

§ 1465.22 Conservation practice operation and maintenance.

(a) The contract will incorporate the O&M agreement that describes the lifespan and operation and maintenance of the conservation practices applied under the contract.

(b) The O&M agreement incorporates the Agency expectation that the participant will operate and maintain the conservation practice(s) installed under the contract for its intended purpose for the lifespan of the conservation practice, as specified in the O&M agreement.

(c) NRCS may periodically inspect the conservation practice(s) during the contract duration to ensure that operation and maintenance requirements are being carried out, and that the conservation practice is fulfilling its intended objectives.

(d) Conservation practices installed before the contract execution, but included in the contract to obtain the environmental benefits agreed upon, must be operated and maintained as specified in the contract and O&M agreement.

§ 1465.23 Payments.

(a) The Federal share of payments to a participant will be:

(1) Up to 75 percent of the estimated incurred cost or 100 percent of the estimated income foregone of an eligible practice, except as provided in paragraph (a)(2) of this section.

(2) In the case of historically underserved producers, the payment rate will be the applicable rate and an additional rate that is not less than 25

percent above the applicable rate, provided that this increase does not exceed 90 percent of the estimated incurred costs or estimated income foregone.

(3) In no instance shall the total financial contributions for an eligible practice from other sources exceed 100 percent of the estimated incurred cost of the practice.

(b) Participants may contribute their portion of the estimated costs of practices through in-kind contributions, including labor and materials, providing the materials contributed meet the NRCS standard and specifications for the practice being installed.

(c) Payments for practices applied prior to application or contract approval—

(1) Payments will not be made to a participant for a conservation practice that was applied prior to application for the program.

(2) Payments will not be made to a participant for a conservation practice that was initiated or implemented prior to contract approval, unless the participant obtained a waiver from the State Conservationist or designated conservationist prior to practice implementation

(d) The total amount of payments paid to a participant under this Part may not exceed $50,000 for any fiscal year.

(e) For purposes of applying the payment limitations provided for in this section, NRCS will use the provisions in 7 CFR part 1400, Payment Limitation and Payment Eligibility.

(f) A participant will not be eligible for payments for conservation practices on eligible land if the participant receives payments or other benefits for the same practice on the same land under any other conservation program administered by USDA.

(g) The participant and NRCS must certify that a conservation practice is completed in accordance with the contract before NRCS will approve any Payment.

(h) Subject to fund availability, the payment rates for conservation practices scheduled after the year of contract obligation may be adjusted to reflect increased costs.

§ 1465.24 Contract modifications, extensions, and transfers of land.

(a) The participant and NRCS may modify a contract if both parties agree to the contract modification, the APO is revised in accordance with NRCS requirements, and the designated conservationist approves the modified contract.

(b) It is the participant's responsibility to notify NRCS when he/she either anticipates the voluntary or involuntary loss of control of the land.

(c) The participant and NRCS may mutually agree to transfer a contract to another party.

(1) To receive an AMA payment, the transferee must be determined by NRCS to be eligible to participate in AMA and shall assume full responsibility under the contract, including the O&M agreement for those conservation practices already installed and those conservation practices to be installed as a condition of the contract.

(2) With respect to any and all payment owed to participants who wish to transfer ownership or control of land subject to a contract, the division of payment shall be determined by the original party and the party's successor. In the event of a dispute or claim on the distribution of payments, NRCS may withhold payments without the accrual of interest pending a settlement or adjudication on the rights to the funds.

(d) NRCS may require a participant to refund all or a portion of any assistance earned under AMA if the participant sells or loses control of the land under an AMA contract and the successor in interest is not eligible or refuses to accept future payments to participate in the AMA or refuses to assume responsibility under the contract.

(e) The participants to the contract shall be jointly and severally responsible for refunding the payments with applicable interest pursuant to paragraph (d) of this section.

(f) In the event a conservation practice fails through no fault of the participant, the State Conservationist may issue payments to re-establish the conservation practice, at the rates established in accordance with § 1465.23, provided such payments do not exceed the payment limitation requirements as set forth in § 1465.23.

§ 1465.25 Contract violations and termination.

(a) If NRCS determines that a participant is in violation of the terms of a contract, O&M agreement, or documents incorporated by reference into the contract, NRCS shall give the participant notice and 60 days, unless otherwise determined by the State Conservationist, to correct the violation and comply with the terms of the contract and attachments thereto. If a participant continues in violation, the State Conservationist may terminate the AMA contract.

(b) Notwithstanding the provisions of paragraph (a) of this section, a contract termination shall be effective immediately upon a determination by the State Conservationist that the participant has submitted false information or filed a false claim, or engaged in any act, scheme, or device for which a finding of ineligibility for payments is permitted under the provisions of § 1465.35, or in a case in which the actions of the party involved are deemed to be sufficiently purposeful or negligent to warrant a termination without delay.

(c) If NRCS terminates a contract, the participant shall forfeit all rights to future payments under the contract and refund all or part of the payments received, plus interest. Participants violating AMA contracts may be determined ineligible for future NRCS-administered conservation program funding.

(1) The State Conservationist may require only a partial refund of the payments received if the State Conservationist determines that a previously installed conservation practice can function independently, is not affected by the violation or the absence of other conservation practices that would have been installed under the contract, and the participant agrees to operate and maintain the installed conservation practice for the life span of the practice.

(2) If NRCS terminates a contract due to breach of contract or the participant voluntarily terminates the contract before any contractual payments have been made, the participant shall forfeit all rights for further payments under the contract and shall pay such liquidated damages as prescribed in the contract. The State Conservationist will have the option to waive the liquidated damages depending upon the circumstances of the case.

(i) When making all contract termination decisions, NRCS may reduce the amount of money owed by the participant by a proportion that reflects the good faith effort of the participant to comply with the contract or the existence of hardships beyond the participant's control that have prevented compliance with the contract. If the participant claims hardship, that claim must be well documented and cannot have existed when the applicant applied for participation in the program.

(ii) The participant may voluntarily terminate a contract if NRCS agrees based on NRCS's determination that termination is in the public interest.

(iii) In carrying out NRCS's role in this section, NRCS may consult with the local conservation district.

Subpart C—General Administration

§ 1465.30 Appeals.

(a) A participant may obtain administrative review of an adverse decision under AMA in accordance with 7 CFR parts 11 and 614, except as provided in paragraph (b) of this section.

(b) The following decisions are not appealable:

(1) Payment rates, payment limits;

(2) Funding allocations;

(3) Eligible conservation practices; and

(4) Other matters of general applicability, including:

(i) Technical standards and formulas;

(ii) Denial of assistance due to lack of funds or authority; or

(iii) Science-based formulas and criteria.

§ 1465.31 Compliance with regulatory measures.

Participants who carry out conservation practices shall be responsible for obtaining the authorities, rights, easements, permits, or other approvals necessary for the implementation, operation, and maintenance of the conservation practices in keeping with applicable laws and regulations. Participants shall be responsible for compliance with all laws and for all effects or actions resulting from the participant's performance under the contract.

§ 1465.32 Access to operating unit.

Any authorized NRCS representative shall have the right to enter an operating unit or tract for the purpose of determining eligibility and for ascertaining the accuracy of any representations related to contracts and performance. Access shall include the right to provide technical assistance; determine eligibility; inspect any work undertaken under the contracts, including the APO and O&M agreement; and collect information necessary to evaluate the conservation practice performance as specified in the contracts. The NRCS representative shall make an effort to contact the participant prior to exercising this provision.

§ 1465.33 Equitable relief.

(a) If a participant relied upon the advice or action of any authorized NRCS representative and did not know, or have reason to know, that the action or advice was improper or erroneous, the State Conservationist may grant relief to the extent it is deemed appropriate by NRCS. Where a participant believes that detrimental reliance on the advice or action of a NRCS representative resulted in an ineligibility or program violation, the participant may request equitable relief under 7 CFR part 635.

(b) The financial or technical liability for any action by a participant that was taken based on the advice of an NRCS certified non-USDA TSP is the responsibility of the certified TSP and will not be assumed by NRCS when NRCS authorizes payment.

(c) If, during the term of an AMA contract, a participant has been found in violation of a provision of the contract, the O&M agreement, or any document incorporated by reference through failure to fully comply with that provision, the participant may be eligible for equitable relief under 7 CFR part 635.

§ 1465.34 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any participant shall be made without regard to questions of title under State law and without regard to any claim or lien against the crop, or proceeds thereof, in favor of the owner or any other creditor except agencies of the United States Government. The regulations governing offsets and withholdings found at 7 CFR part 1403 shall be applicable to contract payments.

(b) AMA participants may assign any payments in accordance with 7 CFR part 1404.

§ 1465.35 Misrepresentation and scheme or device.

(a) A participant who is determined to have erroneously represented any fact affecting an AMA determination made in accordance with this part shall not be entitled to contract payments and must refund to NRCS all payments plus interest, as determined in accordance with 7 CFR part 1403.

(b) A participant shall refund to NRCS all payments, plus interest, as determined by NRCS, with respect to all NRCS contracts to which they are a party if they are determined to have knowingly:

(1) Adopted any scheme or device that tends to defeat the purpose of AMA;

(2) Made any fraudulent representation;

(3) Adopted any scheme or device for the purpose of depriving any tenant or sharecropper of the payments to which such person would otherwise be entitled under the program; or

(4) Misrepresented any fact affecting an AMA determination.

(c) Where paragraph (a) or paragraph (b) of this section apply, the participant's interest in all contracts shall be terminated. In accordance with § 1465.25(c), NRCS may determine the producer ineligible for future funding from any NRCS conservation programs.

§ 1465.36 Environmental Services Credits for Conservation Improvements.

USDA recognizes that environmental benefits will be achieved by implementing conservation practices funded through AMA, and that environmental credits may be gained as a result of implementing activities compatible with the purposes of an AMA contract. NRCS asserts no direct or indirect interest on these credits. However, NRCS retains the authority to ensure that the requirements for AMA funded improvements are met and maintained consistent with § 1465.22. Where activities required under an environmental credit agreement may affect land covered under an AMA contract, participants are highly encouraged to request a compatibility assessment from NRCS prior to entering into such agreements.

Dated: November 12, 2008.

Arlen L. Lancaster,

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

[FR Doc. E8–27398 Filed 11–19–08; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 93

[Docket No. APHIS–2008–0108]

Remove South Carolina From the Lists of States Approved To Receive Stallions and Mares From CEM-Affected Regions

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the animal importation regulations by removing South Carolina from the lists of States approved to receive certain stallions and mares imported into the United States from regions affected with contagious equine metritis. This action is necessary because South Carolina no longer offers contagious equine metritis quarantine or treatment services and has requested removal from the lists.

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

FOR FURTHER INFORMATION CONTACT: Dr. Ellen Buck, Senior Staff Veterinarian,

Technical Trade Services, National Center for Import and Export, APHIS, VS, 4700 River Road Unit 39, Riverdale, MD 20737; (301) 734–8084.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR part 93 (referred to below as the regulations) prohibit or restrict the importation of specified animals and animal products to protect U.S livestock from communicable diseases.

In § 93.301, paragraph (c)(1) prohibits the importation of horses into the United States from certain regions where contagious equine metritis (CEM) exists. Paragraph (c)(2) lists categories of horses that are excepted from this prohibition, including, in § 93.301(c)(2)(vi), horses over 731 days of age imported for permanent entry if the horses meet the requirements of § 93.301(e).

One of the requirements in § 93.301(e) is that mares and stallions over 731 days old imported for permanent entry from regions where CEM exists be consigned to States listed in § 93.301(h)(6), for stallions, or in § 93.301(h)(7), for mares. The Administrator of the Animal and Plant Health Inspection Service (APHIS) has approved these States to receive stallions or mares over 731 days of age from regions where CEM exists because each State has entered into a written agreement with the Administrator to enforce State laws and regulations to control CEM, and each State has agreed to quarantine, test, and treat stallions and mares over 731 days of age from any region where CEM exists, in accordance with § 93.301(e).

The CEM program is a voluntary, cooperative initiative between APHIS and the States. As noted, States that have entered into an agreement with the Administrator and have been approved to receive horses from CEM-affected regions are listed in § 93.301(h) of the regulations. South Carolina entered into such an agreement and was included in the lists in § 93.301(h). However, it has been several years since South Carolina last received horses for CEM quarantine and treatment, and the State has ceased operation of CEM quarantine and treatment facilities. Consequently, South Carolina has requested removal from the lists of States approved to receive stallions and mares from CEM-affected regions. Therefore, in this rule, we are removing South Carolina from those lists.

Executive Order 12866 and Regulatory Flexibility Act; Effective Date

This action has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review under Executive Order 12866.

As noted, a State's decision to enter into a written agreement with the Administrator to enforce State laws and regulations to control CEM and to quarantine, test, and treat stallions and mares over 731 days of age from CEM-affected regions in accordance with § 93.301(e) is voluntary. Because the State of South Carolina has notified APHIS that it has discontinued these activities and has withdrawn from its agreement with the Administrator, it does not appear that public participation in this proceeding would make additional relevant information available to the Department.

Accordingly, pursuant to the administrative procedure provisions in 5 U.S.C. 553, we find upon good cause that prior notice and other public procedure with respect to this action are not necessary. We also find good cause for making this action effective less than 30 days after publication in the **Federal Register**.

Further, this action is not a rule as defined by the Regulatory Flexibility Act, and, thus, is exempt from the provisions of the Act.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with States and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 9 CFR Part 93

Animal diseases, Imports, Livestock, Poultry and poultry products, Quarantine, Reporting and recordkeeping requirements.

■ Accordingly, 9 CFR part 93 is amended as follows:

PART 93—IMPORTATION OF CERTAIN ANIMALS, BIRDS, FISH, AND POULTRY, AND CERTAIN ANIMAL, BIRD, AND POULTRY PRODUCTS; REQUIREMENTS FOR MEANS OF CONVEYANCE AND SHIPPING CONTAINERS

■ 1. The authority citation for part 93 continues to read as follows:

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.

§ 93.301 [Amended]

■ 2. Section 93.301 is amended as follows:

■ a. In paragraph (h)(6), by removing the words ''The State of South Carolina''.

■ b. In paragraph (h)(7), by removing the words ''The State of South Carolina''.

Done in Washington, DC, this 14th day of November 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–27596 Filed 11–19–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM394; Special Conditions No. 25–375–SC]

Special Conditions: Airbus A318, A319, A320 and A321 Series Airplanes; Inflatable Restraints

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Airbus A318, A319, A320, and A321 series airplanes. These airplanes will have a novel or unusual design feature associated with a passenger restraint system that contains an integrated inflatable airbag installed on passenger seats. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is November 12, 2008. We must receive your comments by January 5, 2009.

ADDRESSES: You must mail two copies of your comments to: Federal Aviation

Administration, Transport Airplane Directorate, Attn: Rules Docket (ANM–113), Docket No. NM394, 1601 Lind Avenue, SW., Renton, Washington 98057–3356. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM394. You can inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Dan Jacquet, FAA, Airframe and Cabin Safety Branch, ANM–115, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2676; facsimile (425) 227–1320.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel about these special conditions. You can inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive by the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want us to let you know we received your comments on these special conditions, send us a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

Background

On September 2, 2008, Airbus, 1 Rond-Point Maurice Bellonte, 31707 Blagnac, Cedex, France, applied for an amendment to Type Certificate No. A28NM to install the AmSafe Aviation Inflatable Restraint (AAIR) for head injury protection on passenger seats on Airbus A318, A319, A320 and A321 series airplanes. The AAIR is designed to limit passenger forward excursion in the event of an accident, thus reducing the potential for head injury (and head entrapment).

The AAIR behaves like an automotive inflatable airbag except that the airbag is integrated into the passenger restraint system and inflates away from the seated passenger. While inflatable airbags are standard in the automotive industry, the use of an inflatable passenger restraint system is novel for commercial aviation.

Title 14, Code of Federal Regulations (14 CFR) 25.785 requires that passengers be protected from head injury by either the elimination of any injurious object within the striking radius of the head or by padding. Traditionally, compliance has required either a setback of 35 inches from any bulkhead, front seat or other rigid interior feature or padding where a setback was not practical. The relative effectiveness of these two means of injury protection was not quantified. The adoption of Amendment 25–64 to 14 CFR part 25, specifically § 25.562, created a new standard for protection from head injury. Airbus elected to comply with § 25.562, except for § 25.562(c)(5) (protection from head injury) and § 25.562(c)(6) (protection from femur injury), for the Airbus A318, A319, and A321 series airplanes. The pertinent parts of § 25.562 for these airplanes require that dynamic tests be conducted for each seat type installed in the airplane, and that each seat type meets certain performance measures. Although the head injury protection requirements of § 25.562(e)(5) are not part of the certification basis for the affected airplanes, it is relevant for future compliance with § 121.311(j). This regulation will require full compliance with § 25.562 for airplanes manufactured on or after October 27, 2009.

Because §§ 25.562 and 25.785 do not adequately address seats with AAIRs, the FAA recognizes that we need to develop appropriate pass/fail criteria that do address the safety of occupants of those seats. These special conditions are applicable to inflatable restraint systems in general. However, because this initial application is for the AAIR, the following discussion refers specifically to the AAIR.

The AAIR has two potential advantages over other means of head impact protection. The first is that it can provide significantly greater protection than would be expected with energy-absorbing pads; the second is that it can provide essentially equivalent protection for occupants of all stature. These are significant advantages from a safety standpoint, since such devices will likely provide a level of safety that exceeds the minimum part 25 standards.

On the other hand, AAIRs are active systems and must activate properly when needed, as opposed to an energy-absorbing pad or upper torso restraint that is passive and always available. Therefore, the potential advantages must be balanced against potential disadvantages in order to develop standards that will provide an equivalent level of safety to that intended by the regulations.

There are two primary safety concerns with the use of AAIRs: (1) They perform properly under foreseeable operating conditions, and (2) they do not perform in a way that would constitute a hazard to the airplane or occupants. This latter point has the potential to be the more rigorous of the requirements, owing to the active nature of the system.

The AAIR will rely on electronic sensors for signaling and pyrotechnic charges for activation, so that it is available when needed. These same devices could be susceptible to inadvertent activation, causing deployment in a potentially unsafe manner. The consequences of such deployment must be considered in establishing the reliability of the system. Airbus must substantiate that the effects of an inadvertent deployment in flight are either not a hazard to the airplane or that such deployment is an extremely improbable occurrence (occurring less than 10^{-9} per flight hour). The effect of an inadvertent deployment on a passenger sitting or standing close to the AAIR must also be considered. A minimum reliability level will have to be established for this case, depending upon the consequences, even if the effect on the airplane is negligible.

The potential for an inadvertent deployment could be increased as a result of conditions in service. The installation must take into account wear and tear, so that the likelihood of an inadvertent deployment is not increased to an unacceptable level. In this context, an appropriate inspection interval and self-test capability are necessary.

Other outside influences are lightning and high intensity radiated fields (HIRF). Since the sensors that trigger deployment are electronic, they must be protected from the effects of these threats. Existing regulations regarding lightning (§ 25.1316) and HIRF (§ 25.1317) are applicable in lieu of any other lightning and HIRF special conditions that have been adopted for the affected airplanes.

For the purposes of compliance, if inadvertent deployment could cause a hazard to the airplane, the AAIR is considered a critical system; if inadvertent deployment could cause injuries to persons, the AAIR is considered an essential system. Finally, the AAIR installation should be protected from the effects of fire, so that an additional hazard is not created by, for example, a rupture of a pyrotechnic squib.

In order to be an effective safety system, the AAIR must function properly and must not introduce any additional hazards to occupants as a result of its functioning. There are several areas where the AAIR differs from traditional occupant protection systems, and requires special conditions to ensure adequate performance.

Because the AAIR is essentially a single use device, there is the potential that it could deploy under crash conditions that are not sufficiently severe as to require head injury protection from the AAIR. Since an actual crash is frequently composed of a series of impacts before the airplane comes to rest, this could render the AAIR useless if a larger impact follows the initial impact. This situation does not exist with energy-absorbing pads or upper torso restraints, which tend to provide protection according to the severity of the impact. Therefore, the AAIR installation should be such that the AAIR will provide protection when it is required and will not expend its protection when it is not needed. There is no requirement for the AAIR to provide protection for multiple impacts, where more than one impact would require protection.

Since each passenger's restraint system provides protection for that occupant only, the installation must address seats that are unoccupied. It will be necessary to show that the required protection is provided for each occupant regardless of the number of occupied seats and considering that unoccupied seats may have AAIR that are active.

Since there is a wide range in the size of passengers, the AAIR must be effective over the entire range. The FAA has historically considered the range from the fifth percentile female to the ninety-fifth percentile male as the range of passengers to take into account. In this case, the FAA is proposing consideration of an even broader range of passengers, due to the nature of the AAIR installation and its close proximity to the passenger. In a similar vein, passengers may assume the brace position for those accidents where an impact is anticipated. Test data indicate that passengers in the brace position do not require supplemental protection, so that it will not be necessary to show that the AAIR will enhance the brace position. However, the AAIR must not introduce a hazard in that case by deploying into the seated, braced passenger.

Another area of concern is the use of seats occupied by children, whether lap-held, in approved child safety seats, or occupying the seat directly. Similarly, if the seat is occupied by a pregnant woman, the installation needs to address such usage, either by demonstrating that it will function properly, or by adding an appropriate limitation on usage.

Since the AAIR will be electrically powered, there is the possibility that the system could fail due to a separation in the fuselage. Since this system is intended as a means of protection in a crash or after a crash, failure due to fuselage separation is not acceptable. As with emergency lighting, the system should function properly, if such a separation occurs at any point in the fuselage.

Since the AAIR is likely to have a large volume displacement, the inflated bag could potentially impede egress of passengers. Since the bag deflates to absorb energy, it is likely that an AAIR would be deflated at the time that persons would be trying to leave their seats. Nonetheless, it is considered appropriate to specify a time interval after which the AAIR may not impede rapid egress. Ten seconds has been chosen as a reasonable time, since it corresponds to the maximum time allowed for an exit to be openable. In actuality, it is unlikely that an exit would be prepared this quickly in an accident severe enough to warrant deployment of the AAIR, and the AAIR will likely deflate much quicker than ten seconds.

The manufacturers of the inflatable lap belts have been unable thus far to develop a fabric that meets the inflation requirements for the bag and the flammability requirements of Part I(a)(1)(ii) of appendix F of part 25. The fabrics that have been developed that meet the flammability requirements did not produce acceptable deployment characteristics. However, the manufacturer was able to develop a fabric that meets the less stringent flammability requirements of Part I(a)(1)(iv) of appendix F to part 25 and has acceptable deployment characteristics.

Finally, it should be noted that the special conditions are applicable to the AAIR system, as installed. The special conditions are not an installation approval. Therefore, while the special conditions relate to each such system installed, the overall installation approval is a separate finding and must consider the combined effects of all such systems installed.

Type Certification Basis

Under the provisions of § 21.101, Airbus must show that the A318, A319, A320 and A321 series airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A28NM or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.'' The regulations incorporated for each individual airplane model are defined within Type Certificate Data Sheet (TCDS) A28NM.

In addition, the certification basis includes other regulations and special conditions that are not pertinent to these special conditions.

If the Administrator finds that the applicable airworthiness regulations (*i.e.*, 14 CFR part 25) do not contain adequate or appropriate safety standards for the Airbus A318, A319, A320 and A321 series airplanes, because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, each airplane model must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in § 11.19, under § 11.38 and they become part of the type certification basis under § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model included on the same type certificate be modified to incorporate the same novel or unusual design

feature, the special conditions would also apply to the other model.

Novel or Unusual Design Features

The Airbus A318, A319, A320 and A321 series airplanes will incorporate the following novel or unusual design features: These airplanes as modified by Airbus will have a passenger restraint system that contains an integrated inflatable airbag device installed on passenger seats. The AAIR will be installed to reduce the potential for head injury in the event of an accident. The AAIR works like an automotive airbag, except that the airbag is integrated with the passenger restraint system. The AAIR is considered a novel design for transport category airplanes and was not considered as part of the original type certification basis.

Section 25.785 states the performance criteria for head injury protection in objective terms. However, none of these criteria are adequate to address the specific issues raised concerning seats with AAIR. The FAA has therefore determined that, in addition to the requirements of 14 CFR part 25, special conditions are needed to address requirements particular to installation of seats with AAIR.

Accordingly, in addition to the passenger injury criteria specified in § 25.785, these special conditions are adopted for the Airbus A318, A319, A320 and A321 series airplanes equipped with AAIR. Other conditions may be developed, as needed, based on further FAA review and discussions with the manufacturer and civil aviation authorities.

Discussion

From the standpoint of a passenger safety system, the airbag is unique in that it is both an active and entirely autonomous device. While the automotive industry has good experience with airbags, the conditions of use and reliance on the airbag as the sole means of injury protection are quite different. In automobile installations, the airbag is a supplemental system and works in conjunction with an upper torso restraint. In addition, the crash event is more definable and of typically shorter duration, which can simplify the activation logic. The airplane-operating environment is also quite different from automobiles and includes the potential for greater wear and tear, and unanticipated abuse conditions (due to galley loading, passenger baggage, etc.); airplanes also operate where exposure to high intensity electromagnetic fields could affect the activation system.

The following special conditions can be characterized as addressing either the safety performance of the system, or the system's integrity against inadvertent activation. Because a crash requiring use of the airbags is a relatively rare event, and because the consequences of an inadvertent activation are potentially quite severe, these latter requirements are probably the more rigorous from a design standpoint.

Applicability

As discussed above, these special conditions are applicable to Airbus A318, A319, A320 and A321 series airplanes. Should Airbus apply at a later date for a change to type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on Airbus A318, A319, A320 and A321 series airplanes. It is not a rule of general applicability.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable and that good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

■ The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Airbus A318, A319, A320 and A321 series airplanes, as modified by installation of inflatable restraints.

1. Seats with inflatable restraints. It must be shown that the inflatable restraints will deploy and provide protection under crash conditions where it is necessary to prevent serious head injury or head entrapment. The means of protection must take into consideration a range of stature from a two-year-old child to a ninety-fifth percentile male. The inflatable restraints must provide a consistent approach to energy absorption throughout that range. In addition, the following situations must be considered:

(a) The seat occupant is holding an infant.

(b) The seat occupant is a child in a child restraint device.

(c) The seat occupant is a child not using a child restraint device.

(d) The seat occupant is a pregnant woman.

2. The inflatable restraints must provide adequate protection for each occupant regardless of the number of occupants of the seat assembly, considering that unoccupied seats may have active seatbelts.

3. The design must prevent the inflatable restraints from being either incorrectly buckled or incorrectly installed such that the inflatable restraints would not properly deploy. Alternatively, it must be shown that such deployment is not hazardous to the occupant and will provide the required head injury protection.

4. It must be shown that the inflatable restraints system is not susceptible to inadvertent deployment as a result of wear and tear or inertial loads resulting from in-flight or ground maneuvers (including gusts and hard landings), likely to be experienced in service.

5. Deployment of the inflatable restraints must not introduce injury mechanisms to the seated occupant or result in injuries that could impede rapid egress. This assessment should include an occupant who is in the brace position when it deploys and an occupant whose belt is loosely fastened.

6. It must be shown that an inadvertent deployment that could cause injury to a standing or sitting person is improbable.

7. It must be shown that inadvertent deployment of the inflatable restraints, during the most critical part of the flight, will either not cause a hazard to the airplane or is extremely improbable.

8. It must be shown that the inflatable restraints will not impede rapid egress of occupants 10 seconds after its deployment.

9. If lithium non-rechargeable batteries are used to power the inflatable restraints, the batteries must be DO–227 and UL compliant. However, if rechargeable lithium batteries are used,

additional special conditions may apply.

10. The inflatable restraints must function properly after loss of normal airplane electrical power and after a transverse separation of the fuselage at the most critical location. A separation at the location of the lap belt does not have to be considered.

11. It must be shown that the inflatable restraints will not release hazardous quantities of gas or particulate matter into the cabin.

12. The inflatable restraints installation must be protected from the effects of fire such that no hazard to occupants will result.

13. The system must be protected from lightning and HIRF. The threats specified in Special Conditions No. 25–ANM–23 are incorporated by reference for the purpose of measuring lightning and HIRF protection. For the purposes of complying with HIRF requirements, the inflatable lapbelt system is considered a critical system if its deployment could have a hazardous effect on the airplane; otherwise it is considered an essential system.

14. There must be a means for a crewmember to verify the integrity of the inflatable restraints activation system prior to each flight or it must be demonstrated to reliably operate between inspection intervals.

15. The inflatable material may not have an average burn rate of greater than 2.5 inches/minute when tested using the horizontal flammability test as defined in 14 CFR part 25, appendix F, part I, paragraph (b)(5).

Issued in Renton, Washington, on November 12, 2008.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–27541 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0850; Directorate Identifier 2007–NM–342–AD; Amendment 39–15710; AD 2008–22–14]

RIN 2120–AA64

Airworthiness Directives; Fokker Model F.28 Mark 0100 Airplanes

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

ACTION: Final rule.

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

* * * * *

During recent inspections it was found that some * * * bolts, that connect the horizontal stabilizer control unit actuator with the dog-links, were broken. This condition, if not corrected, could lead to [the loss of the flight control input connection to the horizontal stabilizer and consequent] partial loss of control of the aircraft.

* * * * *

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

DATES: This AD becomes effective December 26, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 26, 2008.

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

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, WA 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on August 7, 2008 (73 FR 45898) and proposed to supersede AD 97–13–05, Amendment 39–10051 (62 FR 34617, June 27, 1997). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

In January 1996, Fokker issued Service Bulletin (SB) SBF100–27–069 (referencing Menasco, now Goodrich, SB 23100–27–19) to introduce an inspection of bolt Part Number (P/N) 23233–1 for cracks after the examination of a failed bolt. This Service Bulletin was made mandatory by CAA–NL (Civil Aviation Authority—the Netherlands) with the issuance of AD BLA 1996–006 (A) [reference corresponding FAA AD 97–13–05]. Additionally the same SB introduced a lower torque value for these bolts.

During recent inspections it was found that some of these bolts, that connect the horizontal stabilizer control unit actuator with the dog-links, were broken. This condition, if not corrected, could lead to [the loss of the flight control input connection to the horizontal stabilizer and consequent] partial loss of control of the aircraft.

Since an unsafe condition has been identified that continues to exist or develop on other aircraft of the same type design, this Airworthiness Directive supersedes CAA–NL AD 1996–006 and requires an integrity check by a re-torque in accordance with SBF100–27–091 and the installation of a tie wrap through the bolt, which will act as a retainer for the bolt and nut. The key function for this tie-wrap is to keep the bolt in place in the event the bolt head fails.

The corrective action includes replacing any failed bolt (i.e., broken or loose bolt) with a serviceable bolt. This AD also expands the applicability of AD 97–13–05. You may obtain further information by examining the MCAI in the AD docket.

Comments

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

Conclusion

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this AD will affect about 9 products of U.S. registry. We also estimate that it will take about 3 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $2,160, or $240 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–10051 (62 FR 34617, June 27, 1997) and adding the following new AD:

2008–22–14 Fokker Services B.V.: Amendment 39–15710. Docket No. FAA–2008–0850; Directorate Identifier 2007–NM–342–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective December 26, 2008.

Affected ADs

(b) This AD supersedes AD 97–13–05, Amendment 39–10051.

Applicability

(c) This AD applies to Fokker Model F.28 Mark 0100 airplanes, certificated in any category, all serial numbers.

Subject

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

Reason

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

In January 1996, Fokker issued Service Bulletin (SB) SBF100–27–069 (referencing Menasco, now Goodrich, SB 23100–27–19) to introduce an inspection of bolt Part Number (P/N) 23233–1 for cracks after the examination of a failed bolt. This Service Bulletin was made mandatory by CAA–NL (Civil Aviation Authority—the Netherlands) with the issuance of AD BLA 1996–006 (A) [reference corresponding FAA AD 97–13–05]. Additionally the same SB introduced a lower torque value for these bolts.

During recent inspections it was found that some of these bolts, that connect the horizontal stabilizer control unit actuator with the dog-links, were broken. This condition, if not corrected, could lead to [the loss of the flight control input connection to the horizontal stabilizer and consequent] partial loss of control of the aircraft.

Since an unsafe condition has been identified that continues to exist or develop on other aircraft of the same type design, this Airworthiness Directive [European Aviation Safety Agency (EASA) Airworthiness Directive 2007–0287, dated November 15, 2007] supersedes CAA–NL AD 1996–006 and requires an integrity check by a re-torque in accordance with SBF100–27–091 and the installation of a tie wrap through the bolt, which will act as a retainer for the bolt and nut. The key function for this tie-wrap is to keep the bolt in place in the event the bolt head fails.

The corrective action includes replacing any failed bolt (*i.e.*, broken or loose bolt) with a serviceable bolt.

Actions and Compliance

(f) Unless already done, within 6 months after the effective date of this AD, do the following actions.

(1) Perform a one-time inspection (integrity check) for failure of the lower bolts of the stabilizer control unit dog-links, in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–27–091, dated August 31, 2007. If a failed bolt is found, before further flight, replace the bolt with a serviceable bolt in accordance with the Accomplishment Instructions of the service bulletin.

(2) Install a tie-wrap through the lower bolts of the stabilizer control unit, in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–27–091, dated August 31, 2007.

FAA AD Differences

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

Other FAA AD Provisions

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

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, WA 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

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

Related Information

(h) Refer to MCAI EASA Airworthiness Directive 2007–0287, dated November 15,

2007; and Fokker Service Bulletin SBF100–27–091, dated August 31, 2007; for related information.

Material Incorporated by Reference

(i) You must use Fokker Service Bulletin SBF100–27–091, dated August 31, 2007, to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands; telephone +31 (0)252–627–350; fax +31 (0)252–627–211; e-mail *technicalservices.fokkerservices@stork.com;* Internet *http://www.myfokkerfleet.com.*

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on October 9, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–25755 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0270; Directorate Identifier 2007–NM–255–AD; Amendment 39–15628; AD 2008–16–10]

RIN 2120–AA64

Airworthiness Directives; Gulfstream Aerospace LP Model Galaxy Airplanes and Gulfstream 200 Airplanes

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

ACTION: Final rule.

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

The 3 supporting blocks [installed on hydraulic tubes] were made of Teflon, which is unsuitable material for this application. Excessive wear of the blocks was discovered on numerous aircraft, as well as several cases of chafing between the loosely supported tubes. In one case, hydraulic fluid was lost due to fatigue failure of an inadequately supported tube. Loss of hydraulic fluid causes subsequent multiple failures of hydraulically operated systems.

Multiple failures of hydraulically operated systems (for the flight air brake actuators, brake system, right thrust reverser, etc.) could result in reduced controllability of the airplane. We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective December 26, 2008.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of December 26, 2008.

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

FOR FURTHER INFORMATION CONTACT: Mike Borfitz, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2677; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on March 13, 2008 (73 FR 13490). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

The 3 supporting blocks [installed on hydraulic tubes] were made of Teflon, which is unsuitable material for this application. Excessive wear of the blocks was discovered on numerous aircraft, as well as several cases of chafing between the loosely supported tubes. In one case, hydraulic fluid was lost due to fatigue failure of an inadequately supported tube. Loss of hydraulic fluid causes subsequent multiple failures of hydraulically operated systems.

Multiple failures of hydraulically operated systems (for the flight air brake actuators, brake system, right thrust reverser, etc.) could result in reduced controllability of the airplane. The corrective actions include repetitive visual inspections of the attaching blocks for wear and of the hydraulic tubes to determine if any tube is loose or damaged; an inspection of the entire length of the tubes for chafing, damage, and cracking; replacement of chafed, damaged, or cracked tubes; and replacement of blocks made of Teflon in the right-hand aft fuselage equipment bay with new blocks made of Nylon 6/6. You may obtain further information by examining the MCAI in the AD docket.

Comments

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

Conclusion

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

Changes to Note 1 and Service Information References

The statement specified in Note 1 of the NPRM is informational only and is not part of the requirements of this AD. The actions specified in that statement are required regardless of AD action. We have removed Note 1 of the NPRM from this AD and revised the numbering on the subsequent Note in this AD.

We have revised paragraph (f)(1)(iii) of this AD to clarify that the repair may be done in accordance with Chapter 20–10–12 of the Gulfstream G200 Maintenance Manual, Revision 15, dated March 31, 2008.

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this AD will affect about 129 products of U.S. registry. We also estimate that it will take about 2 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost about $54 per

product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $27,606, or $214 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008–16–10 Gulfstream Aerospace LP (Formerly Israel Aircraft Industries, Ltd.): Amendment 39–15628. Docket No. FAA–2008–0270; Directorate Identifier 2007–NM–255–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective December 26, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Gulfstream Model Galaxy and Gulfstream 200 airplanes, serial numbers 004 through 156, certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 29: Hydraulic Power.

Reason

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

The 3 supporting blocks [installed on hydraulic tubes] were made of Teflon, which is unsuitable material for this application. Excessive wear of the blocks was discovered on numerous aircraft, as well as several cases of chafing between the loosely supported tubes. In one case, hydraulic fluid was lost due to fatigue failure of an inadequately supported tube. Loss of hydraulic fluid causes subsequent multiple failures of hydraulically operated systems.

Multiple failures of hydraulically operated systems (for the flight air brake actuators, brake system, right thrust reverser, etc.) could result in reduced controllability of the airplane. The corrective actions include repetitive visual inspections of the attaching blocks for wear and of the hydraulic tubes to determine if any tube is loose or damaged; an inspection of the entire length of the tubes for chafing, damage, and cracking; replacement of chafed, damaged, or cracked tubes; and replacement of blocks made of Teflon in the right-hand aft fuselage equipment bay with new blocks made of Nylon 6/6.

Actions and Compliance

(f) Do the following actions.

(1) Unless already done within 300 flight hours or six months prior to the effective date of this AD: Within 50 flight hours or one month after the effective date of this AD, whichever occurs first, perform a visual inspection of the clamping blocks for wear and of the hydraulic tubes to determine if any tube is loose or damaged. Clamping blocks are shown in detail B of Figure 2 of Gulfstream Service Bulletin 200–29–316, dated June 29, 2007; or in details B and C of Figure 10, Page 0, of Chapter 29–10–30, of the Gulfstream G200 Illustrated Parts Catalog.

(i) If clamping blocks are not worn, repeat the inspections specified in paragraph (f)(1) of this AD thereafter at intervals not to exceed 300 flight hours or six months, whichever comes first, until the replacement required by paragraph (f)(2) of this AD is done.

(ii) If any hydraulic tube is loose or damaged, before further flight, inspect the hydraulic tubes along their entire length for chafing, damage, and cracks.

(iii) Before further flight, repair or replace all chafed, damaged, or cracked tubes in accordance with Chapter 20–10–12 of the Gulfstream G200 Maintenance Manual, Revision 15, dated March 31, 2008; or using a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Civil Aviation Authority of Israel (CAAI) (or its delegated agent).

(iv) Before further flight, replace all worn clamping blocks by doing the replacement specified in paragraph (f)(2) of this AD, except as provided by paragraph (f)(1)(v) of this AD.

(v) If Nylon 6/6 clamping blocks part number (P/N) 4AS3565055–511 are not available during the replacement specified in paragraph (f)(1)(iv) of this AD, before further flight, install new or serviceable Teflon clamping blocks P/N 4AS3565055–507. Within 300 flight hours or six months after doing the installation, do the actions specified in paragraph (f)(1) of this AD and repeat thereafter at intervals not to exceed 300 flight hours or six months, whichever comes first, until the replacement required by paragraph (f)(2) of this AD is done.

(2) Unless already done: Within 600 flight hours or one year after the effective date of this AD, whichever comes first, replace the existing Teflon clamping blocks P/N 4AS3565055–507 with Nylon 6/6 clamping blocks P/N 4AS3565055–511 in accordance with Gulfstream Service Bulletin 200–29–316, dated June 29, 2007. Accomplishment of this replacement constitutes terminating action for all inspections of the clamping blocks required by this AD. Accomplishment of this replacement also constitutes terminating action for the repetitive

inspections of the hydraulic tube required by paragraphs (f)(1)(i) and (f)(1)(v) of this AD.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows:

(1) The MCAI does not specify service information if any tube replacement is done. This AD requires doing the replacement as specified in paragraph (f)(1)(iii) of this AD.

(2) The MCAI specifies doing a one-time inspection of the installed Teflon blocks but also specifies doing repetitive inspections of temporary replacement Teflon blocks until the permanent replacement with Nylon 6/6 clamping blocks is done. This AD requires repetitive inspections of all Teflon blocks until the permanent replacement is done.

(3) The MCAI specifies that doing the replacement with Nylon 6/6 clamping blocks constitutes terminating action. This AD specifies that doing the replacement with Nylon 6/6 clamping blocks constitutes terminating action for the inspections of the clamping blocks and for the repetitive inspections of the hydraulic tubes.

Other FAA AD Provisions

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

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Mike Borfitz, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2677; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

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

Related Information

(h) Refer to MCAI Israeli Airworthiness Directive 29–07–01–11, dated May 28, 2007; Gulfstream Service Bulletin 200–29–316, dated June 29, 2007; and Chapter 20–10–12 of the Gulfstream G200 Maintenance Manual, Revision 15, dated March 31, 2008; for related information.

Material Incorporated by Reference

(i) You must use Gulfstream Service Bulletin 200–29–316, dated June 29, 2007; and Chapter 20–10–12 of the Gulfstream G200 Maintenance Manual, Revision 15, dated March 31, 2008; as applicable, to do the actions required by this AD, unless the AD specifies otherwise.

Chapter 20 of the Gulfstream G200 Maintenance Manual, Revision 15, dated March 31, 2008, contains the following effective pages:

Pages	Revision level shown on page	Date shown on page
List of Effective Pages: Pages 1–2 ...	15	Mar. 31, 2008.

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

(2) For service information identified in this AD, contact Gulfstream Aerospace Corporation, P.O. Box 2206, Mail Station D–25, Savannah, Georgia 31402–2206; telephone 800–810–4853; fax 912–965–3520; e-mail *pubs@gulfstream.com*; Internet *http://www.gulfstream.com/product_support/technical_pubs/pubs/index.htm*.

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

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

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–26922 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0887; Directorate Identifier 2007–NM–336–AD; Amendment 39–15735; AD 2008–23–14]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Model BAe 146 and Avro 146–RJ Airplanes

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

ACTION: Final rule.

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

During inspection of undercarriage main beam sidestays, bolts attaching the undercarriage main beam sidestay to frame 29 were found with the heads of the bolts sheared off. Loose bolt assemblies were also found.

If sheared or loose bolts are not detected and replaced, a possible consequence is the collapse of the main landing gear.

* * * * *

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

DATES: This AD becomes effective December 26, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 26, 2008.

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

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on August 21, 2008 (73 FR 49364). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

During inspection of undercarriage main beam sidestays, bolts attaching the undercarriage main beam sidestay to frame 29 were found with the heads of the bolts sheared off. Loose bolt assemblies were also found.

If sheared or loose bolts are not detected and replaced, a possible consequence is the collapse of the main landing gear.

For the reasons described above, this Airworthiness Directive (AD) requires a one-time [rotating eddy current] inspection of the bolt bores and bore dimensions and the installation of replacement bolts, as necessary.

Corrective actions include contacting BAE Systems (Operations) Limited for

repair instructions and repair, if necessary. You may obtain further information by examining the MCAI in the AD docket.

Comments

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

Conclusion

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this AD will affect about 1 product of U.S. registry. We also estimate that it will take about 24 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost about $1,000 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $2,920, or $2,920 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008–23–14 BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–15735. Docket No. FAA–2008–0887; Directorate Identifier 2007–NM–336–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective December 26, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all BAE Systems (Operations) Limited Model BAe 146–100A, –200A, and –300A series airplanes; and Model Avro 146–RJ70A, 146–RJ85A, and 146–RJ100A airplanes; certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 53: Fuselage.

Reason

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

During inspection of undercarriage main beam sidestays, bolts attaching the undercarriage main beam sidestay to frame 29 were found with the heads of the bolts sheared off. Loose bolt assemblies were also found.

If sheared or loose bolts are not detected and replaced, a possible consequence is the collapse of the main landing gear.

For the reasons described above, this Airworthiness Directive (AD) requires a one-time [rotating eddy current] inspection of the bolt bores and bore dimensions and the installation of replacement bolts, as necessary.

Corrective actions include contacting BAE Systems (Operations) Limited for repair instructions and repair, if necessary.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Within 4,000 flight cycles or 5 years, whichever occurs first after the effective date of this AD, perform the inspections to detect defects (including sheared or loose bolts) and do the bolt replacements in accordance with the instructions of paragraphs 2.C.(1) through 2.C.(3), and paragraphs 2.D.(1) through 2.D.(3), of the Accomplishment Instructions of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–194, dated January 10, 2007, except as required by paragraphs (f)(2), (f)(3), and (f)(4) of this AD.

(2) If any defect is found during the inspection specified in paragraph (f)(1) of this AD, before further flight, replace the affected bolts in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–194, dated January 10, 2007, except as required by paragraphs (f)(3) and (f)(4) of this AD.

(3) For airplanes on which replacement parts are not available during the replacement specified in paragraph (f)(2) of this AD, do the actions in paragraphs (f)(3)(i) and (f)(3)(ii) of this AD in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–194, dated January 10, 2007.

(i) Before further flight, temporarily reinstall removed oversized bolts, provided the bolts are serviceable.

(ii) Within 2,000 flight cycles after doing the inspection required by paragraph (f)(1) of this AD, replace all temporary oversized bolts that were installed in accordance with paragraph (f)(3)(i) of this AD.

(4) Where BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–194, dated January 10, 2007, specifies to contact BAE Systems (Operations) Limited if any defect is found in the second oversize fastener bore, before further flight, contact BAE Systems (Operations) Limited for repair instructions and do the repair.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

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

Related Information

(h) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2007–0277, dated November 5, 2007; and BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–194, dated January 10, 2007; for related information.

Material Incorporated by Reference

(i) You must use BAE Systems (Operations) Limited Inspection Service Bulletin ISB.53–194, dated January 10, 2007, to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact BAE Systems Regional Aircraft, 13850 McLearen Road, Herndon, Virginia 20171; telephone 703–736–1080; e-mail *raebusiness@baesystems.com*; Internet *http://www.baesystems.com/Businesses/RegionalAircraft/index.htm.*

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

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

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–26918 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–29045; Directorate Identifier 2007–NM–048–AD; Amendment 39–15736; AD 2008–23–15]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 767–200, –300, and –400ER Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Boeing Model 767–200, –300, and –400ER series airplanes. This AD requires installing new relay(s), circuit breakers as applicable, and wiring to allow the flightcrew to turn off electrical power to the in-flight entertainment (IFE) systems and certain circuit breakers through a utility bus switch, and doing other specified actions. This AD results from an IFE systems review. We are issuing this AD to ensure that the flightcrew is able to turn off electrical power to IFE systems and other non-essential electrical systems through a switch in the flight compartment. The flightcrew's inability to turn off power to IFE systems and other non-essential electrical systems during a non-normal or emergency situation could result in the inability to control smoke or fumes in the airplane flight deck or cabin.

DATES: This AD is effective December 26, 2008.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of December 26, 2008.

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Shohreh Safarian, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6418; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Boeing Model 767–200, –300, and –400ER series airplanes. That NPRM was published in the **Federal Register** on August 24, 2007 (72 FR 48591). That NPRM proposed to require installing new relay(s) and wiring to allow the flightcrew to turn off electrical power to the in-flight entertainment (IFE) systems and certain circuit breakers through a utility bus switch, and doing other specified actions.

Explanation of Additional Requirement for Certain Airplanes

For certain Model 767–300 series airplanes identified in Boeing Service Bulletin 767–24–0151, dated September 14, 2006, paragraph (g) of this AD would require installing circuit breakers. We

inadvertently omitted that action from the NPRM. Since none of these affected airplanes are on the U.S. registry, notice and opportunity for public comment before issuing this AD are unnecessary.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received from the three commenters.

Support for the NPRM

Inflight Canada (IFC) and Japan Airlines (JAL) strongly support the intent of the NPRM.

Request To Clarify Analysis and Background of the IFE System Review

JAL states that the technical analysis and engineering background of the IFE system should be clearly explained in the NPRM. JAL also states that the NPRM does not clearly address Transistor Transistor Logic (TTL) power consumption, location or quantity of the units, operation during flight, or system shutdown in the event of smoke. For example, JAL points out that the ''Discussion'' section of the NPRM states that the IFE review did not consider systems that provide only audio signals to each passenger seat or the passenger flight information system, and in-seat power supply (ISPS) systems that provide power to less than 20 percent of the total passenger seats. JAL states that the NPRM provides no engineering analysis as to why 40 seats with an ISPS system are a concern on a 150-seat airplane, while 60 seats with an ISPS system on a 350-seat airplane is not a concern. JAL also states that this kind of definition leads to confusion (including IFE development and configuration in the future). JAL also states that the technical definition and background on safety must be clear and properly understood by everyone.

We infer that JAL requests that we clarify the analysis and background of the IFE system review, and we agree to provide clarification. The ''Discussion'' section of the NPRM provides the background information that led to FAA regulatory actions requiring the removal of power from complex IFE system installations in the event of smoke or fire, without affecting other systems essential for safe flight and landing and without the use of circuit breakers for power removal. JAL's concerns related to TTL power consumption, etc., are immaterial to correcting the unsafe condition, which is the inability to disconnect power from the IFE system in the event of smoke or fire. The FAA study focused on IFE installations that are complex in terms of electrical circuitry and power demands. This study excluded non-essential systems that are simple in design and demand low power for operation. Due to the large number of ISPS installations, we reviewed only those ISPS installations that provided power to more than 20 percent of the total passenger seats. However, the requirements of this AD apply to all airplanes that have any seats equipped with power supplies. The applicability of this AD is not limited only airplanes having more than 20 percent of the passenger seats equipped with power supplies. No change to the AD is necessary in this regard.

Request To Clarify That Instructions Are for Airplanes Modified After Delivery

Boeing requests that we clarify, in the ''Relevant Service Information'' section of the NPRM, that the instructions in the referenced Boeing service bulletins are based upon the delivered product configuration. Boeing states that it is not obvious to operators that post-production modifications to the IFE system might require an alternative method of compliance (AMOC) to comply with the requirements of the AD.

We agree that operators might not be able to accomplish the requirements of this AD on airplanes that have been modified or altered after airplane delivery. Section 39.17 of the Federal Aviation Regulations (14 CFR 39.17) specifically addresses this situation. If a change in a product affects one's ability to accomplish the actions required by an AD, then a request for FAA approval of an AMOC addressing that configuration must be submitted. The request should include the specific actions that address the unsafe condition, unless one can show that the change eliminated the unsafe condition. No change to the AD is necessary in this regard.

Recommendation To Locate Primary Switch in the Passenger Cabin

IFC recommends that the primary switch to isolate any cabin system be located in the cabin, rather than in the cockpit. IFC states that, in most cases, the cabin crew will be the first to notice a problem, and that the additional time needed to notify the flightcrew will allow the problem to worsen if not immediately addressed by the trained cabin crew. Further, IFC states that the intercom system between the cabin crew and flightcrew could be damaged by the same event, and that any attempt to gain access via the fortified and locked flight deck door would only aggravate the situation.

We partially agree. It is acceptable to install a secondary, redundant switch in the passenger cabin, in addition to installing the primary switch in the flight deck. The emergency IFE power removal switch must be located as close to the power source as possible, as required by FAA Policy Memorandum PS–ANM100–2000–00105, ''Interim Policy Guidance for Certification of In-Flight Entertainment Systems on Title 14 CFR Part 25 Aircraft,'' dated September 18, 2000; and FAA Policy Memorandum ANM–01–111–165, ''Policy Statement on Certification of Power Supply Systems for Portable Electronic Devices on Part 25 Airplanes,'' dated March 18, 2005. This switch must also be accessible to the flightcrew, so that they can remove power from the IFE system in the event of smoke or fire in either the flight deck or passenger cabin. However, operators have the option of installing a secondary switch that is accessible to the cabin crew. It is not necessary to submit a request for an alternative method of compliance to install a secondary switch because the installation of a primary switch in the flight deck satisfies the requirements of this AD. We have not changed the AD in this regard.

Recommendation To Eliminate Power to All Components in the Cabin

IFC recommends that the requirement to remove power from cabin systems, which are controlled by the passengers, be expanded to include systems such as electrically-controlled seats and ISPS systems, in addition to IFE systems. IFC states that, in most cases, the ISPS and seat adjustment systems carry much higher power loads than do the IFE components.

We agree that the ISPS and electrically-controlled seat systems must also be addressed by this AD. We referred to these systems as ''other non-essential electrical systems'' in the NPRM. However, we disagree that this AD must be expanded because those systems are already addressed by the applicable service bulletins referenced in this AD. The ISPS and electrically-controlled seat systems are treated as non-essential loads, which the service bulletin specifies to rewire so that they will be de-powered in the same way as the IFE systems. No change to the AD is necessary in this regard.

Request To Remove Certain Airplanes From the Applicability

JAL states that the NPRM does not include IFE systems that provide only audio signals to each passenger seat, or IFE systems that have only a video

monitor on the forward bulkhead(s) or projection system for providing basic airplane and flight information to passengers. JAL also states that the effectivity of the referenced Boeing service bulletins does not identify Model 767 airplanes with traditional audio/video systems (for example, variable number (V/N) VB371 through VB373, VK001 through VK016, VK021, VK022, and VR441). JAL, therefore, asserts that airplanes having V/N VK181, VK186, and VR461 should be treated the same as those airplanes because the only difference in configuration is four additional bulkhead monitors, with the same power distribution design, to provide passengers in front row seats with a better angle for viewing video.

We infer that JAL requests that we remove airplanes having V/N VK181, VK186, and VR461 from the applicability of this AD. We disagree with revising the applicability. The delivered configuration of the IFE systems installed on airplanes having V/Ns VK001 through VK016 do not meet the IFE complexity criteria for regulatory action at this time. Further, airplanes having V/N VB371 through VB373, VK021, and VK022 were not included in the effectivity of the referenced Boeing service bulletins because those airplanes were delivered prior to 1992, and IFE systems installed prior to 1992 are not as complex as IFE systems installed later. Although the airplane having V/N VR441 was delivered after 1992, the delivered configuration of that airplane also did not meet our criteria for a complex system. That airplane was delivered with two monitors and three projectors, but our criteria for a complex system required a combination of seven or more components. We are continuing to evaluate such less-complex systems and might consider further rulemaking in the future. We have not changed the AD in this regard.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the change described previously. We also determined that the change will not increase the economic burden on any operator or increase the scope of the AD.

Costs of Compliance

There are about 316 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs, at an average labor rate of $80 per hour, for U.S. operators to comply with this AD.

ESTIMATED COSTS

Model	Boeing Service Bulletin	Work hours	Parts	Cost per airplane	Number of U.S.-registered airplanes	U.S. fleet cost
767–400ER series airplanes	767–24–0147	10	$995	$1,795	2	$3,590
767–300 series airplanes	767–24–0148	Up to 59	Up to 5,079	Up to 9,799	0	0
767–300 series airplanes	767–24–0149	49	4,077	7,997	7	55,979
767–300 series airplanes	767–24–0150	42	5,812	9,172	1	9,172
767–300 series airplanes	767–24–0151	Up to 42	Up to 10,047	Up to 13,407	0	0
767–200 and −300 series airplanes	767–24–0152	42	12,280	15,640	86	1,345,040
767–200 and −300 series airplanes	767–24–0153	42	7,751	11,111	5	55,555
767–200 and −300 series airplanes	767–24–0154	9	1,257	1,977	10	19,770

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008–23–15 Boeing: Amendment 39–15736. Docket No. FAA–2007–29045; Directorate Identifier 2007–NM–048–AD.

Effective Date

(a) This airworthiness directive (AD) is effective December 26, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the airplanes identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, certificated in any category.

(1) Boeing Model 767–200 and -300 series airplanes, as identified in Boeing Service Bulletin 767–24–0152, dated September 29, 2006; Boeing Service Bulletin 767–24–0153, dated September 29, 2006; and Boeing Service Bulletin 767–24–0154, dated September 26, 2002.

(2) Boeing Model 767–300 series airplanes, as identified in Boeing Service Bulletin 767–24–0148, dated September 14, 2006; Boeing Service Bulletin 767–24–0149, dated September 14, 2006; Boeing Service Bulletin 767–24–0150, dated September 21, 2006; and Boeing Service Bulletin 767–24–0151, dated September 14, 2006.

(3) Boeing Model 767–400ER series airplanes, as identified in Boeing Service Bulletin 767–24–0147, dated February 20, 2003.

Unsafe Condition

(d) This AD results from an in-flight entertainment (IFE) systems review. We are issuing this AD to ensure that the flightcrew is able to turn off electrical power to IFE systems and other non-essential electrical systems through a switch in the flight compartment. The flightcrew's inability to turn off power to IFE systems and other non-essential electrical systems during a non-normal or emergency situation could result in the inability to control smoke or fumes in the airplane flight deck or cabin.

Compliance

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

Installing New Relays on Certain Model 767–200 and –300 Series Airplanes

(f) For the airplanes identified in paragraph (c)(1) of this AD: Within 60 months after the effective date of this AD, install new relays and wiring to allow the flightcrew to turn off electrical power to the IFE system and certain circuit breakers through the right utility bus switch and do all other specified actions, by accomplishing all of the applicable actions specified in the Accomplishment Instructions of Boeing Service Bulletin 767–24–0152, dated September 29, 2006; Boeing Service Bulletin 767–24–0153, dated September 29, 2006; and Boeing Service Bulletin 767–24–0154, dated September 26, 2002; as applicable. The other specified actions must be done before further flight after installing the new relays and wiring.

Installing New Relays on Certain Model 767–300 Series Airplanes

(g) For the airplanes identified in paragraph (c)(2) of this AD: Within 60 months after the effective date of this AD, install new relay(s), circuit breakers as applicable, and wiring to allow the flightcrew to turn off electrical power to the IFE system and the IFE video and audio circuit breakers through the right utility bus switch and do all other specified actions as applicable, by accomplishing all of the applicable actions specified in the Accomplishment Instructions of Boeing Service Bulletin 767–24–0148, dated September 14, 2006; Boeing Service Bulletin 767–24–0149, dated September 14, 2006; Boeing Service Bulletin 767–24–0150, dated September 21, 2006; and Boeing Service Bulletin 767–24–0151, dated September 14, 2006; as applicable. The other specified actions must be done before further flight after installing the new relay(s) and wiring.

Installing New Relays on Certain Model 767–400ER Series Airplanes

(h) For the airplanes identified in paragraph (c)(3) of this AD: Within 60 months after the effective date of this AD, install a new relay and wiring to allow the flightcrew to turn off electrical power to some of the IFE systems and certain circuit breakers through the left utility bus switch and do all other specified actions, by accomplishing all of the actions specified in the Accomplishment Instructions of Boeing Service Bulletin 767–24–0147, dated February 20, 2003. The other specified actions must be done before further flight after installing the new relay and wiring.

Alternative Methods of Compliance (AMOCs)

(i)(1) The Manager, Seattle Aircraft Certification Office, FAA, ATTN: Shohreh Safarian, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6418; fax (425) 917–6590; has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

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

Material Incorporated by Reference

(j) You must use the service information contained in Table 1 of this AD, as applicable, to do the actions required by this AD, unless the AD specifies otherwise.

TABLE 1—MATERIAL INCORPORATED BY REFERENCE

Service information	Date
Boeing Service Bulletin 767–24–0147	February 20, 2003.
Boeing Service Bulletin 767–24–0148	September 14, 2006.
Boeing Service Bulletin 767–24–0149	September 14, 2006.
Boeing Service Bulletin 767–24–0150	September 21, 2006.
Boeing Service Bulletin 767–24–0151	September 14, 2006.
Boeing Service Bulletin 767–24–0152	September 29, 2006.
Boeing Service Bulletin 767–24–0153	September 29, 2006.
Boeing Service Bulletin 767–24–0154	September 26, 2002.

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

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207; telephone 206–544–9990; fax 206–766–5682; e-mail *DDCS@boeing.com*; Internet *https://www.myboeingfleet.com*.

(3) You may review copies of the service information that is incorporated by reference at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

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

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–26920 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0817; Airspace Docket No. 08–ANE–101]

Amendment to Class E Airspace; Windsor Locks, Bradley International Airport, CT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; confirmation of effective date; correction.

SUMMARY: This action confirms the effective date of a direct final rule published in the **Federal Register** (73 FR 56471) that revises the Class E Airspace at Windsor Locks, Bradley International Airport, CT (BDL) to provide for adequate controlled airspace for those aircraft using Instrument Approach Procedures previously defined using the CHUPP NDB. The CHUPP NDB has been decommissioned, and after evaluation of the extension to the Windsor Locks Class C airspace, the FAA determined that the Class E3 airspace should be retained and extended 1 mile to provide adequate controlled airspace for the Instrument Approach Procedures to BDL. In addition, this action corrects a minor error made in the Airspace Designation.

DATES: Effective 0901 UTC, November 20, 2008. The Director of the Federal Register approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments

FOR FURTHER INFORMATION CONTACT: Melinda Giddens, Operations Support Group, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; Telephone (404) 305–5610, Fax 404–305–5572.

SUPPLEMENTARY INFORMATION:

Confirmation of Effective Date

The FAA published this direct final rule with a request for comments in the **Federal Register** on September 29 (73 FR 56471) amending Class E3 airspace at Windsor Locks, Bradley International Airport, CT (BDL) to provide for adequate controlled airspace for those aircraft using Instrument Approach Procedures to the airport. The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on November 20, 2008. No adverse comments were received, and thus this notice confirms that effective date.

Correction to Final Rule

After publication, it was observed that a grammatical correction was required to correct the Airspace Designation. Therefore, in the **Federal Register** Docket No. FAA–2008–0817; Airspace Docket No. 08–ANE–101, published on September 29, 2008, (73 FR 56471) make the following correction. On page 56473, in the first column, in the Airspace Designation correct the State identifier (currently CTA) to read ''CT''.

For verification and to avoid confusion, the entire description should read as follows:

Paragraph 6003 Class E Airspace Areas Designated as an Extension.

* * * * *

ANE CT E3 Windsor Locks, CT [Revised]

Windsor Locks, Bradley International Airport, CT,
(Lat. 41°56′20″ N., long 72°41′00″ W.)

That airspace extending upward from the surface within 3.2 miles each side of the 224 bearing from the Bradley International Airport (BDL) and extending from the 5 mile radius to 9.6 miles SW of the Bradley International Airport. The Class E airspace area is effective during 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.

* * * * *

Issued in College Park, Georgia, on October 29, 2008.

Signed by:

Barry A. Knight,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. E8–27536 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0454; Airspace Docket No. 08–AAL–13]

Establishment of Class E Airspace; Napakiak, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace at Napakiak, AK to provide adequate controlled airspace to contain aircraft executing Standard Instrument Approach Procedures (SIAPs). Two SIAPs are being developed for the Napakiak Airport. This action establishes Class E airspace upward from 700 feet (ft.) and 1,200 ft. above the surface at Napakiak Airport, Napakiak, AK.

DATES: *Effective Date:* 0901 UTC, January 15, 2009. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Gary Rolf, AAL–538G, 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.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/fs/alaskan/rulemaking/.*

SUPPLEMENTARY INFORMATION:

History

On Thursday September 18, 2008, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR) part 71 to establish Class E airspace upward from 700 ft. above the surface and from 1,200 ft. above the surface at Napakiak, AK (73 FR 54092). The action was proposed in order to create Class E airspace sufficient in size to contain aircraft while executing instrument procedures for the Napakiak Airport. Class E controlled airspace extending upward from 700 ft. and 1,200 ft. above the surface in the Napakiak Airport area is created by this action.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received. The rule is adopted as proposed.

The area will be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1,200 ft. transition areas are published in paragraph 6005 of FAA Order 7400.9S, *Airspace Designations and Reporting Points,* signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 establishes Class E airspace at the Napakiak Airport, Alaska. This Class E airspace is created to accommodate aircraft executing new instrument procedures, and will be depicted on aeronautical charts for pilot reference. The intended effect of this rule is to provide adequate controlled airspace for

Instrument Flight Rules (IFR) operations at the Napakiak Airport, Napakiak, Alaska.

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. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule 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 creates Class E airspace sufficient in size to contain aircraft executing instrument procedures for the Napakiak Airport 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).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 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 7400.9S, *Airspace Designations and Reporting Points,* signed October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 6005 Class E Airspace Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AAL AK E5 Napakiak, AK [New]

Napakiak, Napakiak Airport, AK
(Lat. 62°41′25″ N., long. 161°58′43″ W.)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of the Napakiak Airport, AK; and that airspace extending upward from 1,200 feet above the surface within a 84-mile radius of the Napakiak Airport, AK.

* * * * *

Issued in Anchorage, AK, November 7, 2008.

Anthony M. Wylie,

Manager, Alaska Flight Services Information Area Group.

[FR Doc. E8–27547 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0458; Airspace Docket No. 08–AAL–17]

Establishment of Class E Airspace; Shageluk, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace at Shageluk, AK to provide adequate controlled airspace to contain aircraft executing Standard Instrument Approach Procedures (SIAPs). Two SIAPs are being developed for the Shageluk Airport. This action establishes Class E airspace upward from 700 feet (ft.) and 1,200 ft. above the surface at Shageluk Airport, Shageluk, AK.

DATES: *Effective Date:* 0901 UTC, January 15, 2009. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Gary Rolf, AAL–538G, 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.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/fs/alaskan/rulemaking/.*

SUPPLEMENTARY INFORMATION:

History

On Thursday, September 18, 2008, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR) part 71 to establish Class E airspace upward from 700 ft. above the surface and from 1,200 ft. above the surface at Shageluk, AK (73 FR 54091). The action was proposed in order to create Class E airspace sufficient in size to contain aircraft while executing instrument procedures for the Shageluk Airport. Class E controlled airspace extending upward from 700 ft. and 1,200 ft. above the surface in the Shageluk Airport area is created by this action.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received. The rule is adopted as proposed.

The area will be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1,200 ft. transition areas are published in paragraph 6005 of FAA Order 7400.9S, *Airspace Designations and Reporting Points*, signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 establishes Class E airspace at the Shageluk Airport, Alaska. This Class E airspace is created to accommodate aircraft executing new instrument procedures, and will be depicted on aeronautical charts for pilot reference. The intended effect of this rule is to provide adequate controlled airspace for Instrument Flight Rules (IFR) operations at the Shageluk Airport, Shageluk, Alaska.

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. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule 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 creates Class E airspace sufficient in size to contain aircraft executing instrument procedures for the Shageluk Airport 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).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 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 7400.9S, *Airspace Designations and Reporting Points*, signed October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 6005 Class E Airspace Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AAL AK E5 Shageluk, AK [New]

Shageluk, Shageluk Airport, AK
(Lat. 62°41′32″ N., long. 159°34′09″ W.)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of the Shageluk Airport, AK; and that airspace extending upward from 1,200 feet above the surface within a 73-mile radius of the Shageluk Airport, AK.

* * * * *

Issued in Anchorage, AK, November 7, 2008.

Anthony M. Wylie,

Manager, Alaska Flight Services Information Area Group.

[FR Doc. E8–27543 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0956; Airspace Docket No. 08–AAL–26]

Revision of Class E Airspace; Badami, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action revises Class E airspace at Badami, AK to provide adequate controlled airspace to contain aircraft executing Standard Instrument Approach Procedures (SIAPs). Two SIAPs are being developed for the Badami Airport. Additionally, a textual Obstacle Departure Procedure (ODP) is being developed. This action revises existing Class E airspace upward from 700 feet (ft.) and 1,200 ft. above the surface at Badami Airport, Badami, AK.

DATES: *Effective Date:* 0901 UTC, January 15, 2009. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Gary Rolf, AAL–538G, 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.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/fs/alaskan/rulemaking/*.

SUPPLEMENTARY INFORMATION:

History

On Thursday September 18, 2008, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to revise Class E airspace upward from 700 ft. above the surface and from 1,200 ft. above the surface at Badami, AK (73 FR 54093). The action was proposed in order to create Class E airspace sufficient in size to contain aircraft while executing instrument procedures for the Badami Airport. Class E controlled airspace extending upward from 700 ft. and 1,200 ft. above the surface in the Badami Airport area is revised by this action.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received. The rule is adopted as proposed.

The area will be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1,200 ft. transition areas are published in paragraph 6005 of FAA Order 7400.9S, *Airspace Designations and Reporting Points*, signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 revises Class E airspace at the Badami Airport, Alaska. This Class E airspace is revised to accommodate aircraft executing new instrument procedures, and will be depicted on aeronautical charts for pilot reference. The intended effect of this rule is to provide adequate controlled airspace for Instrument Flight Rules (IFR) operations at the Badami Airport, Badami, Alaska.

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. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule 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 creates Class E airspace sufficient in size to contain aircraft executing instrument procedures for the Badami Airport 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).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 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 7400.9S, *Airspace Designations and Reporting Points*, signed October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 6005 Class E Airspace Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AAL AK E5 Badami, AK [Revised]

Badami, Badami Airport, AK
(Lat. 70°08′15″ N., long. 147°01′49″ W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of the Badami Airport, AK; and that airspace extending upward from 1,200 feet above the surface within a 73-mile radius of the Badami Airport, AK.

* * * * *

Issued in Anchorage, AK, on November 7, 2008.

Anthony M. Wylie,

Manager, Alaska Flight Services Information Area Group.

[FR Doc. E8–27535 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 12

RIN 3038–AC59

Rules Relating to Reparation Proceedings

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is amending its regulations to clarify that post-judgment interest shall run on reparation awards in voluntary decisional proceedings and to provide that in all reparation proceedings resulting in a judgment for complainant post-judgment interest shall run whether or not expressly awarded.

DATES: December 22, 2008.

FOR FURTHER INFORMATION CONTACT: Laura Richards, Office of General Counsel, U.S. Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5126. E-mail: *lrichards@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background Information

Currently, 17 CFR part 12 provides the following guidance regarding the award of interest to the prevailing party in reparation proceedings. Prejudgment interest ''may'' be awarded in summary decisional proceedings as part of a reparation order under Rule 12.210(c), and in formal decisional proceedings under Rule 12.314(c), ''if warranted as a matter of law under the circumstances of a particular case.'' [1] Judgment Officers and Administrative Law Judges routinely have awarded prejudgment interest. Prejudgment interest is prohibited, however, in voluntary decisional proceedings under Rule 12.106(c).

Rule 12.407(d), which governs post-judgment interest, applies to all forms of reparation proceedings. It provides that interest shall run on an unpaid reparation award ''at the prevailing rate computed in accordance with 28 U.S.C. 1961 from the date directed in the final order to the date of payment, compounded annually.'' *See* Section 14(f) of the Commodity Exchange Act, 7 U.S.C. 18(f) (statutory authority for Rule 12.407(d)).

To clarify existing authority, and to further just and equitable decision proceedings, the Commission hereby amends Rule 12.106(c) to state that post-judgment interest shall run on awards in voluntary proceedings. The Commission believes such a clarifying rule is appropriate to make clear that the Act intends to compensate a prevailing party for the loss of use of the party's money when a reparation judgment is not satisfied within the mandated deadline (for voluntary proceedings, within 45 days after service of the final decision, *see* Rule 12.106(e)).

Amended Rule 12.407(d) provides that if an initial decision inadvertently omits an award of post-judgment interest such interest shall run at the applicable rate from the date that satisfaction of the reparation judgment is due.

In furtherance of the Commission's efforts to fully inform parties and the public of practices regarding interest on reparation judgments, the Commission also is amending Form 30 (which is not included in the Code of Federal Regulations) to include details of which types of interest may be awarded in voluntary, summary and formal decisional proceedings.

II. Related Matters

A. No Notice Required Under 5 U.S.C. 553

The Commission has determined that these amendments are exempt from the provisions of the Administrative Procedure Act, 5 U.S.C. 553, which generally requires notice of proposed rulemaking and provides other opportunities for public participation. According to the exemptive language of 5 U.S.C. 553, these amendments pertain to ''rules of agency organization, procedure or practice,'' as to which there exists agency discretion not to provide notice. In addition, notice and public comment are unnecessary in this case because the amendments are self-explanatory. If made effective immediately, they will promote

[1] *See Ruddy* v. *FCCB,* 1981 WL 21010 at *5 n.18 (CFTC Mar. 31, 1981) (''regarding the award of prejudgment interest[,] [w]here such awards are clearly compensatory and * * * involve the breach of a fiduciary duty, prejudgment interest, while a matter of discretion, should hereafter been the rule, rather than the exception'').

efficiency and facilitate the Commission's core mission without imposing a new burden. For the above reasons, the notice requirements under 5 U.S.C. 553 are inapplicable.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.*, requires agencies with rulemaking authority to consider the impact those rules will have on small businesses. With respect to persons involved in reparation proceedings, the amendments impose no additional burden and in fact provide greater certainty and increased predictability concerning awards of post-judgment interest. Thus, the Acting Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the amendments will not have a significant economic impact on a substantial number of small businesses.

C. Paperwork Reduction Act

The amendments to Part 12 do not impose a burden within the meaning and intent of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

D. Cost-Benefit Analysis

Section 15(a) of the Act, 7 U.S.C. 19(a), requires the Commission to consider the costs and benefits of its action before issuing a new regulation. The Commission understands that, by its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the regulation outweigh its costs. Nor does it require that each rule be analyzed in isolation when that rule is a component of a larger package of rules or rule revisions. Rather, Section 15(a) simply requires the Commission to ''consider the costs and benefits'' of its action.

Section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. Accordingly, the Commission can, in its discretion, give greater weight to any one of the five enumerated areas of concern and can, in its discretion, determine that notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions, or accomplish any of the purposes, of the Commodity Exchange Act.

The amendments to Parts 12 will not create any significant change in the Commission's reparation proceedings. The amendments will enhance the protection of market participants and the public by taking uncertainty out of the awarding of post-judgment interest in certain instances and helping to ensure that reparation awards are satisfied in a timely manner. The cost-benefit factors are not influenced by the amendments, which simply articulate and clarify applicable law and precedent in reparation proceedings.

List of Subjects in 17 CFR Part 12

Administrative practice and procedure, Commodity exchange, Commodity futures, Reparations.

■ After considering these factors, the Commission has determined to amend Part 12 as set forth below:

PART 12—RULES PERTAINING TO REPARATION PROCEEDINGS

■ 1. The authority citation for part 12 continues read as follows:

Authority: 7 U.S.C. 2a(12), 12a(5) and 18.

■ 2. In § 12.106, revise paragraph (c) to read as follows:

§ 12.106 Final decision and order.

* * * * *

(c) *No assessment of prejudgment interest or costs; assessment of post-judgment interest.* A party found liable for damages in a voluntary decisional proceeding shall not be assessed prejudgment interest, attorney's fees, or costs (other than the filing fee and costs assessed as a sanction for abuse of discovery). Post-judgment interest shall be awarded at a rate determined in accordance with 28 U.S.C. 1961(a).

* * * * *

■ 3. In § 12.407, revise paragraph (d) to read as follows:

§ 12.407 Satisfaction of reparation award; enforcement; sanctions.

* * * * *

(d) *Reinstatement.* The sanctions imposed in accordance with paragraph (c) of this section shall remain in effect until the person required to pay the reparation award demonstrates to the satisfaction of the Commission that he has paid the amount required in full including prejudgment interest if awarded and post-judgment interest at the prevailing rate computed in accordance with 28 U.S.C. 1961 from the date directed in the final order to the date of payment, compounded annually. In the event an award of post-judgment interest is inadvertently omitted, such interest nevertheless shall run as calculated in accordance with 28 U.S.C. 1961 and the Part 12 Rules.

* * * * *

Note: The following text will not appear in the Code of Federal Regulations.

Reparations Complaint Form (Form 30)

Portions of the Commission's Reparations Complaint Form, available on the Commission's Web site at *http://www.cftc.gov*, are revised to read as follows:

* * * * *

____$50 Voluntary Decisional Procedure. This procedure enables you, if the respondents agree, to present your case in written form before a CFTC judgment officer. A final decision will be issued without explanation of the reasons. By electing the voluntary procedure, you will waive your right to appeal as well as prejudgment interest and costs. *You do not waive your right to post-judgment interest in the event that reparation awards, if any, are not satisfied within the timeframe provided in the final decision.* In the event an award of post-judgment interest is inadvertently omitted, such interest nevertheless shall run according to the term of 28 U.S.C. 1961 and the Part 12 Rules.

____$125 Summary Decisional Procedure. If your claim is $30,000 or less, it can be heard by a CFTC Judgment Officer. You may present your case in written form, and if deemed necessary by the judgment officer, orally, in Washington, or by telephone under this procedure. The judgment officer will issue brief statements of factual findings and conclusions based on law, and may order a reparation award including prejudgment interest pursuant to Rule 12.210(c) and post-judgment interest. The judgment officer's decision is appealable first to the Commission and from there to a U.S. Court of appeals. In the event an award of post-judgment interest is inadvertently omitted, such interest nevertheless shall run according to the terms of 28 U.S.C. 1961 and the Part 12 Rules.

____$250 Formal Decisional Procedure. If your claim is over $30,000, it can be assigned to an Administrative Law Judge (ALJ) for a formal hearing. You may present your case in written form. If oral testimony is deemed necessary by the ALJ, you may be required to travel up to 300 miles to attend the hearing. The ALJ will issue findings of fact and conclusions of law, and may order a reparation award including prejudgment interest pursuant to Rule 12.314(c) and post-judgment interest. The Administrative Law

Judge's decision is appealable first to the Commission and from there to a U.S. Court of appeals. In the event an award of post-judgment interest is inadvertently omitted, such interest nevertheless shall run according to the terms of 28 U.S.C. 1961 and the Part 12 Rules.

* * * * *

Issued in Washington, DC, on October 20, 2008 by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E8–27177 Filed 11–19–08; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

[Docket No. FDA–2008–N–0039]

Oral Dosage Form New Animal Drugs; Amprolium; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Correcting amendments.

SUMMARY: The Food and Drug Administration (FDA) is correcting a document amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) that appeared in the **Federal Register** of August 6, 2008 (73 FR 45610). FDA is correcting a paragraph designating the sponsors of approved applications for oral dosage forms of amprolium. This correction is being made to improve the accuracy of the animal drug regulations.

DATES: This rule is effective November 20, 2008.

FOR FURTHER INFORMATION CONTACT: George K. Haibel, Center for Veterinary Medicine (HFV–6), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9019, e-mail: *george.haibel@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: For reasons set forth in this preamble, FDA is correcting 21 CFR part 520 as follows:

List of Subjects in 21 CFR Part 520

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is corrected by making the following amendment:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

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

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

§ 520.100 [Corrected]

■ 2. In § 520.100(b)(2), remove ''Nos. 051311 and 066104'' and add in its place ''No. 66104''.

Dated: October 17, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8–27646 Filed 11–19–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF JUSTICE

28 CFR Part 14

Administrative Claims Under the Federal Tort Claims Act; Delegation of Authority

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This Directive delegates authority to the Postmaster General to settle administrative tort claims presented pursuant to the Federal Tort Claims Act where the amount of the settlement does not exceed $300,000. This Directive implements the Administrative Dispute Resolution Act. This Directive will alert the general public to the new authority and is being published in the Code of Federal Regulations to provide a permanent record of this delegation.

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

FOR FURTHER INFORMATION CONTACT: Phyllis J. Pyles, Director, Torts Branch, Civil Division, U.S. Department of Justice, P.O. Box 888, Washington, DC 20044, (202) 616–4400.

SUPPLEMENTARY INFORMATION: This Directive has been issued to delegate settlement authority and is a matter solely related to the division of responsibility between the Department of Justice and the United States Postal Service. As such, this rule is a rule of agency organization, procedure, and practice that is limited to matters of agency management and personnel. Accordingly: (1) This rule is exempt from the notice requirement of 5 U.S.C. 553(b) and is made effective upon issuance; (2) the Department certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities and further that no Regulatory Flexibility Analysis was required to be prepared for this final rule since the Department was not required to publish a general notice of proposed rulemaking; (3) this action is not a ''regulation'' or ''rule'' as defined by Executive Order 12866, ''Regulatory Planning and Review,'' § 3(d)(3) and, therefore, this action has not been reviewed by the Office of Management and Budget.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, ''Federalism,'' it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, ''Civil Justice Reform.'' This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Finally, this action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a ''rule'' as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 14

Authority delegations (government agencies), Claims.

■ By virtue of the authority vested in me by part 0 of title 28 of the Code of Federal Regulations, including §§ 0.45, 0.160, 0.162, 0.164, and 0.168, 28 CFR part 14 is amended as follows:

PART 14—ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

■ 1. The authority citation for part 14 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, and 2672.

■ 2. The appendix to part 14 is amended by revising the heading and text for the ''Delegation of Authority to the Postmaster General'' to read as follows:

Appendix to Part 14—Delegations of Settlement Authority

* * * * *

Delegation of Authority to the Postmaster General

Section 1. Authority to Compromise Tort Claims.

(a) The Postmaster General shall have the authority to adjust, determine, compromise, and settle a claim involving the United States Postal Service under section 2672 of title 28, United States Code, relating to the administrative settlement of federal tort claims, if the amount of the proposed adjustment, compromise, or award does not exceed $300,000. When the Postmaster General believes a claim pending before him presents a novel question of law or of policy, he shall obtain the advice of the Assistant Attorney General in charge of the Civil Division.

(b) The Postmaster General may redelegate, in writing, the settlement authority delegated to him under this section.

Section 2. Memorandum.

Whenever the Postmaster General settles any administrative claim pursuant to the authority granted by section 1 for an amount in excess of $100,000 and within the amount delegated to him under section 1, a memorandum fully explaining the basis for the action taken shall be executed. A copy of this memorandum shall be sent contemporaneously to the Director, FTCA Staff, Torts Branch of the Civil Division.

* * * * *

Gregory G. Katsas,

Assistant Attorney General, Civil Division.

[FR Doc. E8–27518 Filed 11–19–08; 8:45 am]

BILLING CODE 4410–12–P

DEPARTMENT OF JUSTICE

28 CFR Part 14

Administrative Claims Under the Federal Tort Claims Act; Delegation of Authority

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This Directive delegates authority to the Secretary of Defense to settle administrative tort claims presented pursuant to the Federal Tort Claims Act where the amount of the settlement does not exceed $300,000. This Directive implements the Administrative Dispute Resolution Act. This Directive will alert the general public to the new authority and is being published in the Code of Federal Regulations to provide a permanent record of this delegation.

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

FOR FURTHER INFORMATION CONTACT: Phyllis J. Pyles, Director, Torts Branch, Civil Division, U.S. Department of Justice, P.O. Box 888, Washington, DC 20044, (202) 616–4400.

SUPPLEMENTARY INFORMATION: This Directive has been issued to delegate settlement authority and is a matter solely related to the division of responsibility between the Department of Justice and the Department of Defense. As such, this rule is a rule of agency organization, procedure, and practice that is limited to matters of agency management and personnel. Accordingly: (1) This rule is exempt from the notice requirement of 5 U.S.C. 553(b) and is made effective upon issuance; (2) the Department certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities and further that no Regulatory Flexibility Analysis was required to be prepared for this final rule since the Department was not required to publish a general notice of proposed rulemaking; (3) this action is not a ''regulation'' or ''rule'' as defined by Executive Order 12866, ''Regulatory Planning and Review,'' § 3(d)(3) and, therefore, this action has not been reviewed by the Office of Management and Budget.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, ''Federalism,'' it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, ''Civil Justice Reform.'' This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Finally, this action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a ''rule'' as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 14

Authority delegations (government agencies), Claims.

■ By virtue of the authority vested in me by part 0 of title 28 of the Code of Federal Regulations, including §§ 0.45, 0.160, 0.162, 0.164, and 0.168, 28 CFR part 14 is amended as follows:

PART 14—ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

■ 1. The authority citation for part 14 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, and 2672.

■ 2. The appendix to part 14 is amended by revising the heading and text for the ''Delegation of Authority to the Secretary of Defense'' to read as follows:

Appendix to Part 14—Delegations of Settlement Authority

* * * * *

Delegation of Authority to the Secretary of Defense

Section 1. Authority To Compromise Tort Claims.

(a) The Secretary of Defense shall have the authority to adjust, determine, compromise, and settle a claim involving the Department of Defense under section 2672 of title 28, United States Code, relating to the administrative settlement of federal tort claims, if the amount of the proposed adjustment, compromise, or award does not exceed $300,000. When the Secretary believes a claim pending before him presents a novel question of law or of policy, he shall obtain the advice of the Assistant Attorney General in charge of the Civil Division.

(b) The Secretary may redelegate, in writing, the settlement authority delegated to him under this section.

Section 2. Memorandum.

Whenever the Secretary of Defense settles any administrative claim pursuant to the authority granted by section 1 for an amount in excess of $100,000 and within the amount delegated to him under section 1, a memorandum fully explaining the basis for the action taken shall be executed. A copy of this memorandum shall be sent contemporaneously to the Director, FTCA Staff, Torts Branch of the Civil Division.

* * * * *

Gregory G. Katsas,

Assistant Attorney General, Civil Division.

[FR Doc. E8–27517 Filed 11–19–08; 8:45 am]

BILLING CODE 4410–12–P

DEPARTMENT OF JUSTICE

28 CFR Part 14

Administrative Claims Under the Federal Tort Claims Act; Delegation of Authority

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This Directive delegates authority to the Secretary of Veterans Affairs to settle administrative tort claims presented pursuant to the Federal Tort Claims Act where the amount of the settlement does not exceed $300,000. This Directive implements the Administrative Dispute Resolution Act. This Directive will alert the general public to the new authority and is being published in the Code of Federal Regulations to provide a permanent record of this delegation.

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

FOR FURTHER INFORMATION CONTACT: Phyllis J. Pyles, Director, Torts Branch, Civil Division, U.S. Department of Justice, P.O. Box 888, Washington, DC 20044, (202) 616–4400.

SUPPLEMENTARY INFORMATION: This Directive has been issued to delegate settlement authority and is a matter solely related to the division of responsibility between the Department of Justice and the Department of Veterans Affairs. As such, this rule is a rule of agency organization, procedure, and practice that is limited to matters of agency management and personnel. Accordingly: (1) This rule is exempt from the notice requirement of 5 U.S.C. 553(b) and is made effective upon issuance; (2) the Department certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities and further that no Regulatory Flexibility Analysis was required to be prepared for this final rule since the Department was not required to publish a general notice of proposed rulemaking; (3) this action is not a ''regulation'' or ''rule'' as defined by Executive Order 12866, Regulatory Planning and Review,'' § 3(d)(3) and, therefore, this action has not been reviewed by the Office of Management and Budget.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, ''Federalism,'' it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, ''Civil Justice Reform.'' This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Finally, this action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a ''rule'' as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 14

Authority delegations (government agencies), Claims.

■ By virtue of the authority vested in me by part 0 of title 28 of the Code of Federal Regulations, including §§ 0.45, 0.160, 0.162, 0.164, and 0.168, 28 CFR part 14 is amended as follows:

PART 14—ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

■ 1. The authority citation for part 14 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, and 2672.

■ 2. The appendix to part 14 is amended by revising the heading and text for the ''Delegation of Authority to the Secretary of Veterans Affairs'' to read as follows:

Appendix to Part 14—Delegations of Settlement Authority

Delegation of Authority to the Secretary of Veterans Affairs

Section 1. Authority to Compromise Tort Claims.

(a) The Secretary of Veterans Affairs shall have the authority to adjust, determine, compromise, and settle a claim involving the Department of Veterans Affairs under section 2672 of title 28, United States Code, relating to the administrative settlement of federal tort claims, if the amount of the proposed adjustment, compromise, or award does not exceed $300,000. When the Secretary believes a claim pending before him presents a novel question of law or of policy, he shall obtain the advice of the Assistant Attorney General in charge of the Civil Division.

(b) The Secretary may redelegate, in writing, the settlement authority delegated to him under this section.

Section 2. Memorandum.

Whenever the Secretary of Veterans Affairs settles any administrative claim pursuant to the authority granted by section 1 for an amount in excess of $100,000 and within the amount delegated to him under section 1, a memorandum fully explaining the basis for the action taken shall be executed. A copy of this memorandum shall be sent contemporaneously to the Director, FTCA Staff, Torts Branch of the Civil Division.

* * * * *

Gregory G. Katsas,

Assistant Attorney General, Civil Division.

[FR Doc. E8–27514 Filed 11–19–08; 8:45 am]

BILLING CODE 4410–12–P

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 549

[BOP Docket No. 1145]

RIN 1120–AB45

Civil Commitment of a Sexually Dangerous Person

AGENCY: Bureau of Prisons, Justice.

ACTION: Final Rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) finalizes its proposed rule providing definitions and standards relating to the certification of persons as sexually dangerous for the purpose of civil commitment, as authorized by the Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109–248) (Walsh Act), enacted July 27, 2006, which amended title 18 of the United States Code, Chapter 313.

DATES: This rule is effective December 22, 2008.

FOR FURTHER INFORMATION CONTACT: Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307–2105.

SUPPLEMENTARY INFORMATION: A proposed rule on this subject was published August 3, 2007. We received six comments on the proposed rule. One was in support of the rule. We discuss the issues raised by the remaining five comments below.

Also, in the proposed rule, we stated that these rules would be added to 28 CFR part 549, as ''new'' subpart F. However, subpart F currently contains regulations regarding ''Fees for Health Care Services.'' These rules will instead be added to 28 CFR part 549 as new subpart H, and are renumbered accordingly.

Description of Bureau Mental Health Professionals

Several commenters requested more detail concerning the qualifications of the Bureau mental health professionals who will be making determinations regarding the eligibility of persons for civil commitment under these regulations.

The Bureau's Certification Review Panel (CRP), similar to the practice of several states' civil commitment systems, is composed of a variety of persons, including qualified health services staff as well as legal counsel. Included on the panel are appropriately-credentialed psychologists. These psychologists review each inmate's case thoroughly before the CRP decides to certify an inmate for civil commitment.

Definition of ''Conduct of a Sexual Nature''

Section 549.72 of the proposed rule (now § 549.92 of the final rule) defined the term ''sexually violent conduct'' as ''any unlawful conduct of a sexual nature with another person (''the victim'') that involves'' certain elements further enumerated in the regulation. Several commenters called for a definition of the term ''conduct of a sexual nature,'' raising concerns that this language could be interpreted as including ''flirting,'' certain terms of endearment, or other ''harmless conduct.''

At the outset, we note that our terminology is not limited solely to ''conduct of a sexual nature,'' but also includes the necessary initial component that such conduct be ''unlawful.'' Further, the term ''conduct of a sexual nature'' is not activated as a consideration unless accompanied by another qualification among those listed in the regulation. The conduct must involve one of the following:

(a) The use or threatened use of force against the victim;

(b) Threatening or placing the victim in fear that the victim, or any other person, will be harmed;

(c) Rendering the victim unconscious and thereby engaging in conduct of a sexual nature with the victim;

(d) Administering to the victim, by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance, and thereby substantially impairing the ability of the victim to appraise or control conduct; or

(e) Engaging in such conduct with a victim who is incapable of appraising the nature of the conduct, or physically or mentally incapable of declining participation in, or communicating unwillingness to engage in, that conduct.

Further, a person cannot be committed based on conduct alone. A sexually dangerous person is one who also ''suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.'' 18 U.S.C. 4247(a)(6). This requires the Bureau to review not only a person's behavioral history, but also his or her mental condition and risk of engaging in sexually violent conduct or child molestation in the future to determine whether he or she should be certified as a sexually dangerous person.

HIV Infected Innmates' ''Innocent'' Conduct

Several commenters expressed concerns that § 549.72(b) of the proposed regulation (now § 549.92(b) of the final rule) ''could be used to impose civil commitment on a defendant infected with HIV who had flirted with, or otherwise indicated an innocent desire to have intercourse (which was never consumated [sic]) with someone.''

In reconsidering this provision, the Bureau has determined that the best course of action is to remove this paragraph from § 549.92.

Constitutionality of the Walsh Act

One commenter stated that ''[t]he Walsh Act was recently held unconstitutional. * * * *See United States* v. *Comstock,* 06–HC–2212–BR (E.D. N.C., U.S.D.J).'' (*United States* v. *Comstock,* 507 F. Supp. 2d 522 (E.D. N.C. 2007).)

The case cited by the commenter does not have any immediate effect on the authority for this regulation. On September 7, 2007, the district court found 18 U.S.C. 4248 unconstitutional in that case, but the court stayed its order pending the government's appeal of the ruling. The district court recognized that other district courts had upheld the constitutionality of 18 U.S.C. 4248, in the face of similar challenges. See *United States* v. *Shields,* 522 F. Supp. 2d 317, 341 (D. Mass. Nov. 7, 2007); *United States* v. *Carta,* 503 F. Supp. 2d 405, 407 (D. Mass. 2007); *United States* v. *Harnden,* No. 06–6960 (C.D. Cal. Dec. 27, 2006). *See also United States* v. *Dowell,* No. 06–1216 (W.D. Okla. Nov. 26, 2007 and Dec. 5, 2007); *United States* v. *Abregana,* No. 07–385 (D. Hawaii, Aug. 22, 2008). *But see U.S.* v. *Tom,* Civil No. 06–3947 (D. Minn. May 23, 2008).

The Regulation Violates the Fifth and Sixth Amendments of the United States Constitution

One commenter posited that the Bureau intends to ''apply its regulation(s) retrospectively and based on any evidence regardless of source or conviction. [This] violate[s] the Fifth Amendment, U.S. Const., where applied retroactively/retrospectively to alleged conduct predating the enabling statute's enactment as attaching new legal consequences.'' The commenter argues that 18 U.S.C. 4248 violates the Fifth Amendment because it attaches new legal consequences to conduct that pre-dated the effective date of the statute.

Section 4248, and the regulations implementing the statute, do not have retroactive effect. Rather, they permit civil commitment based on a determination that a person ''suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.'' 18 U.S.C. 4247(a)(6). While past behavior is taken into account, it is only one of several factors to be considered. The determination whether to certify an inmate for civil commitment is based also on a person's current mental condition and risk of future unlawful sexual conduct. Past conduct is used for evidentiary purposes. Thus, neither section 4248 nor these regulations attaches new legal consequences solely to past behavior. *See Kansas* v. *Hendricks,* 521 U.S. 346, 370–71, 117 S. Ct. 2072, 2086, 138 L.Ed.2d 501 (1997) (Kansas' Sexually Violent Predators Act does not have retroactive effect, but rather, permits involuntary confinement based on determination that person currently both suffers from mental abnormality or personality disorder and is likely to pose future danger to public; to the extent that past behavior is taken into account, it is used solely for evidentiary purposes).

The same commenter also argued that ''the intention to rely on any evidence regardless of source or conviction would * * * violate a prisoner's Sixth Amendment right to have a jury of one's peers determine the facts in accord with the Court's reasoning.''

The Sixth Amendment would not be implicated by these regulations. First, we note that the civil commitment proceeding contemplated under the Walsh Act is not a criminal proceeding to which Sixth Amendment jury rights would attach. *See, e.g.*, *Poole* v. *Goodno,* 335 F.3d 705, 710–11 (8th Cir. 2003) (''There is no clearly established

Supreme Court law which holds that due process requires a jury trial in civil commitment proceedings or that incorporates the Seventh Amendment right to a jury for such cases.''); *United States* v. *Sahhar,* 917 F.2d 1197, 1207 (9th Cir. 1990), cert. denied, 499 U.S. 963 (1991) (jury trial is ''neither a necessary element of the fundamental fairness guaranteed by the due process clause, nor an essential component of accurate factfinding'') (citing *McKeiver* v. *Pennsylvania,* 403 U.S. 528, 543 (1971)).

Further, the Walsh Act authorizes the Bureau only to certify to federal district courts that certain persons are ''sexually dangerous persons'' for whom civil commitment is required. The filing of the certificate by the Bureau stays the release of the person; however, the final determination that a person is ''a sexually dangerous person'' subject to civil commitment is made by the court after proceedings held pursuant to 18 U.S.C. 4248(b) and (c), which make applicable the procedures set forth in 18 U.S.C. 4247(b), (c), and (d). As provided in section 4248(b), the court may order that a psychiatric or psychological examination of the person be conducted, and that a psychiatric or psychological report be filed with the court. Pursuant to section 4248(c), a hearing shall be conducted in which the person shall be represented by counsel, and be afforded an opportunity to testify, present evidence, subpoena witnesses on his or her behalf, and confront and cross-examine witnesses who appear at the hearing. If the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit him/her to the custody of the Attorney General as detailed in section 4248(d).

Based on the foregoing discussion, the Bureau now adopts the proposed rule as final, with minor changes.

Executive Order 12866

This rule falls within a category of actions that the Office of Management and Budget (OMB) has determined to constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866 and, accordingly, it was reviewed by OMB.

The Bureau has assessed the costs and benefits of this rule as required by Executive Order 12866 section 1(b)(6) and has made a reasoned determination that the benefits of this rule justify its costs. This rule will have the benefit of avoiding confusion caused by the statutory change, while allowing the Bureau to operate under the definitions stated in the regulations. There will be no new costs associated with this rulemaking.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, under Executive Order 13132, we determine that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation and by approving it certifies that it will not have a significant economic impact upon a substantial number of small entities for the following reasons: This rule pertains to the correctional management of persons in the custody of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

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 $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 549

Prisoners.

Dated: November 17, 2008.

Harley G. Lappin,

Director, Bureau of Prisons.

■ Under rulemaking authority vested in the Attorney General in 5 U.S.C. 301; 28 U.S.C. 509, 510 and delegated to the Director, Bureau of Prisons in 28 CFR 0.96, we amend 28 CFR part 549 as follows.

Subchapter C—Institutional Management

PART 549—MEDICAL SERVICES

■ 1. Revise the authority citation for 28 CFR part 549 to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. 876b; 18 U.S.C. 3621, 3622, 3524, 4001, 4005, 4042, 4045, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4241–4248, 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

■ 2. Add a new subpart H, to read as follows:

Subpart H—Civil Commitment of a Sexually Dangerous Person

Sec.

§ 549.90 Purpose and application.

(a) This subpart provides definitions and standards for review of persons for certification to federal district courts as sexually dangerous persons, as authorized by title 18 U.S.C. Chapter 313, by Bureau of Prisons staff or contractors (collectively referred to in this Part as ''the Bureau'').

(b) This subpart applies to persons in Bureau custody, including those:

(1) Under a term of imprisonment;

(2) For whom all criminal charges have been dismissed solely for reasons relating to the person's mental condition; or

(3) In Bureau custody pursuant to 18 U.S.C. 4241(d).

(c) The Bureau may certify that a person in Bureau custody is a sexually dangerous person when review under this subpart provides reasonable cause to believe that the person is a sexually dangerous person. In determining whether a person is a sexually dangerous person and should be so certified, the Bureau will consider any available information in its possession and may transfer the person to a suitable facility for psychological examination in order to obtain information for this purpose.

§ 549.91 Definition of ''sexually dangerous person.''

For purposes of this subpart, a ''sexually dangerous person'' is a person:

(a) Who has engaged or attempted to engage in:

(1) Sexually violent conduct; or

(2) Child molestation; and

(b) Has been assessed as sexually dangerous to others by a Bureau mental health professional.

§ 549.92 Definition of ''sexually violent conduct.''

For purposes of this subpart, ''sexually violent conduct'' includes any unlawful conduct of a sexual nature with another person (''the victim'') that involves:

(a) The use or threatened use of force against the victim;

(b) Threatening or placing the victim in fear that the victim, or any other person, will be harmed;

(c) Rendering the victim unconscious and thereby engaging in conduct of a sexual nature with the victim;

(d) Administering to the victim, by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance, and thereby substantially impairing the ability of the victim to appraise or control conduct; or

(e) Engaging in such conduct with a victim who is incapable of appraising the nature of the conduct, or physically or mentally incapable of declining participation in, or communicating unwillingness to engage in, that conduct.

§ 549.93 Definition of ''child molestation.''

For purposes of this subpart, ''child molestation'' includes any unlawful conduct of a sexual nature with, or sexual exploitation of, a person under the age of 18 years.

§ 549.94 Definition of ''sexually dangerous to others.''

For purposes of this subpart, ''sexually dangerous to others'' means that a person suffers from a serious mental illness, abnormality, or disorder as a result of which he or she would have serious difficulty in refraining from sexually violent conduct or child molestation if released.

§ 549.95 Determining ''serious difficulty in refraining from sexually violent conduct or child molestation if released.''

In determining whether a person will have ''serious difficulty in refraining from sexually violent conduct or child molestation if released,'' Bureau mental health professionals may consider, but are not limited to, evidence:

(a) Of the person's repeated contact, or attempted contact, with one or more victims of sexually violent conduct or child molestation;

(b) Of the person's denial of or inability to appreciate the wrongfulness, harmfulness, or likely consequences of engaging or attempting to engage in sexually violent conduct or child molestation;

(c) Established through interviewing and testing of the person or through other risk assessment tools that are relied upon by mental health professionals;

(d) Established by forensic indicators of inability to control conduct, such as:

(1) Offending while under supervision;

(2) Engaging in offense(s) when likely to get caught;

(3) Statement(s) of intent to re-offend; or

(4) Admission of inability to control behavior; or

(e) Indicating successful completion of, or failure to successfully complete, a sex offender treatment program.

[FR Doc. E8–27723 Filed 11–19–08; 8:45 am]

BILLING CODE 4410–05–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[USCG–2008–1060]

RIN 1625–AA09

Drawbridge Operation Regulation; Mantua Creek, Paulsboro, NJ

AGENCY: Coast Guard, DHS.

ACTION: Temporary deviation from regulations.

SUMMARY: The Commander, Fifth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the S.R. 44 Bridge, at mile 1.7, across Mantua Creek at Paulsboro, NJ. This deviation allows the bridge to remain closed to navigation to facilitate mechanical repairs.

DATES: This deviation is effective from 6 a.m. on December 1, 2008, to 6 p.m. on December 31, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–1060 and are available online at *http://www.regulations.gov*. They are also available for inspection or copying at two locations: the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and the Commander (dpb), Fifth Coast Guard District, Federal Building, 1st Floor, 431 Crawford Street, Portsmouth, VA 23704–5004 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Gary S. Heyer, Bridge Management Specialist, Fifth Coast Guard District, at (757) 398–6629.

SUPPLEMENTARY INFORMATION: The New Jersey Department of Transportation, who owns and operates this vertical-lift drawbridge, has requested a temporary deviation from the current operating regulations set out in 33 CFR 117.729(b) which requires the bridge to open signal from March 1 through November 30 from 7 a.m. to 11 p.m., and on signal at all other times upon four hours notice.

The S.R. 44 Bridge, at mile 1.7, across Mantua Creek has vertical clearances in the full open and closed positions to vessels of 64 feet and 5 feet, above mean high water, respectively.

Under this temporary deviation to facilitate the repairs to the operating machinery, the S.R. 44 Bridge will be maintained in the closed-to-navigation position beginning at 6 a.m. on Monday, December 1, 2008 until and including 6 p.m. on Wednesday, December 31, 2008. There are no alternate routes for vessels with a mast height greater than 5 feet.

The Coast Guard will inform the users of the waterway through our Local and Broadcast Notices to Mariners of the opening restrictions of the draw span to minimize transiting delays caused by the temporary deviation.

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

Dated: November 6, 2008.

Waverly W. Gregory, Jr.,

Chief, Bridge Administration Branch Fifth Coast Guard District.

[FR Doc. E8–27520 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 41

[Docket No.: PTO–P–2008–0054]

Clarification of the Effective Date Provision in the Final Rule for Ex Parte Appeals

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Interpretation and effective date clarification.

SUMMARY: On June 10, 2008, the United States Patent and Trademark Office (Office) published the final rule that amends the rules governing practice before the Board of Patent Appeals and Interferences (BPAI) in *ex parte* patent appeals. The effective date provision in the final rule states that the effective date is December 10, 2008, and the final rule shall apply to all appeals in which an appeal brief is filed on or after the effective date. The final rule requires, in part, appeal briefs in a new format relative to the format required prior to the rule revision. The Office is issuing this notice to clarify that it will not hold an appeal brief as non-compliant solely for following the new format even though it is filed before the effective date.

DATES: This is effective November 20, 2008.

FOR FURTHER INFORMATION CONTACT: Kery A. Fries at (571) 272–7757 or Joni Y. Chang at (571) 272–7720, Senior Legal Advisors, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy directly by phone, or by facsimile to (571) 273–7757, or by mail addressed to: Mail Stop Comments-Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450.

SUPPLEMENTARY INFORMATION: On June 10, 2008, the United States Patent and Trademark Office (Office) published the final rule that amends the rules governing practice before the Board of Patent Appeals and Interferences (BPAI) in *ex parte* patent appeals. *See Rules of Practice Before the Board of Patent Appeals and Interferences in Ex Parte Appeals*; Final Rule, 73 FR 32938 (June 10, 2008), 1332 *Off. Gaz. Pat. Office* 47 (July 1, 2008) (hereinafter ''BPAI final rule 2008''). The BPAI final rule 2008 states that the effective date is December 10, 2008, and the final rule shall apply to all appeals in which an appeal brief is filed on or after the effective date. The BPAI final rule requires, in part, appeal briefs in a new format relative to the format required prior to the rule revision. The Office has received appeal briefs in the new format under the final rule before the effective date. The Office will not hold an appeal brief as non-compliant solely for following the new format even though it is filed before the effective date.

Accordingly, appeal briefs filed before December 10, 2008, must either comply with current 37 CFR 41.37 (in effect before December 10, 2008) or revised 37 CFR 41.37 (in effect on or after December 10, 2008). Appeal briefs filed on or after December 10, 2008, must comply with the revised 37 CFR 41.37. A certificate of mailing or transmission in compliance with 37 CFR 1.8 will be applicable to determine whether the appeal brief was filed prior to the effective date in order to determine which rule applies. For any appeal brief filed in the new format under revised 37 CFR 41.37, the Office will provide an examiner's answer in the new format under revised 37 CFR 41.39 if the appeal is maintained.

Similarly, a notice of appeal filed before December 10, 2008, in compliance with revised 37 CFR 41.31 (in effect on or after December 10, 2008) will be accepted by the Office. Thus a notice of appeal filed before December 10, 2008, must either comply with current 37 CFR 41.31 (in effect before December 10, 2008) or revised 37 CFR 41.31 (in effect on or after December 10, 2008), regardless of the date of filing of the appeal brief. However, a notice of appeal filed on or after December 10, 2008, must comply with the revised 37 CFR 41.31 (*e.g.*, the notice of appeal must be signed in accordance with 37 CFR 1.33(b)).

The Office has held a few appeal briefs filed in the new format prior to the publication of this clarification notice non-compliant. Any appellant who has received a notice of non-compliant appeal brief may request that the notice of non-compliant appeal brief be withdrawn if the sole reason for non-compliance is that the appeal brief was presented in the new format.

Dated: November 10, 2008.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E8–27357 Filed 11–19–08; 8:45 am]

BILLING CODE 3510–16–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[FCC 08–205; MB Docket No. 04–219; RM–10986]

Radio Broadcasting Services; Evergreen, AL and Shalimar, FL

AGENCY: Federal Communications Commission.

ACTION: Final rule; denial.

SUMMARY: This document denies an Application for Review filed by Qantum of Fort Walton Beach License Company, LLC directed to the *Memorandum Opinion and Order* in this proceeding. With this action, the proceeding is terminated.

DATES: Effective November 20, 2008.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Media Bureau, (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Memorandum Opinion and Order* in MB Docket No. 04–219, adopted September 5, 2008, and released October 31, 2008. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* The Commission will not send a copy of this *Memorandum Opinion and Order* pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the adopted rules are rules of particular applicability. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–27665 Filed 11–19–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[FCC 08–204; MM Docket No. 01–120; RM–10126]

Radio Broadcasting Services; Lincoln and Sherman, IL

AGENCY: Federal Communications Commission.

ACTION: Final rule; denial.

SUMMARY: This document denies an Application for Review filed by Long Nine, Inc. directed to the *Memorandum Opinion and Order* in this proceeding. With this action, the proceeding is terminated.

DATES: Effective November 20, 2008.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Media Bureau, (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Memorandum Opinion and Order* in MM Docket No. 01–120, adopted September 5, 2008, and released October 31, 2008. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* The Commission will not send a copy of this *Memorandum Opinion and Order* pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the application for review is denied. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–27666 Filed 11–19–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–2328; MB Docket No. 08–128; RM–11460]

Television Broadcasting Services; Hendersonville, TN

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission grants a petition for rulemaking filed by Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting Network, licensee of station WPGD–DT, to substitute DTV channel 33 for post-transition DTV channel 51 at Hendersonville, Tennessee.

DATES: This final rule is effective December 22, 2008.

FOR FURTHER INFORMATION CONTACT: David J. Brown, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket No. 08–128, adopted October 14, 2008, and released October 22, 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 information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any 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.

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

Television, Television broadcasting.

■ For the reasons discussed 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.

§ 73.622 [Amended]

■ 2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Tennessee, is amended by adding DTV channel 33 and removing DTV channel 51 at Hendersonville.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E8–27659 Filed 11–19–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket OST–2003–15245]

RIN 2105–AD55

Procedures for Transportation Workplace Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: On June 25, 2008, the Department issued a Final Rule amending, among other provisions, paragraph (b) of our section pertaining to urine specimen collections. This amendment required direct observation collections for all return-to-duty and follow-up tests. We sought additional comments to this provision on August 25, 2008. On October 22, 2008, the Department issued a notice responding to those comments. The Department did not change the amendment, and determined that the revised paragraph would go into effect, as scheduled, on November 1, 2008. On November 12, 2008, the United States Court of Appeals for the District of Columbia

Circuit issued a stay of the revised paragragh (b). This document, therefore, returns the language of 49 CFR 40.67(b) that existed prior to the November 1, 2008, effective date pending further order of the Court.

DATES: November 20, 2008.

FOR FURTHER INFORMATION CONTACT: Jim L. Swart, Director, U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE., Washington, DC 20590; (202) 366–3784 (voice), (202) 366–3897 (fax), or *jim.swart@dot.gov*; or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, same address, (202) 366–9310 (voice), (202) 366–9313 (fax), or *bob.ashby@dot.gov*.

SUPPLEMENTARY INFORMATION:

Background

The Department issued a final rule on June 25, 2008 (73 FR 35961), which included, among other things, two provisions (49 CFR 40.67(b) and (i)) concerning the use of direct observation (DO) collections, a very significant tool the Department uses to combat attempts by employees to cheat on their drug tests.

Several petitioners, including the Association of American Railroads (AAR), joined by the American Short Line and Regional Railroad Association; the Transportation Trades Department (TTD) of the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO); the International Brotherhood of Teamsters; and the Air Transport Association (ATA), joined by the Regional Airline Association (RAA), asked the Department to delay the effective date of these two provisions, seek further comment on them, and reconsider them. In response, the Department issued a notice delaying the effective date of 49 CFR 40.67(b)—the provision for making DO collections mandatory for all return-to-duty and follow-up tests—until November 1, 2008 (73 FR 50222; August 26, 2008). The Department opened a comment period on that provision, which closed on September 25, 2008. The Department did not delay the effective date of 49 CFR 40.67(i), and that provision went into effect, as scheduled, on August 25, 2008.

The Department fully considered the comments filed in the public docket regarding the amendment to 49 CFR 40.67(b). On October 22, 2008, at 73 FR 62910, the Department issued a notice responding to the comments and stated ''the Department remains convinced that conducting all return-to-duty and follow-up tests under DO is the most prudent course from the viewpoint of safety.'' (73 FR 62918) The Department decided not to change the amendment and announced that the revised 49 CFR 40.67(b) would go into effect, as scheduled, on November 1, 2008.

On October 24, 2008, several of the petitioners described above again petitioned the Department for further postponement of the final rule regarding 49 CFR 40.67(b). On October 30, 2008, the Department denied the petition. Several of the petitioners also filed a motion for stay with the United States Court of Appeals for the District of Columbia Circuit. On October 31, 2008, the Court issued a temporary administrative stay to allow more time for the court to consider the request for stay. On November 12, 2008, the court issued a further order to stay the effectiveness of section 40.67(b) (*BNSF Railway Company* v. *Department of Transportation,* D.C. Circuit, September Term 2008, No. 08–1265, November 12, 2008). This stay will remain in effect until the court issues a decision on the merits of petitioners' challenge to the provisions of 40.67(b).

Therefore, DO collections for return-to-duty and follow-up testing will continue to be an employer option, rather than mandatory. All other requirements of 49 CFR part 40 that went into effect on August 25, 2008, including the DO provision at 40.67(i) [checking for prosthetic and other devices used to carry ''clean'' urine and urine substitutes] will remain in effect.

Therefore, the revised section 40.67(b), as issued in the Department's final rule on June 25, 2008, is removed from the CFR in order to comply with the court's stay, and the prior version of 49 CFR 40.67(b), which the department reinstates with this document, will remain in effect until further notice.

Issued this 17th day of November, 2008, at Washington, DC.

Jim L. Swart,

Director, Office of Drug and Alcohol Policy Compliance.

49 CFR Subtitle A—Authority and Issuance

■ For reasons discussed in the preamble, the Department of Transportation is amending part 40 of Title 49 Code of Federal Regulations, as follows:

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

■ 1. The authority citation for 49 CFR part 40 continues to read as follows:

Authority: 40 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 54101 *et seq.*

■ 2. Section 40.67 is amended by revising paragraph (b) to read as follows:

§ 40.67 When and how is a directly observed collection conducted?

* * * * *

(b) As an employer, you may direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test.

* * * * *

[FR Doc. E8–27617 Filed 11–17–08; 4:15 pm]

BILLING CODE 4910–9X–P

Proposed Rules

Federal Register
Vol. 73, No. 225
Thursday, November 20, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM395; Notice No. 25–08–07–SC]

Special Conditions: Dassault Falcon 2000 Series Airplanes; Aircell Airborne Satcom Equipment Consisting of a Wireless Handset and Associated Base Station, With Lithium Battery Installations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Dassault Falcon 2000 series airplanes. These airplanes, as modified by Aircell LLC, will have a novel or unusual design feature associated with the Aircell airborne satcom equipment (ASE) which use lithium battery technology. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: We must receive your comments by January 5, 2009.

ADDRESSES: You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, Attention: Rules Docket (ANM–113), Docket No. NM395, 1601 Lind Avenue, SW., Renton, Washington 98057–3356. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM395. You can inspect comments in the Rules Docket weekdays, except federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Nazih Khaouly, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2432; facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive as well as a report summarizing each substantive public contact with FAA personnel about these special conditions. You can inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except federal holidays.

We will consider all comments we receive by the closing date for comments. We will consider comments filed late, if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want us to let you know we received your comments on this proposal, send us a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

Background

On March 15, 2007, Aircell LLC, applied for a type design change to an existing STC (ST01388WI–D), to install additional equipment on Dassault Falcon 2000 series airplanes. This installation adds components to the existing airplane installation to include a low power Wi-Fi handset containing a single cell lithium polymer rechargeable battery. The battery identified for application in this design is a low capacity, single cell lithium polymer rechargeable battery, with a nominal capacity of 1400mAh and a nominal voltage of 3.7V. The battery has a weight of 26.5 grams. The battery has been Underwriters Laboratories, Inc. (UL) tested and qualified by DO–160E in the Aircell handset (P12857). The design is supported by a System Safety Assessment/Functional Hazard Assessment (SSA/FHA) analysis. The Aircell Wi-Fi handset, which is a component of the Aircell ASE, consists of a wireless handset and associated base station (cradle and charging unit), both with protective circuits and fuse devices which provide multiple levels of redundant protection from hazards, such as overcharging or discharging. The lithium battery is installed in the handset.

A lithium battery has certain failure, operational, and maintenance characteristics that differ significantly from those of the nickel-cadmium and lead-acid rechargeable batteries currently approved for installation on large transport category airplanes. The FAA is proposing these special conditions to require that (1) all characteristics of the lithium batteries and their installations that could affect safe operation of the Dassault Falcon 2000 are addressed, and (2) appropriate continued airworthiness instructions, which include maintenance requirements, are established to ensure the availability of electrical power from the batteries when needed.

At present, there is limited experience with use of rechargeable lithium batteries in applications involving commercial aviation. However, other users of this technology, ranging from wireless telephone manufacturers to the electric vehicle industry, have noted safety problems with lithium batteries. These problems include overcharging, over-discharging, and flammability of cell components.

1. Overcharging

In general, lithium batteries are significantly more susceptible to internal failures that can result in self-sustaining increases in temperature and pressure (*i.e.*, thermal runaway) than their nickel-cadmium or lead-acid counterparts. This is especially true for overcharging that causes heating and destabilization of the components of the cell, leading to the formation (by plating) of highly unstable metallic lithium. The metallic lithium can ignite, resulting in a self-sustaining fire or explosion. Finally, the severity of thermal runaway due to overcharging

increases with increasing battery capacity due to the higher amount of electrolyte in large batteries.

2. Over-Discharging

Discharge of some types of lithium batteries beyond a certain voltage (typically 2.4 volts) can cause corrosion of the electrodes of the cell, resulting in loss of battery capacity that cannot be reversed by recharging. This loss of capacity may not be detected by the simple voltage measurements commonly available to flightcrews as a means of checking battery status—a problem shared with nickel-cadmium batteries.

3. Flammability of Cell Components

Unlike nickel-cadmium and lead-acid batteries, some types of lithium batteries use liquid electrolytes that are flammable. The electrolyte can serve as a source of fuel for an external fire, if there is a breach of the battery container.

These problems experienced by users of lithium batteries raise concern about the use of these batteries in commercial aviation. Accordingly, the proposed use of lithium batteries in the Aircell ASE on Dassault Falcon 2000 series aircraft has prompted the FAA to review the adequacy of existing regulations in Title 14 Code of Federal Regulations (14 CFR) part 25. Our review indicates that the existing regulations do not adequately address several failure, operational, and maintenance characteristics of lithium batteries that could affect the safety and reliability of lithium battery installations.

The intent of these special conditions is to establish appropriate airworthiness standards for lithium batteries in Dassault Falcon 2000 series aircraft, modified Aircell LLC, and to ensure, as required by § 25.601, that these battery installations are not hazardous or unreliable. Accordingly, these special conditions include the following requirements:

- Those provisions of § 25.1353 which are applicable to lithium batteries.
- The flammable fluid fire protection provisions of § 25.863.

In the past, this regulation was not applied to batteries of transport category airplanes, since the electrolytes used in lead-acid and nickel-cadmium batteries are not flammable.

- New requirements to address the hazards of overcharging and over-discharging that are unique to lithium batteries.
- New Instructions for Continuous Airworthiness that include maintenance requirements to ensure that batteries used as spares are maintained in an appropriate state of charge.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Aircell LLC must show that the Dassault Falcon 2000 series airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. Type Certificate A50NM, Revision 3, or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.''

The certification basis for Dassault Falcon 2000 is listed in Type Certificate A50NM, Revision 3, dated September 21, 2004. In addition, the certification basis includes certain special conditions and exemptions that are not relevant to these special conditions. Also, if the regulations incorporated by reference do not provide adequate standards with respect to the change, the applicant must comply with certain regulations in effect on the date of application for the change.

If the Administrator finds that the applicable airworthiness regulations (*i.e.*, part 25, as amended) do not contain adequate or appropriate safety standards for Dassault Aviation Falcon 2000 series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of 14 CFR 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Dassault Falcon 2000 series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, under § 11.38, and they become part of the type certification basis in accordance with § 21.101.

Special conditions are initially applicable to the models for which they are issued. Should Aircell LLC apply for a supplemental type certificate to modify any other model included on Type Certificate No. A50NM to incorporate the same or similar novel or unusual design feature, these special conditions would also apply to the other model.

Novel or Unusual Design Features

The Dassault Aviation Falcon 2000 series airplanes, as modified by Aircell LLC, to include the Aircell ASE which will use lithium battery technology, will incorporate a novel or unusual design feature. Because of rapid improvements in airplane technology, the applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

The Aircell Access system will include lithium battery installations. The application of a rechargeable lithium battery is a novel or unusual design feature in transport category airplanes. This type of battery has certain failure, operational, and maintenance characteristics that differ significantly from those of the nickel-cadmium and lead-acid rechargeable batteries currently approved for installation on large transport category airplanes. The FAA issues these special conditions to require that (1) all characteristics of the lithium battery and its installation that could affect safe operation of the satellite communication system are addressed, and (2) appropriate maintenance requirements are established to ensure that electrical power is available from the batteries when it is needed.

Applicability

As discussed above, these special conditions are applicable to the Dassault Aviation 2000 series airplanes as modified by Aircell LLC. Should Aircell LLC apply at a later date for a supplemental type certificate to modify any other model included on Type Certificate No. A28NM to incorporate the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features of the Dassault Aviation 2000 series airplanes as modified by Aircell LLC. It is not a rule of general applicability and affects only the applicant which applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for the

Dassault Aviation 2000 series airplanes, modified by Aircell LLC in lieu of the requirements of § 25.1353(c)(1) through (c)(4), Amendment 25–113.

Lithium batteries and battery installations on Dassault Aviation 2000 series airplanes must be designed and installed as follows:

1. Safe cell temperatures and pressures must be maintained during any foreseeable charging or discharging condition and during any failure of the charging or battery monitoring system not shown to be extremely remote. The lithium battery installation must preclude explosion in the event of those failures.

2. Design of the lithium batteries must preclude the occurrence of self-sustaining, uncontrolled increases in temperature or pressure.

3. No explosive or toxic gases emitted by any lithium battery in normal operation or as the result of any failure of the battery charging system, monitoring system, or battery installation which is not shown to be extremely remote may accumulate in hazardous quantities within the airplane.

4. Installations of lithium batteries must meet the requirements of § 25.863(a) through (d).

5. No corrosive fluids or gases that may escape from any lithium battery may damage surrounding structure or any adjacent systems, equipment, or electrical wiring of the airplane in such a way as to cause a major or more severe failure condition, in accordance with § 25.1309(b) and applicable regulatory guidance.

6. Each lithium battery installation must have provisions to prevent any hazardous effect on structure or essential systems caused by the maximum amount of heat the battery can generate during a short circuit of the battery or of its individual cells.

7. Lithium battery installations must have a system to control the charging rate of the battery automatically, so as to prevent battery overheating or overcharging, and,

(a) A battery temperature sensing and over-temperature warning system with a means for automatically disconnecting the battery from its charging source in the event of an over-temperature condition, or

(b) A battery failure sensing and warning system with a means for automatically disconnecting the battery from its charging source in the event of battery failure.

8. Any lithium battery installation whose function is required for safe operation of the airplane must incorporate a monitoring and warning feature that will provide an indication to the appropriate flight crewmembers whenever the state-of-charge of the batteries has fallen below levels considered acceptable for dispatch of the airplane.

9. The Instructions for Continued Airworthiness required by § 25.1529 must contain maintenance requirements to assure that the lithium battery is sufficiently charged at appropriate intervals specified by the battery manufacturer. The Instructions for Continued Airworthiness must also contain procedures for the maintenance of lithium batteries in spares storage to prevent the replacement of batteries whose function is required for safe operation of the airplane with batteries that have experienced degraded charge retention ability or other damage due to prolonged storage at a low state of charge. Precautions should be included in the Instructions for Continued Airworthiness maintenance instructions to prevent mishandling of the lithium battery which could result in short-circuit or other unintentional damage that could result in personal injury or property damage.

Note 1: The term ''sufficiently charged'' means that the battery will retain enough of a charge, expressed in ampere-hours, to ensure that the battery cells will not be damaged. A battery cell may be damaged by lowering the charge below a point where there is a reduction in the ability to charge and retain a full charge. This reduction would be greater than the reduction that may result from normal operational degradation.

Note 2: These special conditions are not intended to replace § 25.1353(c), Amendment 25–113 in the certification basis of the Aircell LLC supplemental type certificate. These special conditions apply only to lithium batteries and their installations. The requirements of § 25.1353(c), Amendment 25–113 remain in effect for batteries and battery installations on the Aircell LLC supplemental type certificate that do not use lithium batteries.

Compliance with the requirements of these special conditions must be shown by test or analysis, with the concurrence of the Fort Worth Special Certification Office.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–27538 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1102; Airspace Docket No. 08–AGL–8]

Proposed Establishment of Class D Airspace; Branson, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to establish Class D airspace at Branson Airport, Branson, MO. The establishment of an air traffic control tower has made this action necessary for the safety of Instrument Flight Rule (IFR) operations at Branson Airport.

DATES: 0901 UTC. Comments must be received on or before January 5, 2009.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2008–1102/Airspace Docket No. 08–AGL–8, at the beginning of your comments. You may also submit comments through 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 ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Area, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76193–0530; telephone: (817) 222–5582.

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–2008–1102/Airspace Docket No. 08–AGL–8.'' The postcard will be date/time stamped and returned to the commenter.

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/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), 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

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by establishing Class D airspace for IFR operations at Branson Airport, Branson, MO, where a new control tower has been installed. The Class D airspace will revert to a Class E Surface Area during those periods when the control tower is not operating. This area would be depicted on appropriate aeronautical charts.

Class D airspace areas are published in Paragraph 5000 of FAA Order 7400.9S, dated October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class D airspace designation 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 U.S. 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 I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of 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 would establish controlled airspace at Branson Airport, Branson, MO.

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; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for 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 7400.9S, Airspace Designations and Reporting Points, dated October 3, 2008, and effective October 31, 2008, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ACE MO D Branson, MO [New]

Branson Airport, MO
(Lat. 36°31′55″ N., long. 93°12′02″ W.)

That airspace extending upward from the surface to and including 3,800 feet MSL within a 4.1-mile radius of Branson Airport. 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.

Issued in Fort Worth, TX on October 28, 2008.

Walter L. Tweedy,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. E8–27544 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–155087–05]

RIN 1545–BF17

Alcohol Fuel and Biodiesel; Renewable Diesel; Alternative Fuel; Diesel-Water Fuel Emulsion; Taxable Fuel Definitions; Excise Tax Returns; Hearing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: This document provides notice of public hearing on proposed regulations relating to credits and payments for alcohol mixtures, biodiesel mixtures, renewable diesel mixtures, alternative fuel mixtures, and alternative fuel sold for use or used as a fuel, as well as proposed regulations relating to the definition of gasoline and diesel fuel.

DATES: The public hearing is being held on Monday, February 9, 2009, at 10 a.m. The IRS must receive outlines of the topics to be discussed at the public hearing by Friday, January 9, 2009.

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–155087–05), 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–155087–05), 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–155087–05).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Taylor Cortright (202) 622–3130; concerning submissions of comments, the hearing and/or to be placed on the building access list to attend the hearing Funmi Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is the notice of proposed rulemaking (REG–155087–05) that was published in the **Federal Register** on Tuesday, July 29, 2008 (73 FR 43890).

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 by October 27, 2008, must submit an outline of the topics to be addressed and the amount of time to be devoted to each topic (Signed original and eight copies).

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. E8–27556 Filed 11–19–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–102822–08]

RIN 1545–BH54

Section 108 Reduction of Tax Attributes for S Corporations; Hearing Cancellation

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 that provides guidance on the manner in which an S corporation reduces its tax attributes under section 108(b) for taxable years in which the S corporation has discharge of indebtedness income that is excluded from gross income under section 108(a).

DATES: The public hearing, originally scheduled for December 8, 2008, at 10 a.m. is cancelled.

FOR FURTHER INFORMATION CONTACT: Funmi Taylor of the Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration), at (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking and a notice of public hearing that appeared in the **Federal Register** on Wednesday, August 6, 2008 (73 FR 45656), announced that a public hearing was scheduled for December 8, 2008, at 10 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. The subject of the public hearing is under section 108 of the Internal Revenue Code.

The public comment period for the proposed rulemaking expired on November 4, 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 Thursday, November 13, 2008, no one has requested to speak. Therefore, the public hearing scheduled for December 8, 2008, is cancelled.

LaNita VanDyke,

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

[FR Doc. E8–27555 Filed 11–19–08; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2008–0334; FRL–8742–8]

RIN 2060–AM19

National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of extension of public comment period.

SUMMARY: EPA is announcing an extension of the public comment period on the proposed rule, ''National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources.'' As initially published in the **Federal Register** on October 6, 2008, written comments on the proposed rule were to be submitted by November 20, 2008. On November 12, 2008, EPA received a court order extending the deadline for signature of the notice of final rulemaking to May 15, 2009, and we are extending the public comment period on the proposed rule to January 5, 2009.

DATES: *Comments.* Comments on the proposed rule must be received on or before January 5, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2008–0334, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-Docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* U.S. Postal Service, send comments to: EPA Docket Center (2822T), Docket No. EPA–HQ–OAR–2008–0334, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. We request that a separate copy also be sent to the contact person identified below (see **FOR FURTHER INFORMATION CONTACT**).
- *Hand Delivery:* In person or by courier, deliver comments to: EPA Docket Center (2822T), EPA West Building, Room 3444, 1301 Constitution Ave., NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please include a total of two copies.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2008–0334. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which

means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center (2822T), EPA West Building, Room 3444, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For further information, contact Mr. Randy McDonald, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Coatings and Chemicals Group (E143–01), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–5402; fax number: (919) 541–0246; e-mail address: *mcdonald.randy@epa.gov.*

SUPPLEMENTARY INFORMATION:

General Information

Extension of Public Comment Period

We proposed the national emission standards for hazardous air pollutants (NESHAP) as part of our effort to comply with a court-ordered deadline that requires EPA to issue final standards for 10 area source categories listed pursuant to Clean Air Act sections 112(c)(3) and (k) by December 15, 2008 (*Sierra Club* v. *Johnson*, no. 01–1537, D.D.C., March 2006). To meet this deadline, we proposed NESHAP for nine area source categories in the chemical manufacturing sector. The proposal was published in the **Federal Register** on October 6, 2008 (73 FR 58352).

We received several requests to extend the public comment period by up to 55 days. Commenters requested more time to review the information in the docket and prepare in-depth comments. We agree that the comment period should be extended to allow more time for interested parties to prepare comprehensive comments. At the request of EPA, the Court has extended EPA's deadline for the nine area source categories at issue in the proposed rule from December 15, 2008, to May 15, 2009. Therefore, the public comment period will now end on January 5, 2009, rather than November 20, 2008. (The public comment period is currently scheduled to end on November 20, 2008, instead of November 5, 2008, because a public hearing was requested and held on October 21, 2008.)

What should I consider as I prepare my comments for EPA?

1. Submitting CBI

Do not submit information that you consider to be CBI electronically through *http://www.regulations.gov* or e-mail. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, NC 27711, Attention Docket ID EPA–HQ–OAR–2008–0334. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

2. Availability of Related Information

The proposed rule for the National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources was published in the **Federal Register** on October 6, 2008 (73 FR 58352). EPA has established the official public docket for the proposed rulemaking under Docket ID No. EPA–HQ–OAR–2008–0334. Information on how to access the docket is presented above in the **ADDRESSES** section. In addition to being available in the docket, an electronic copy of the proposed rule is available on the World Wide Web through the Technology Transfer Network (TTN) at *http://www.epa.gov/ttn/oarpg.*

Dated: November 14, 2008.

Robert J. Meyers,

Principal Deputy Assistant Administrator for Air and Radiation.

[FR Doc. E8–27609 Filed 11–19–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 070717355–8030–01]

RIN 0648–AV74

Endangered and Threatened Species; Critical Habitat for the Endangered Distinct Population Segment of Smalltooth Sawfish

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

ACTION: Proposed rule; request for comments.

SUMMARY: We, the National Marine Fisheries Service (NMFS), propose to designate critical habitat for the U.S. DPS of smalltooth sawfish (*Pristis pectinata*), which was listed as endangered on April 1, 2003, under the Endangered Species Act (ESA). The proposed critical habitat consists of two units: the Charlotte Harbor Estuary Unit, which comprises approximately 221,459 acres of coastal habitat; and the Ten Thousand Islands/Everglades Unit (TTI/E), which comprises approximately 619,013 acres of coastal habitat. The two units are located along the southwestern coast of Florida between Charlotte Harbor and Florida Bay.

DATES: Comments on this proposed rule must be received by January 20, 2009.

ADDRESSES: You may submit comments, identified by the Regulatory Information Number (RIN) 0648–AV74, by any of the following methods:

Mail: Assistant Regional Administrator, Protected Resources Division, NMFS, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

Facsimile (fax) to: 727–824–5309.

Electronic Submissions: Submit all electronic comments to www.regulations.gov by clicking on ''Search for Dockets'' at the top of the screen, then entering the RIN in the ''RIN'' field and clicking the ''Submit'' tab.

Instructions: All comments received are considered part of the public record and will generally be posted to *http://www.regulations.gov*. All Personal Identifying Information (i.e., name, address, etc.) voluntarily submitted 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). Please provide electronic attachments using Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Shelley Norton, NMFS, Southeast Regional Office, at 727–824–5312; or Lisa Manning, NMFS, Office of Protected Resources, at 301–713–1401.

SUPPLEMENTARY INFORMATION:

Background

Under the ESA, we are responsible for determining whether certain species are threatened or endangered and for designating critical habitat for such species (16 U.S.C. 1533). On April 1, 2003, we listed the U.S. distinct population segment (DPS) of smalltooth sawfish (''the species'') as endangered (68 FR 15674). At the time of listing, we also announced that critical habitat was not then determinable because we were completing ongoing studies necessary for the identification of specific habitats and environmental features important for the conservation of the species. Subsequently, we have sponsored additional research on the species, its habitat use, and its conservation needs. Additionally, NMFS has developed a draft recovery plan for the species pursuant to section 4(f) of the ESA. NMFS has now reviewed the best available scientific data and identified specific areas on which are located those physical and biological features essential to the conservation of the species.

Smalltooth Sawfish Natural History

The following discussion of the distribution, life history, and habitat use of the U.S. DPS of smalltooth sawfish is based on the best available commercial and scientific information, including information provided in the Status Review (65 FR 12959, March 10, 2000) and the Draft Smalltooth Sawfish Recovery Plan (71 FR 49418, August 23, 2006).

Distribution and Range

Smalltooth sawfish are tropical marine and estuarine elasmobranch (e.g., sharks, skates, and rays) fish that are reported to have a circumtropical distribution. The historic range of the smalltooth sawfish in the United States extends from Texas to New York (NMFS, 2006). The U.S. region that has historically harbored the largest number of smalltooth sawfish is south and southwest Florida from Charlotte Harbor to the Dry Tortugas. Most capture records along the Atlantic coast north of Florida are from spring and summer months and warmer water temperatures. Most specimens captured along the Atlantic coast north of Florida have also been large (greater than 10 ft or 3 m) adults and are thought to represent seasonal migrants, wanderers, or colonizers from a core or resident population(s) to the south rather than being resident members of a continuous, even-density population (Bigelow and Schroeder, 1953). Historic records from Texas to the Florida Panhandle suggest a similar spring and summer pattern of occurrence. While less common, winter records from the northern Gulf of Mexico suggest a resident population, including juveniles, may have once existed in this region.

The Status Review Team (NMFS, 2000) compiled information from all known literature accounts, museum collection specimens, and other records of the species. The species suffered significant population decline and range constriction in the early to mid 1900's. Encounters with the species outside of Florida have been rare since that time.

Since the 1990's, the distribution of smalltooth sawfish in the United States has been restricted to peninsular Florida (Seitz and Poulakis, 2002; Poulakis and Seitz, 2004; Simpfendorfer and Wiley, 2005; Mote Marine Laboratory's National Sawfish Encounter Database [MMLNSED]). Encounter data indicates smalltooth sawfish encounters can be found with some regularity only in south Florida from Charlotte Harbor to Florida Bay. A limited number of reported encounters (one in Georgia, one in Alabama, one in Louisiana, and one in Texas) have occurred outside of Florida since 1998.

Peninsular Florida is the main U.S. region that historically and currently hosts the species year-round because the region provides the appropriate climate (subtropical to tropical) and contains the habitat types (lagoons, bays, mangroves, and nearshore reefs) suitable for the species. Encounter data and research efforts indicate a resident, reproducing population of smalltooth sawfish exists only in southwest Florida (Simpfendorfer and Wiley, 2005).

Life History

Smalltooth sawfish are approximately 31 in (80 cm) in total length at birth and may grow to a length of 18 ft (540 cm) or greater. A recent study by Simpfendorfer *et al.* (2008) suggests rapid juvenile growth occurs during the first two years after birth. First year growth is 26–33 in (65–85 cm) and second year growth is 19–27 in (48–68 cm). Growth rates beyond two years are uncertain; however, the average growth rate of captive smalltooth sawfish has been reported between 5.8 in (13.9 cm) and 7.7 in (19.6 cm) per year. Apart from captive animals, little is known of the species' age parameters (i.e., age-specific growth rates, age at maturity, and maximum age). Simpfendorfer (2000) estimated age at maturity between 10 and 20 years, and a maximum age of 30 to 60 years. Unpublished data from Mote Marine Laboratory (MML) and NMFS indicates male smalltooth sawfish do not reach maturity until they reach 133 in (340 cm).

No directed research on smalltooth sawfish feeding habits exists. Reports of sawfish feeding habits suggest they subsist chiefly on small schooling fish, such as mullets and clupeids. They are also reported to feed on crustaceans and other bottom-dwelling organisms. Observations of sawfish feeding behavior indicate that they attack fish by slashing sideways through schools, and often impale the fish on their rostral (saw) teeth (Breeder, 1952). The fish are subsequently scraped off the teeth by rubbing them on the bottom and then ingested whole. The oral teeth of sawfish are ray-like, having flattened cusps that are better suited to crushing or gripping.

Very little is known about the specific reproductive biology of the smalltooth sawfish. As with all elasmobranchs, fertilization occurs internally. The embryos of smalltooth sawfish, while still bearing the large yolk sac, resemble adults relative to the position of their fins and absence of the lower caudal lobe. During embryonic development,

the rostral blade is soft and flexible. The rostral teeth are also encapsulated or enclosed in a sheath until birth. Shortly after birth, the teeth become exposed and attain their full size, proportionate to the size of the saw. Total length of the animal at birth is approximately 31 in (80 cm), with the smallest free-living specimens reported during field studies in Florida being 27–32 in (69–81 cm) (Simpfendorfer *et al.*, 2008). Documentation on the litter size of smalltooth sawfish is very limited. Gravid females have been documented carrying between 15–20 embryos; however, the source of this data is unclear and may represent an over-estimate of litter size. Studies of largetooth sawfish in Lake Nicaragua (Thorson, 1976) report brood sizes of 1–13 individuals, with a mean of 7.3 individuals. The gestation period for largetooth sawfish is approximately 5 months, and females likely produce litters every second year. Although there are no such studies on smalltooth sawfish, their similarity to the largetooth sawfish implies that their reproductive biology may be similar. Genetic research currently underway may assist in determining reproductive characteristics (i.e., litter size and breeding periodicity).

No confirmed breeding sites have been identified to date since directed research began in 1998. Research is underway to investigate areas where adult smalltooth sawfish have been reported to congregate along the Everglades coast to determine if breeding is occurring in the area.

Life history information on the smalltooth sawfish has been evaluated using a demographic approach and life history data on largetooth sawfish and similar species from the literature. Simpfendorfer (2000) estimates intrinsic rates of natural population increase as 0.08 to 0.13 per year and population doubling times from 5.4 to 8.5 years. These low intrinsic rates of population increase are associated with the life history strategy known as ''k-selection.'' K-selected animals are usually successful at maintaining relatively small, persistent population sizes in relatively constant environments. Consequently, they are not able to respond effectively (rapidly) to additional and new sources of mortality resulting from changes in their environment. Musick (1999) and Musick *et al.* (2000) noted that intrinsic rates of increase less than ten percent were low, and such species are particularly vulnerable to excessive mortalities and rapid population declines, after which recovery may take decades. Thus, smalltooth sawfish populations are expected to recover slowly from depletion. Simpfendorfer (2000) concluded that recovery was likely to take decades or longer, depending on how effectively sawfish could be protected.

Habitat Usage

At the time of listing, very little information was known about the habitat usage patterns of the species. The Status Review and the final listing rule identified habitat loss and degradation as the secondary cause of the species' decline. The primary reason for the species' decline was bycatch in various commercial and recreational fisheries.

The Status Review (NMFS, 2000) described sawfish habitat usage as: ''Sawfish in general inhabit the shallow coastal waters of most warm seas throughout the world. They are found very close to shore in muddy and sandy bottoms, seldom descending to depths greater than 32 ft (10 m). They are often found in sheltered bays, on shallow banks, and in estuaries or river mouths.'' In the years since the status review, additional research on habitat use by smalltooth sawfish has been undertaken. This research confirmed this general characterization for smalltooth sawfish and has revealed a more complex pattern of habitat use than previously known, with different life history stages having different patterns of habitat use.

A variety of methods have been applied to studying habitat use patterns of smalltooth sawfish, including acoustic telemetry (Simpfendorfer, 2003), acoustic monitoring (Simpfendorfer, unpublished data; Poulakis, unpublished data), public encounter databases (Seitz and Poulakis, 2002; Poulakis and Seitz, 2004; Simpfendorfer and Wiley, 2005), and satellite archival tagging (Simpfendorfer and Wiley, 2005b). The majority of this research has targeted juvenile sawfish, but some information on adult habitat use has also been obtained.

Encounter databases also provide insight into the habitat use patterns of smalltooth sawfish. MML, Florida Fish and Wildlife Research Institute (FWRI, formerly managed by Poulakis and Seitz), and the Florida Museum of Natural History (FLMNH) manage encounter databases containing data on sightings and captures of smalltooth sawfish from commercial and recreational fishermen, research efforts, and other sources (e.g., divers and boaters). To request reporting of sightings/captures from the public, MML, FWRI, and FLMNH have engaged in various outreach efforts. These efforts include placing flyers at boat ramps and tackle/dive shops, media releases, articles in fishing magazines, interviews with recreational fishing guides and commercial fisheries, websites, and personal contacts with researchers. Standard questionnaires are used to collect encounter data (water depth, location, tidal states, gear information, size of animal, and various other physical and environmental features). Outreach efforts were initially focused primarily in Florida but have expanded into areas along the southeastern coasts of the United States between Texas and North Carolina. The bulk of the reports of smalltooth sawfish sightings and/or captures occur primarily in Florida between Charlotte Harbor and Florida Bay.

Based on our historic and current knowledge of where smalltooth sawfish are encountered (coastal areas), we believe recreational fishers who primarily fish in coastal areas represent the best source of data for the species. Additionally, Simpfendorfer and Wiley (2005) analyzed the number of registered fishers in Florida by county to see if fishing effort affects the distribution of the encounters. No strong correlation between the distribution of fishers and the encounter locations was found. Based on Simpfendorfer and Wiley (2005), we believe that the encounter data is not geographically biased.

The second largest source of encounter data is directed-research programs conducted by FWRI, MML, and NMFS. Directed-research efforts on the species are also primarily focused in coastal areas but are limited to southwest Florida between Charlotte Harbor and the Florida Keys. The sampling methodologies for the directed research efforts are not random or stratified: research efforts are focused in areas where sawfish have been encountered, primarily southwest Florida. We anticipate future sampling efforts for these and other areas will use a random-stratified approach. Research is underway to determine habitat usage patterns, site fidelity, movement patterns, and various genetic relationships.

Encounter and research data provide some insight into adult smalltooth sawfish habitat usage patterns. Data on adult male (at least 134 in [340 cm] in length) and adult female (142 in [360 cm] in length) smalltooth sawfish is very limited. Information on adult smalltooth sawfish comes from encounter data, observers aboard fishing vessels, and pop-up satellite archival (PAT) tags. The encounter data suggest that adult sawfish occur from shallow

coastal waters to deeper shelf waters. Poulakis and Seitz (2004) observed that nearly half of the encounters with adult-sized sawfish in Florida Bay and the Florida Keys occurred in depths from 200 to 400 ft (70 to 122 m). Simpfendorfer and Wiley (2005) also reported encounters in deeper water off the Florida Keys, noting that these were mostly reported during winter. Observations on commercial longline fishing vessels and fishery independent sampling in the Florida Straits show large sawfish in depths of up to 130 ft (40 m) (Carlson and Burgess, unpublished data).

Seitz and Poulakis (2002) reported that one adult-sized animal, identifiable by its broken rostrum, was captured in the same location over a period of a month near Big Carlos Pass. This suggests that adults may have some level of site fidelity for relatively short periods; however, the historic occurrence of seasonal migrations along the U.S. East Coast also suggests that adults may be more nomadic than juveniles with their distribution controlled, at least in part, by water temperature.

In summary, there is limited information on adult sawfish distribution and habitat use. Adult sawfish are encountered in various habitat types (mangrove, reef, seagrass, and coral), in varying salinity regimes and temperatures, and at various water depths. Adults are believed to feed on a variety of fish species and crustaceans. No known breeding sites have been identified. Encounter data have identified river mouths as areas where many people observe both juvenile and adult sawfish. Seitz and Poulakis (2002) noted that many of the encounters occurred at or near river mouths in southwest Florida. Simpfendorfer and Wiley (2005b) reported a similar pattern of distribution along the entire west coast of Florida. Along the Everglades coastal region, Simpfendorfer and Wiley (2005) report a strong association of smalltooth sawfish with the Chatham, Lostmans, Rodgers, Broad, Harney, and Shark Rivers.

Most of the research and encounter data on habitat usage of smalltooth sawfish has been obtained on juveniles that are less than 79 in (200 cm). Juveniles in this size class are most susceptible to predation and starvation (Simpfendorfer, 2006). Like other species of elasmobranchs, smalltooth sawfish appear to use nursery areas because of the reduced numbers of predators and abundant food resources (Simpfendorfer and Milward, 1993).

Much of the research on smalltooth sawfish juveniles indicates some differences in habitat use based on the length of the animals, between what are characterized as very small (less than 39 in [100 cm]) and small (39–79 in [100–200] cm) juveniles. Most encounters of both very small and small juveniles have been within 1,641 ft (500 m) of shore (Simpfendorfer, 2006).

Very small juvenile smalltooth sawfish show high levels of site fidelity, at least over periods of days and potentially for much longer (Simpfendorfer, 2003 and 2006). Limited acoustic tracking studies (less than five animals) have shown that, at this size, sawfish will remain associated with the same shallow mud bank over periods of several days (Simpfendorfer, 2003). Very small juveniles spend a large portion of their time on the same shallow mud or sand banks in water less than 1 ft (30 cm) deep. Since water levels on individual mud banks vary with the tide, the movements of these small animals appear to be directed toward remaining in shallow water. The mud banks are very small and preliminary home range size for the tracked animals is estimated to be 1,076 -10,763 ft2 (100–1,000 m2) (Simpfendorfer, 2003). The longer-term fidelity to these sites is poorly understood, and ongoing research is expected to provide more insight into determining how much habitat very small juveniles use on a daily basis. Simpfendorfer (2001) concludes that shallow coastal waters represent key habitat for the species, and in particular that waters less than 3.3 ft (1 m) may be very important as nursery areas. The primary purpose of staying in such shallow water is likely to avoid predators, such as bull sharks. Additionally, these shallow waters may provide warm water temperatures that may be utilized to maximize growth rates (Simpfendorfer, 2006). Simpfendorfer (2001) concludes that most smalltooth sawfish (adults and juveniles) show a preference for water temperatures greater than 17.8° C (64° F).

In addition to shallow mud banks, very small juveniles also use red mangrove prop root habitats in southern Florida (Simpfendorfer and Wiley, 2005). Animals in this size class spend the vast majority of their time in very shallow water less than 1 ft (30 cm) deep, and they tend to move into mangrove prop roots during periods of high tide. Red mangrove habitats also provide foraging opportunities for very small and small juveniles, because the prop root system provides nursery areas for various fish and crustacean species.

Small juveniles have many of the same habitat use characteristics seen in the very small sawfish. Their association with very shallow water (less than 1 ft [30 cm] deep) is slightly weaker, possibly because they are better suited to predator avoidance due to their larger size and greater experience (NMFS, 2006). They do still have a preference for shallow water, remaining in depths mostly less than 3.3 ft (1 m). Most encounters of small juveniles also occur near red mangroves. Site fidelity has also been studied on small juvenile sawfish. Several sawfish, approximately 59 in (150 cm) in length and fitted with acoustic tags, have been relocated in the same general areas over periods of several months, suggesting a high level of site fidelity (Simpfendorfer 2003). The daily home range for these animals, based on data from a few animals, appears to be much larger than that of very small juveniles (e.g., 10,763,910–53,819,552 ft^2 [1–5 km^2]). The recent implementation of acoustic monitoring systems to study the longer term site fidelity of sawfish has confirmed these observations and also indicates that changes in environmental conditions (salinity) may be important in driving changes in local distribution and, therefore, habitat use patterns (Simpfendorfer, unpublished data).

Simpfendorfer and Wiley (2005) documented that no encounters occurred within habitat in permanent freshwater areas. Many encounters occur near river mouths or near sources of freshwater inflow and encounter data suggests that estuarine habitats may be an important factor affecting the species' distribution. Simpfendorfer (2001) suggests the reason smalltooth sawfish occur in river mouth areas may be due to the lower salinity, submerged vegetation, or because prey may be abundant. We analyzed (MML and FWRI) encounter data from 1998–2008 for juveniles and the data indicates the majority of the juvenile encounters occur within euryhaline or estuarine waters. Euryhaline/estuarine waters are highly productive areas that contain a variety of food sources for the smalltooth sawfish. Mullet, clupeids, and various crustacean species that are known food sources for the smalltooth sawfish are commonly found in estuarine areas.

Juvenile smalltooth sawfish may require specific salinity regimes with specific freshwater inputs but at this time data on specific salinity regime requirements for the species does not exist. Ongoing studies of habitat use patterns of very small and small juveniles in the Caloosahatchee River are expected to provide more insight into the habitat used by or necessary for an individual juvenile (less than or

equal to 79 in [200 cm] in length) smalltooth sawfish. At this time, however, there is insufficient data available to determine whether specific salinity ranges are requirements of small juveniles.

Data on large (greater than 79 in [200 cm] in length) juvenile smalltooth sawfish is limited, and more information is needed to determine the habitat usage patterns and site fidelity characteristics of this size class of smalltooth sawfish.

Critical Habitat Identification and Designation

Critical habitat is defined by section 3 of the ESA as ''(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.'' This definition provides us with a step-wise approach to identifying areas that may be designated as critical habitat for the endangered smalltooth sawfish.

Geographical Area Occupied by the Species

The best available scientific and commercial data identifies the geographical area occupied by the smalltooth sawfish at the time of listing (April 1, 2003) as peninsular Florida. We have interpreted ''geographical area occupied'' in the definition of critical habitat as the range of the species at the time of listing (45 FR 13011; February 27, 1980). The range was delineated at the time of listing from data provided by existing literature and encounter data. Because only a few contemporary encounters (one in Georgia, one in Alabama, and one in Louisiana) have been documented outside of Florida since 1998, we consider peninsular Florida to be the species' occupied range at the time of listing. At this time, we do not consider these limited observations as indicating that the species has re-established either its occupation of Gulf coast states or its seasonal migrations up the east coast of the U.S. outside of Florida.

Specific Areas Containing Physical or Biological Features Essential to Conservation

The definition of critical habitat further instructs us to identify the specific areas on which are found the physical or biological features essential to the species' conservation. Our regulations state that critical habitat will be defined by specific limits using reference points and lines on standard topographic maps of the area, and referencing each area by the State, county, or other local government unit in which it is located (50 CFR 424.12(c)).

According to the definition of critical habitat, the physical and biological features essential to conservation must be identified (hereafter also referred to as ''essential features''). Section 3 of the ESA (16 U.S.C. 1532(3)) defines the terms ''conserve,'' ''conserving,'' and ''conservation'' to mean: ''to use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.'' Our regulations at 50 CFR 424.12(b) provide guidance as to the types of habitat features that may be used to describe critical habitat.

The draft recovery plan developed for the smalltooth sawfish represents the best judgment about the objectives and actions necessary for the species' recovery. We reviewed the draft recovery plan's habitat-based recovery objective for guidance on the habitat-related conservation requirements of the species. This objective identifies the need to protect and/or restore smalltooth sawfish habitats and discusses adult and juvenile habitats separately. Habitats, especially those that have been demonstrated to be important for juveniles, must be protected and, if necessary, restored. Protected, suitable habitat throughout the species' range will be necessary to support recruitment of young individuals to the recovering population. Without sufficient habitat, the population is unlikely to increase to a level associated with low extinction risk and delisting.

The draft recovery plan also identifies specific recovery criteria that must be met to satisfy each objective. As stated in the plan, adult habitat-based recovery criteria for the species require the identification and protection of adult aggregation, mating, and/or pupping areas. Information on historic aggregation, mating, and/or pupping sites does not exist. Currently, no aggregation or mating areas have been identified for adults. Additionally, no information is available on specific pupping locations for gravid females. Tracking data on gravid females is lacking, but newborn juveniles still possessing their protective sheaths and newly pupped animals have been documented close to shore. Encounter and site fidelity data suggest juveniles are pupped in these areas, but this has not been validated. No known specific areas where adults perform any particular function, including feeding, are known. Adults are considered opportunistic feeders and forage on a variety of fish and crustacean species. Based on the available information on the habitat usage patterns of adults, we cannot identify physical or biological features essential to the species' conservation, or identify any areas on which such features may be found.

In contrast to the paucity of information available on adult smalltooth sawfish, more detailed information on habitat usage patterns of juveniles is available, and more specific habitat-based recovery criteria are identified in the recovery plan. The habitat-based recovery criterion for juveniles identifies mangrove shorelines, non-mangrove nursery habitats, and freshwater flow regimes as important features for juveniles. As stated earlier, the habitat-based recovery objective for the species focuses on protecting areas that have been identified as important for juveniles (i.e., nurseries). This objective also stresses the need to protect suitable habitats for juveniles to support their recruitment into the population. Juveniles are especially vulnerable to predation and starvation (Simpfendorfer and Wiley, 2005). Protection of the species' nurseries is crucial because the rebuilding of the population cannot occur without protecting the source (juvenile) population and its associated habitats. The recovery plan states that the recovery of the smalltooth sawfish depends on the availability and quality of nursery habitats and that protection of high-quality nursery habitats located in southwest Florida is essential to the species.

We conclude that facilitating recruitment into the population by protecting the species' juvenile nursery areas is the key conservation objective for the species that will be supported by the designation of critical habitat.

As stated in the recovery plan, smalltooth sawfish, like many sharks and rays, use specific habitats commonly referred to as nurseries or nursery areas. The recovery plan does not identify specific locations for

nursery areas but does state that protecting nursery areas within southwest Florida is important to the recovery of the species. Nursery areas in addition to those in southwest Florida are also identified as important for recovery but locations of these additional areas were not specified. Thus, to identify specific areas that may meet the definition of critical habitat, we focused on specifically defining what constitutes a ''nursery'' area for smalltooth sawfish. We then identified those physical or biological features that are essential to the conservation of the species because they provide nursery area functions to the species in these areas.

We evaluated information in the draft recovery plan, historical information on habitat use by sawfish, and available encounter data and scientific literature, as well as sought expert opinion, to determine where or what constitutes a ''nursery area'' for the species. Historical information on the species only provides limited, mostly anecdotal, information on the location of juvenile animals and does not discuss specific habitat usage patterns for them. Historical information indicates that juveniles were found in the lower reaches of the St. Johns River, the Indian River Lagoon, southwest Florida, and in areas along the Gulf coast between Florida and Texas. Using historic location information alone would not provide a reasonable basis for identification of nursery areas, given the qualitative nature of the information. Further, because most of these areas have been so physically altered, conditions present historically may not be present today, and thus features that may have provided nursery area functions in the past may be absent.

We then reviewed juvenile encounter data from the MML and FWRI databases to see whether the data alone indicates the existence of nursery areas. In summary, juvenile sawfish have been encountered in the Florida Panhandle, the Tampa Bay area, in Charlotte Harbor and the Caloosahatchee River, throughout the Everglades region and Florida Bay, the Florida Keys, and in scattered locations along the east coast of Florida south of the St. Johns River. However, apart from the Charlotte Harbor, Caloosahatchee River, and Ten Thousand Islands/Everglades (TTI/E) areas, many of these encounters are represented by a single individual in a single year.

Heupel *et al.* (2007) are critical of defining nursery areas for sharks and related species such as sawfish based solely on the presence of single occurrences of individual juvenile fish. Instead, these authors argue that nursery areas are areas of increased productivity which can be evidenced by natal homing or philopatry (use of habitats year after year) and that juveniles in such areas should show a high level of site fidelity (remain in the area for extended periods of time). Heupel *et al.* (2007) propose that shark nursery areas can be defined based on three primary criteria: (1) juveniles are more common in the area than other areas, i.e., density in the area is greater than the mean density over all areas; (2) juveniles have a tendency to remain or return for extended periods (weeks or months), i.e., site fidelity is greater than the mean site fidelity for all areas; and (3) the area or habitat is repeatedly used across years whereas other areas are not. Scattered and infrequent occurrences of juveniles may indicate a lack of features that provide the necessary functions of a nursery area, and an area with only scattered or infrequent occurrences is not viewed by the authors as constituting a nursery area. Heupel *et al.* (2007) do not assume that that all sharks have nursery areas. The authors discuss that size-at-birth, rate of growth, time to maturity, litter size and frequency of breeding may be important factors dictating whether a shark species utilizes a nursery or not. Shark species with high growth rates, early maturity, and annual reproduction may not benefit as much from utilizing a nursery area. In contrast, the authors predict that species that have small size at birth and slow juvenile growth rates may be more likely to utilize nursery areas because they may be more susceptible to juvenile predation. We believe this paper provides the best framework for defining a ''nursery area'' for the smalltooth sawfish because they are small at birth, slow to mature, and existing data on tracked juveniles indicates their limited movements and ranges are directed toward avoiding predation by sharks foraging in deeper waters.

Using the Heupel *et al.* (2007) framework, we evaluated our juvenile encounter data for patterns in juvenile density, site fidelity, and repeat usage over years. Encounter data indicate three types of distributions of individual juvenile sawfish. The first group consists of scattered or single encounters. Encounters occurring in areas north of Charlotte Harbor, including a few in the panhandle of Florida and along the east coast of Florida, are included in this group. Encounters in these areas were scattered individual encounters, and no indication of repeat or multiple use of an area was evident. The second group of encounters consists of encounters that had multiple individuals in an area, but these encounters were geographically scattered and not repeated over years. These encounters occurred in the Florida Keys. Encounters in this group were located on different sides of various Keys, and no consistent or continuous pattern of repeat usage over years could be identified. In fact, in 2006, juvenile encounters were largely lacking throughout much of the Keys. The third group of encounters exhibit repeat usage of the same location by both single and multiple individuals, higher density of encounters than the other groups, and usage occurring year after year. These encounters occurred in areas from Charlotte Harbor south through the Everglades and Florida Bay.

Based on this analysis, the juvenile encounters in the third grouping discussed above, from Charlotte Harbor through the Everglades, are the only encounters that suggest these areas meet the nursery area criteria set forth by Heupel *et al.* (2007). Juvenile sawfish are more commonly encountered in these areas than in other areas, i.e. density in the area is greater than the mean density over all areas, and the area is repeatedly used across years, whereas others are not. Available information about site fidelity of juveniles is limited and does not allow quantitative comparisons between the apparent nursery areas and all other areas. However, as discussed above, available information indicates that small and very small juveniles show high fidelity to shallow nearshore areas where they have been acoustically tracked. Data from juveniles tracked in the TTI/E area indicate they exhibit site fidelity and residency patterns between 15 and 55 days (Wiley and Simpfendorfer, 2007). Tracking data also suggests that juveniles exhibit specific movement patterns to avoid predation. A juvenile tracked in the Everglades National Park (ENP) in the Shark River spent its time moving between a shallow mud bank during low tide and mangrove roots during high tide (Simpfendorfer, 2003). Tracking data in Mud Bay (ENP) and Faka Union Bay (TTI) indicate juveniles remain in very shallow waters, 0.9 ft (0.3 m) over several weeks. Tracking data in the Charlotte Harbor Estuary is limited to the Caloosahatchee River and its adjacent canals. Juvenile tracking data from a 60 in (153 cm) juvenile indicates that the animal remained within water depths less than 3 ft (0.9 m) along a highly modified shoreline (Simpfendorfer, 2003). Tracking data

indicates the animal spent the majority of its time within man-made canals and adjacent to docks and marinas within the river.

Juvenile encounters outside of the area between Charlotte Harbor and the Everglades and Florida Bay do not fit the framework and are not considered nursery areas at this time. Anecdotal information indicates that juvenile size animals have been encountered throughout portions of their historic range, and our recovery plan indicates that the establishment of nursery areas outside of southwest Florida is necessary for the species to recover. However, we cannot determine at this time the temporal or spatial distribution of future sawfish nursery areas.

To more specifically delineate the boundaries of the nursery area or areas, we utilized Geographical Information System (GIS) software to map the density of all juvenile (length less than or equal to 200cm) encounters (MML and FWRI) located along peninsular Florida within 500 m of land, documented between the years of 1998–2008, with all years combined. Two density maps were generated to determine the mean density for all encounters and the density for all encounters excluding the research encounters. We utilized 1km2 density grids (same grid size utilized by Simpfendorfer, 2006) to determine density levels and distributions. Juvenile densities were very similar between the two groups. However, to remove any bias from the research efforts, we utilized the juvenile density map excluding research effort. The overall nursery area between Charlotte Harbor and Florida Bay breaks naturally into two areas between Ten Thousand Islands and the Caloosahatchee River, based on a long stretch of sandy beach habitat in the Naples area that is lacking encounters with densities greater than the mean density overall. Next we mapped juvenile encounters in these two areas by year (1998–2008), to verify where repeat usage occurred over years. This produced several groupings of 1 km2 grids with higher mean juvenile densities compared to mean juvenile density throughout peninsular Florida: 1 grouping within Charlotte Harbor, 1 grouping encompassing the Caloosahatchee River, and 3 groupings from the Ten Thousand Islands area through Florida Bay. We do not believe either the Charlotte Harbor Estuary or the TTI/E nursery areas should be subdivided into multiple smaller nursery areas for several reasons. First, the Heupel *et al.* (2007), framework does not indicate how discrete nursery areas within a large area of juvenile use might be identified. Second, our knowledge about juvenile sawfish movements and ranges is very limited. Third, both areas consist of interconnected environmental systems and no environmental barriers exist to prohibit juvenile sawfish movement throughout the system. Finally, limiting nursery area boundaries to discrete habitat grids represented only by past encounters with juveniles would not best serve the conservation objective of facilitating population growth through juvenile recruitment. The specific boundaries of the two nursery areas were then derived by locating the nearest publicly identifiable boundary (e.g., boundaries of established parks or preserves) or structure external to the outermost boundary of the juvenile density grids where the mean density is greater than the density in the surrounding areas. We identified reference points and lines on standard topographic maps in the area to describe the specific boundary of the nursery areas.

The Charlotte Harbor Estuary nursery area includes Charlotte Harbor, Gasparilla Sound, Pine Island Sound, Matlacha Pass, San Carlos Bay, Estero Bay, and the Caloosahatchee River in Charlotte and Lee Counties. The nursery area is defined by the following boundaries. It is bounded by the Peace River at the eastern extent at the mouth of Shell Creek and the northern extent of the Charlotte Harbor Preserve State Park. At the Myakka River the estuary is bounded by the SR–776 Bridge and Gasparilla Sound at the SR–771 Bridge. The COLREGS–72 lines between Gasparilla Island, Lacosta Island, North Captiva Island, Captiva Island, Sanibel Island, and the northern point of Estero Island are used as the coastal boundary for the nursery area. The southern extent of the area is the Estero Bay Aquatic Preserve, which is bounded on the south by the Lee/Collier County line. Inland waters are bounded at SR–867 (McGregor Blvd) to Fort Myers, SR–80 (Palm Beach Blvd), Orange River Blvd, Buckingham Rd, and SR–80 to the west side of the Franklin Lock and Dam (S–79), which is the eastern boundary on the Caloosahatchee River and a structural barrier for sawfish access. Additional inland water boundaries north and west of the lock are bounded by North River Road, SR–31, SR–78 near Cape Coral, SR–765, US–41, SR–35 (Marion Ave) in Punta Gorda, and Riverside Road to the eastern extent of the Peace River. The Charlotte Harbor nursery area is graphically displayed at the end of this document.

The Ten Thousand Islands/Everglades (TTI/E) nursery area is located within Collier, Monroe, and Miami-Dade Counties, Florida. The Everglades nursery area includes coastal and inshore waters within Everglades National Park (ENP), including Florida Bay; in the vicinity of Everglades City; within the Cape Romano-Ten Thousand Islands Aquatic Preserve (AP); and within the portion of Rookery Bay AP south of SR–92. The boundaries match the portion of Rookery Bay AP south of SR–92, and the Cape Romano-Ten Thousand Islands Aquatic Preserve AP. The nursery area boundaries also match the ENP boundaries with following two exceptions. The nursery area boundary connects points 55 and 57, which extend beyond the ENP boundary to include accessible nursery areas. The nursery area boundary is located inside the ENP boundary between points 77 and 2, omitting the northeastern portion of the ENP. The area is omitted because it is not accessible to sawfish. The TTI/E nursery area is graphically displayed at the end of this document.

Having identified the nursery areas, we next identified the physical or biological features found in these areas that are essential to the species' conservation because they provide nursery area functions to the sawfish.

Simpfendorfer (2006) analyzed MML's smalltooth sawfish encounter data to determine the importance of habitat factors to juveniles less than 79 in (200 cm) in length. Depth data is consistently reported by fishers and is accurately reported because most fishers use depth finders so depth data was extracted from the encounter database. Simpfendorfer (2006) examined the proximity of encounters to habitat features that could be evaluated from geographic information system (GIS) databases. These features were: mangroves (GIS mangrove coverages cannot distinguish between mangrove species), seagrasses, freshwater sources, and the shoreline. Simpfendorfer (2006) used GIS shapefiles for the features to determine the shortest distance from the encounter to the feature. The encounter data was converted to encounter density by gridding the data, and the results of the analysis were then used in a habitat suitability model. The model indicates that water depths less than 3 ft, mangrove buffers or shorelines, and euryhaline habitat areas (areas with wider salinity ranges and receiving freshwater input) have the strongest correlation with juvenile smalltooth sawfish encounters. Additionally, most encounters were documented within a distance of 1641 ft (500 m) from shore. The Simpfendorfer (2006) model suggests that areas of high suitability for juvenile sawfish contain all three of these features. Large areas coded as

''highly suitable'' habitat for juveniles are located in the areas we determined meet the Heupel *et al.* (2007) framework criteria for a nursery area, as applied to the sawfish.

Based on the natural history of the species, its habitat needs and the key conservation objective of protecting juvenile nursery areas, two physical and biological features are identified as essential to the conservation of the smalltooth sawfish because they provide nursery area functions. The two features are: red mangroves and shallow euryhaline habitats characterized by water depths between the Mean High Water line and 3 ft (0.9 m) measured at Mean Lower Low Water (MLLW). As discussed above, the prop root system and the location of red mangroves (close to shore), and shallow water depths provide refuge from predators. Red mangroves and shallow mud or sand bank euryhaline habitats are also highly productive and provide ample, diverse foraging resources. Among elasmobranchs, smalltooth sawfish are one of the few species known to inhabit euryhaline habitats which may provide several benefits for the species. Euryhaline habitats are very productive environments that support an abundance and variety of prey resources that can only be accessed by species that inhabit their systems. Additionally, the risk of predation may be reduced in these euryhaline habitats because potential predators (sharks) may be incapable of inhabiting these habitats.

Based on the best available information, we conclude red mangroves and adjacent shallow euryhaline habitats and the nursery area functions they provide facilitate recruitment of juveniles into the adult population. Thus, these features are essential to the conservation of the smalltooth sawfish. While some studies cite 1.0 meter as the preferred depth limit, others (Simpfendorfer, 2006), cite 3.0 ft. For this rule, the water depth feature will be defined as 3 ft (0.9 m) because the NOAA Navigational Charts depth contour lines and most GIS databases utilize English units of measure.

Based upon the best available information, we cannot conclude that any other sufficiently definable features of the environment in the two nursery areas, other than red mangroves and adjacent shallow euryhaline habitats, are essential to smalltooth sawfish conservation.

Based on the boundaries of the two nursery areas and GIS data information on the location of the features, the Charlotte Harbor Estuary and the TTI/E nursery areas contain the features essential to the conservation of smalltooth sawfish because they facilitate recruitment into the adult population. In this rule, we propose to designate these two specific areas, referred to as critical habitat ''units,'' as critical habitat for the smalltooth sawfish.

There are areas outside of the two nursery areas, including areas on the east and west coasts of Florida that contain some of the same features identified as essential features in our two proposed nursery areas. Habitat areas outside the specific nursery areas also meet Simpfendorfer's (2006) classification of highly suitable habitat for juveniles because they contain these features, notably areas in Tampa Bay and in the Indian River Lagoon. Because the features are essential to the conservation of the species based on the nursery functions they provide, we determined that these features are essential to the conservation of smalltooth sawfish only when present in nursery areas. None of these other areas meet the Heupel *et al.* (2007) definition of a nursery area. Encounters in these areas are rare and no pattern of repeat usage could be identified. Lack of repeat or high-density usage of these other areas by juveniles may be a function of the limited current size of a reproducing population that does not yet need additional nursery areas. Even so, we have no basis to conclude that other areas, even those containing shallow euryhaline habitats and mangroves, will be used as nursery areas in the future. Nursery areas cannot be located based solely on the co-location of shallow depths and euryhaline salinity regimes, and juveniles are not commonly or repeatedly found everywhere the features are present. Mangroves may also not be determinative of nursery area function for the sawfish; the Florida Keys contain mangrove resources, yet juvenile sawfish use of the Keys as evidenced by encounter data has been highly variable, including near absence in certain recent years. Additionally, historic anecdotal information on locations of small animals suggests they were found in the lower St. Johns River which does not support mangroves. Based on the best available scientific information, we identified two specific areas for the species where these features provide nursery functions and are therefore essential to the conservation of the species. We therefore propose to designate the Charlotte Harbor Estuary and TTI/E Units.

The boundaries of the two specific areas are the same as the Charlotte Harbor Estuary and TTI/E nursery area boundaries. GIS bathymetry data, mangrove coverage data, and salinity data were used to verify the distribution of the essential features within the nursery areas. We have identified reference points and lines on standard topographic maps of the areas to describe the specific boundaries of the two units in the proposed regulatory text.

The essential features can be found unevenly dispersed throughout the two areas. The limits of available information on the distribution of the features, and limits on mapping methodologies, make it infeasible to define the specific areas containing the essential features more finely than described herein. Existing man-made structures such as boat ramps, docks, pilings, maintained channels or marinas do not provide the essential features that are essential for the species' conservation and are thus not proposed as critical habitat. Areas not accessible (i.e., areas behind water control structures) to sawfish are not part of this designation. As discussed here and in the supporting impacts analysis, given the specificity of the essential features, determining whether an action may affect one or both of the features can be accomplished without entering into an ESA section 7 consultation.

Unoccupied Areas

ESA section 3(5)(A)(ii) further defines critical habitat to include specific areas outside the geographical area occupied if the areas are determined by the Secretary of Commerce (Secretary) to be essential for the conservation of the species. Regulations at 50 CFR 424.12(e) specify that we shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species. Habitat based recovery criteria in the recovery plan suggest areas outside the current occupied range may be important to the species' recovery. However, based on the best available information we cannot identify unoccupied areas that are currently essential to the conservation of the species. If information on essential features or habitats for the species becomes available, we will consider revising this critical habitat designation.

Special Management Considerations or Protection

Specific areas within the geographical area occupied by a species may be designated as critical habitat only if they

contain physical or biological features essential to the conservation of the species that ''may require special management considerations or protection.'' A few courts have interpreted aspects of this statutory requirement, and the plain language aids in its interpretation. For instance, the language clearly indicates the features, not the specific area containing the features, are the focus of the ''may require'' provision. Use of the disjunctive ''or'' also suggests the need to give distinct meaning to the terms ''special management considerations'' and ''protection.'' Generally speaking, ''protection'' suggests actions to address a negative impact or threat of a negative impact. ''Management'' seems plainly broader than protection, and could include active manipulation of a feature or aspects of the environment. Two Federal district courts, focusing on the term ''may,'' ruled that features can meet this provision based on either present requirements for special management considerations or protections, or on possible future requirements. See *Center for Biol. Diversity* v. *Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003); *Cape Hatteras Access Preservation Alliance* v. *DOI*, 344 F. Supp. 108 (D.D.C. 2004). The Arizona district court ruled that the provision cannot be interpreted to mean that features already covered by an existing management plan must be determined to require ''additional'' special management, because the term ''additional'' is not in the statute. Rather, the court ruled that the existence of management plans may be evidence that the features in fact require special management. *Center for Biol. Diversity* v. *Norton*, 1096–1100. NMFS' regulations define ''special management considerations or protections'' to mean ''any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species'' (50 CFR 424.02(j)).

Based on the above, we evaluated whether the essential features proposed in this document may require special management considerations or protections by evaluating four criteria:

(a) Whether there is presently a need to manage the feature;

(b) Whether there is the possibility of a need to manage the feature;

(c) Whether there is presently a negative impact on the feature; or

(d) Whether there is the possibility of a negative impact on the feature.

In evaluating present or possible future management needs for the features, we recognized that the features in their present condition must be the basis for a finding that these are essential to the smalltooth sawfish's conservation. In addition, the needs for management evaluated in (a) and (b) were limited to managing the features for the conservation of the species. In evaluating whether the essential features meet either criterion (c) or (d), we evaluated direct and indirect negative impacts from any source (e.g., human or natural). However, we only considered the criteria to be met if impacts affect or have the potential to affect the aspect of the feature that makes it essential to the conservation of the species. We also evaluated whether the features met the ''may require'' provision separately for the two ''specific areas'' proposed for designation.

Red mangroves and adjacent shallow euryhaline habitats are susceptible to impacts from human activities because they are located in areas where urbanization occurs. The Status Review (NMFS, 2000) states that habitat destruction is one of the key factors affecting the present range of the species. The continued urbanization of the southeastern U.S. has resulted in substantial habitat losses for the species. Coastal areas where these features are located are subject to various impacts from activities including, but not limited to, dredging and disposal activities, coastal maritime construction, land development, and installation of various submerged pipelines. The impact from these activities combined with natural factors (e.g., major storm events) can significantly affect the quality and quantity of the two features listed above and their ability to provide nursery area functions (i.e., refuge from predators and abundant food resources), to juvenile smalltooth sawfish to facilitate recruitment into the population. Dredging projects modify water depths to accommodate navigation needs, mangroves are removed to construct docks and various maritime structures, and water control structures are installed to modify water flows in various areas, which can alter salinity regimes downstream. Based on our past ESA section 7 consultation database records we know that coastal areas in southwest Florida will continue to experience impacts from coastal construction projects and that these features will continue to experience negative impacts in the future. Based on our past consultation history, fewer Federal actions may affect habitats in the TTI/E Unit than in the Charlotte Harbor Estuary Unit, because much of the TTI/E Unit is held in public ownership by the Department of Interior. However, coastal storm impacts to mangroves, salinity, and water depth still occur within this area, and salinity regimes as well as mangroves in this area may be altered in the future by projects implemented under the Comprehensive Everglades Restoration Project. Thus, the two essential features currently need and will continue to need special management and protection in both of the two specific areas.

Application of ESA Section 4(a)(3)(B)(i)

Section 4(a)(3)(B) prohibits designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DOD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP), if we determine that such a plan provides a benefit to the sawfish species (16 U.S.C. 1533(a)(3)(B)). We solicited information from DOD, and received information indicating that no DOD facilities or managed areas are located within the specific areas identified as proposed critical habitat.

Application of ESA Section 4(b)(2)

The foregoing discussion described the specific areas within U.S. jurisdiction that fall within the ESA section 3(5) definition of critical habitat because they contain the physical and biological features essential to the sawfish's conservation that may require special management considerations or protection. Before including areas in a designation, section 4(b)(2) of the ESA requires the Secretary to consider the economic, national security, and any other relevant impacts of designation of any particular area. Additionally, the Secretary has the discretion to exclude any area from designation if he determines the benefits of exclusion (that is, avoiding some or all of the impacts that would result from designation) outweigh the benefits of designation based upon the best scientific and commercial data available. The Secretary may not exclude an area from designation if exclusion will result in the extinction of the species. Because the authority to exclude is discretionary, exclusion is not required for any particular area under any circumstances.

The analysis of impacts below summarizes the comprehensive analysis contained in our Draft Section 4(b)(2) Report, considering the economic, national security, and other relevant impacts that we projected would result from including the two units in the proposed critical habitat designation. This consideration informed our

decision on whether to exercise our discretion to propose excluding particular areas from the designation. Both positive and negative impacts were identified and considered (these terms are used interchangeably with benefits and costs, respectively). Impacts were evaluated in quantitative terms where feasible, but qualitative appraisals were used where that was more appropriate to particular impacts.

The ESA does not define what ''particular areas'' means in the context of section 4(b)(2), or the relationship of particular areas to ''specific areas'' that meet the statute's definition of critical habitat. As there was no biological basis to subdivide the two specific critical habitat units into smaller units, we treated these units as the ''particular areas'' for our initial consideration of impacts of designation.

Impacts of Designation

The primary impacts of a critical habitat designation result from the ESA section 7(a)(2) requirement that Federal agencies ensure their actions are not likely to result in the destruction or adverse modification of critical habitat. Determining these impacts is complicated by the fact that section 7(a)(2) also requires that Federal agencies ensure their actions are not likely to jeopardize the species' continued existence. An incremental impact of designation is the extent to which Federal agencies modify their proposed actions to ensure they are not likely to destroy or adversely modify the critical habitat beyond any modifications they would make because of listing and the jeopardy prohibition. When a modification would be required due to impacts to both the species and critical habitat, the impact of the designation may be co-extensive with the ESA listing of the species. The nature of the sawfish and the proposed essential features, and the type of projects predicted to occur in the future in the areas proposed for designation, allowed us to identify incremental impacts of the proposed designation. The Draft Section 4(b)(2) Report identifies incremental cost and benefits that may result from the designation. Additional impacts of designation include state and local protections that may be triggered as a result of designation, and positive impacts that may arise from avoiding destruction or adverse modification of the species' habitat, and education of the public to the importance of an area for species conservation.

The Draft Section 4(b)(2) Report describes the impacts analysis in detail (NMFS, 2008). The report describes the projected future Federal activities that would trigger section 7 consultation requirements because they may affect one or both of the essential features. Additionally, the report describes the project modifications we identified that may reduce impacts to the essential features. The report also discusses the lack of expected impacts on national security, and other relevant impacts including conservation benefits that are expected to result from the proposed critical habitat designation. This report is available on NMFS' Southeast Region Web site at *http://sero.nmfs.noaa.gov/pr/SmalltoothSawfish.htm*.

Economic Impacts

As discussed above, economic impacts of the critical habitat designation result through implementation of section 7 of the ESA in consultations with Federal agencies to ensure their proposed actions are not likely to destroy or adversely modify critical habitat. These economic impacts may include both administrative and project modification costs; economic impacts that may be associated with the conservation benefits of the designation are characterized as other relevant impacts and described later.

Because the smalltooth sawfish has been listed for 5 years, a consultation history exists for the species. Assumptions about the types of future Federal activities that might require ESA section 7 consultation in the next 10 years were based on the species' past consultation history. We examined our consultation records over the last 10 years, as compiled in our Public Consultation Tracking System (PCTS) database, to identify types of Federal activities that have the potential to adversely affect either both the smalltooth sawfish and its critical habitat, or just the critical habitat (actions that require consultation due to effects solely on the fish are not impacts of the designation of critical habitat). The PCTS database contains information dating from 1997, providing a consultation history for sawfish and co-located listed species spanning 10 years. Consultation data for smalltooth sawfish began when the species was listed in 2003, and available information indicates that the number of consultations increased as Federal agencies recognized those projects that might affect the species and thus require consultation. Based on our outreach efforts to Federal agencies about the need to consult on the species, we believe that our data from 2005 to the present represents the level of future actions that may trigger consultation in the two areas proposed for designation from which to estimate the number of future actions that may trigger consultation. Thus we extrapolated the number of consultation that occurred over a three-year period between 2005 and the present that required consultation due to the presence of the sawfish into the number of future consultations. We request Federal action agencies to provide us with information on future consultations if our assumptions omitted any future actions likely to affect the proposed critical habitat.

We identified four categories of activities that would require consultation due to potential impacts to one or both of the essential features: marine construction activities that require a Federal permit (e.g., docks, piers, boat ramps, dredging, shoreline stabilization, etc.); general permits authorizing specified categories and locations of construction activities without the need for individual project specific permits; water control structure repair and replacement; and road/bridge expansions, repairs and removals. No categories of future Federal actions are expected to require consultation due solely to impacts on one or both of the critical habitat features; all categories of projected future actions that may trigger consultation because they have the potential to adversely affect the essential features also have the potential to adversely affect the species itself. Therefore, we do not predict that the proposed designation will result in an increase in the number of consultations that would be required due solely to the presence of the species in the two specific units. Moreover, fewer than half of the past projects that required consultation due to effects on sawfish had actual impacts on one or both of the features now being proposed as critical habitat. A total of 76 consultations are predicted due to the proposed designation in the Charlotte Harbor Estuary Unit, and only 8 consultations in the TTI/E Unit, over the next 10 years. The U.S. Army Corps of Engineers is projected to be the Federal action agency for the majority of future projects requiring consultation due to adverse effects to critical habitat in both proposed units; the U.S. Coast Guard and/or the Federal Highways Administration may be co-action agencies that may also be involved in three consultations per unit over the next ten years. Although the TTI/E unit largely overlaps the Everglades National Park due to limitations on habitat altering activities in the park, we project one consultation with DOI over the next 10 years as a result of this designation.

Based on our consultation history, no past projects in these areas required modification to avoid adverse impacts to the sawfish; all consultations that were triggered were concluded informally. Thus, to be conservative and avoid underestimating impacts of the designation, we assumed that although all future projects will trigger consultation due to both the species and the critical habitat, the consultations will be formal and require a biological opinion based on potential adverse impacts on one or both of the essential features of the critical habitat. Thus, we have estimated incremental administrative costs of each consultation that will result from the proposed designation, as the difference in average costs of an informal and formal consultation. We have estimated the total costs for each unit as a range, reflecting the possible range in complexity and cost of consultations. The incremental administrative costs for the Charlotte Harbor Estuary Unit are estimated to range from $1,026,000 to $1,368,000 (depending on complexity) over the 10–year planning period. The incremental administrative costs for the TTI/E Unit are estimated to range from $108,000 to $144,000 (depending on complexity) over the 10–year planning period.

We next considered the range of modifications we may recommend to avoid adverse modification from projected future activities in the smalltooth sawfish critical habitat. Based on our consultation history for the sawfish, no project modifications have been recommended for categories of Federal activities projected to require consultation in the future, to avoid adverse impacts to the fish. Thus, we assumed in our analysis that the costs of project modifications to avoid destroying or adversely modifying critical habitat would not be costs that are co-extensive with the listing of the species. Similarly, we assumed that the costs of project modifications required to avoid destruction or adverse modification of critical habitat will not be costs that are co-extensive with another existing regulatory requirement. Though there are numerous existing Federal, state, or local laws and regulations that protect natural resources including the proposed essential features to some degree, none of these laws focuses on avoiding the destruction or adverse modification of these features, which provide sawfish nursery area functions, thus facilitating sawfish recovery. As a result, we assumed the proposed designation will provide unique, additional protections to the critical habitat features that would result in project modifications where existing laws would not require such modifications.

We identified eight potential project modifications that we may recommend during section 7 consultation to avoid or reduce impacts to the essential features. To be conservative in estimating impacts, we assumed that project modifications would be recommended to address adverse effects from all projected future agency actions requiring consultation. Although we made the assumption that all potential project modifications would be recommended by NMFS, not all of the modifications identified for a specific category of activity would be necessary for an individual project, but we are not able to identify the exact modification or combinations of modifications that would be required for all future actions. Conversely, more than one project modification may be required for individual future projects where both essential features may be adversely affected by a project, and multiple project modifications are required to avoid such impacts.

Table 1 provides a summary of the estimated costs, where possible, of individual project modifications. The Draft Section 4(b)(2) Report provides a detailed description of each project modification, actions for which it may be prescribed, and whether it may be useful in avoiding adverse impacts to one or both of the essential features.

TABLE 1. SUMMARY OF TYPES OF POTENTIAL PROJECT MODIFICATIONS

Project Modification	Cost	Unit	Range	Approx. Totals
Project Relocation	Undeterminable	N/A	N/A	N/A
Horizontal Directional Drilling (HDD)	$1.39-2.44 million	per mile	0.2-31.5 Miles	$278,000-$-$76,900,000
Restriction of Utility/Road Corridor Widths	Roadway Retained Sides, 2 Lane = $1,875 Roadway Retained Sides, 4 Lane = $2,150 Roadway Bridge, 2 Lane = $3,370 Roadway Bridge 4 Lane = $5,050	Linear Foot	N/A	$1,875-$5,050 per linear foot
Alternative Shoreline Stabilization Methods	Undeterminable	N/A	N/A	N/A
Limitations on Dock Widths and Sizes	Undeterminable	Sq. Foot	N/A	N/A
Limitations/Restrictions on Modifying Freshwater Flow	Undeterminable	N/A	N/A	N/A
Sediment and Turbidity Controls	Staked Silt Fence = $2 Floating Turbidity Barrier = $12	Linear Foot	N/A	$2-$12 per linear foot
Conditions Monitoring	Undeterminable	N/A	N/A	N/A

Note: Where information was available, the estimated ranges (extents) of the impacts are included.

National Security Impacts

Previous critical habitat designations have recognized that impacts to national security may result if a designation would trigger future ESA section 7 consultations because a proposed military activity ''may affect'' the physical or biological feature(s) essential to the listed species' conservation. Anticipated interference with mission-essential training or testing or unit readiness, either through delays caused by the consultation process or through requirements to modify the action to prevent adverse modification of critical habitat, has been identified as a negative impact of critical habitat designations (see, e.g., Proposed Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover, 71 FR 34571, 34583 (June 15, 2006); and Proposed Designation of Critical Habitat for Southern Resident Killer Whales; 69 FR 75608, 75633 (December 17, 2004).

These past designations have also recognized that national security impacts do not result from a critical habitat designation if future ESA section 7 consultations would be required for a jeopardy analysis even if no critical habitat was designated, in which case the critical habitat designation would not add new burdens beyond those related to the jeopardy consultation.

On April 11, 2008, we sent a letter to DOD requesting information on national security impacts of the proposed designation. We received responses from the Departments of the Army, Navy, and Air Force indicating that they have no facilities or managed areas located within the proposed critical habitat areas. Thus, consultations with respect to activities on DOD facilities or training are unlikely to be triggered as a result of the proposed critical habitat designation, and no national security impacts are anticipated as a result of this proposed critical habitat rule.

Other Relevant Impacts

Past critical habitat designations have identified three broad categories of other relevant impacts: educational awareness benefits, conservation benefits, both to the species and to society as a result of the avoidance of destruction or adverse modification of critical habitat, and impacts on governmental or private entities that implement existing management plans in the areas covered by the proposed designation. Our Draft Section 4(b)(2) Report discusses these impacts of designating the specific areas as critical habitat for smalltooth sawfish.

As summarized in the Draft Section 4(b)(2) Report, there are potential educational benefits resulting from the designation. Particularly in Florida, the designation may expand the awareness raised by the listing of the smalltooth sawfish. Mangrove shoreline areas are often used for recreational activities such as kayaking, and provide habitat for viewable wildlife. Additionally, Federal and State protected areas, such as Everglades National Park, Rookery Bay National Estuarine Preserve, Cape Romano-Ten Thousand Islands Aquatic Preserve, and Collier-Seminole State Park may benefit from the added awareness of the endangered smalltooth sawfish within their boundaries, and from the protection critical habitat designation affords.

Implementation of ESA Section 7 to avoid destruction or adverse modification of critical habitat is expected to increase the probability of recovery for listed species. In addition to contributing to sawfish recovery, benefits associated with project modifications required through section 7 consultation to minimize or avoid the destruction or adverse modification of the essential features, would include minimizing or avoiding the destruction or adverse modification of the ecosystem services that these features provide. By definition, the proposed physical and biological features are ''essential to the conservation'' of the smalltooth sawfish; in other words, conservation of the species as defined in the ESA is not possible without the presence and protection of the features. As discussed above, we have determined that the two areas proposed for inclusion in the critical habitat designation are juvenile nursery areas. The essential features of these areas, red mangroves with their prop root systems, and adjacent shallow euryhaline habitats, provide protection from predators and abundant and diverse prey resources, and thus provide key nursery area functions for the sawfish.

Because the smalltooth sawfish has limited commercial and recreational value, and because the species' recovery is expected to take decades, we can predict no direct or indirect monetary value that may result from the proposed designation because of its contribution to the recovery of the smalltooth sawfish. However, as discussed in the following paragraphs, other benefits are expected to accrue to society in the course of protecting the essential features of the sawfish's critical habitat from destruction or adverse modification.

Mangrove ecosystems provide a range of important uses and services to society. As these benefits currently exist, we do not interpret them as resulting from the critical habitat designation per se. However, protection of the critical habitat from destruction or adverse modification may at a minimum prevent loss of the benefits provided by these resources, and would contribute to any benefits associated with increased future abundance of the smalltooth sawfish as it recovers. As we discuss in the Draft 4(b)(2) Report, we believe that the critical habitat designation will provide unique, additional protections to mangroves in the areas covered by the designation, relative to existing laws and regulations.

The additional protection of mangroves offered through the critical habitat designation ensures that mangroves in the areas covered by the proposed designation can continue to function as critical components of the ecosystem. The Draft 4(b)(2) Report discusses benefits of mangroves including benefits to biodiversity, benefits to fisheries, benefits to air and water quality protection, shoreline protection, and benefits to recreation and tourism. Most of these benefits are described in non-monetary metrics. Where economic values are presented, we note that they are derived from a variety of sources and studies and are provided for context in support of our conclusion that non-negligible economic benefits are expected to result from the proposed designation, because protection of the proposed critical habitat from destruction or adverse modification is expected at minimum to prevent loss of existing benefits the habitat provides.

While the shallow water euryhaline habitat feature offers important ecosystem services to various juvenile fish, invertebrates, and benthic and epibenthic organisms as described in the Draft Section 4(b)(2) Report, their conservation benefits are interrelated with the benefits offered by conservation of red mangroves. Consequently, the Draft 4(b)(2) Report focuses on the benefits of mangroves, and the interrelated benefits of the shallow water euryhaline habitat are not discussed in detail.

Very little impact on entities responsible for natural resource management or conservation plans that benefit listed species, or on the functioning of those plans, is predicted to result from the proposed critical habitat designation in the areas covered by the plans. Though the TTI/E unit largely overlaps with the Everglades National Park, our discussions with park managers identify only one park management project that will require consultation during the next 10 years.

Synthesis of Impacts within the Specific Areas

For the reasons set forth below, based on our consideration of positive and negative economic, national security and other relevant impacts predicted to result from the proposed designation, we do not exercise our discretion to propose for exclusion all or any part of either the Charlotte Harbor Estuary Unit or the Ten Thousand Islands/Everglades Unit from the designation. No impacts on national security are projected to result from the proposed designation. Very little negative impact on existing resource management activities is projected to result from the proposed designation. Negative economic impacts resulting from section 7 consultation requirements are projected to be limited. A total of 84 Federal actions over the next ten years are projected to require ESA section 7 consultation to address predicted adverse effects to one or both of the physical or biological features of the proposed critical habitat. Only 76 of these actions are projected for the Charlotte Harbor Estuary Unit, or approximately eight per year on average. Only eight future consultations are projected to be required in the TTI/E Unit over the next ten years due to impacts on the critical habitat features, or approximately one per year on average. All of these projects would have required consultation due to the listing of the sawfish, even in the absence of the designation. We have projected that incremental section 7 costs will be associated with the designation, in the form of increased administrative costs of more complex, formal consultations, and in project modification costs. Estimated costs for these project modifications are provided in the Draft 4(b(2) Report, though we could not predict the total cost of modifications resulting from the designation given the lack of information on project design and locations. However, we may have overestimated impacts in our assumption that all modification costs will be necessary and will be incremental impacts of the designation rather than baseline impacts of existing state, local or other Federal laws or regulations that protect natural resources. We do not project that any required project modifications will have secondary impacts on local or regional economies. The majority of project modifications are projected to be recommended to avoid adverse effects to the red mangroves in the proposed critical habitat areas. We expect that the designation will provide unique, additional protections to mangroves because existing laws and regulations in these areas do not avoid the destruction or adverse modification of mangroves for the purpose of facilitating recovery of the sawfish. The proposed designation is expected to, at minimum, prevent the loss of societal benefits that mangroves and shallow euryhaline habitats currently provide in the two specific areas included in the proposal.

Critical Habitat Designation

We propose to designate approximately 840,472 acres in two units of critical habitat occupied by the U.S. DPS of smalltooth sawfish at the time of its listing. The two units proposed for designations are: the Charlotte Harbor Estuary Unit, which comprises approximately 221,459 acres of habitat; and the Ten Thousand Islands/Everglades Unit (TTI/E), which comprises approximately 619,013 acres of habitat. The two units are located along the southwestern coast of Florida between Charlotte Harbor and Florida Bay.

The proposed specific areas contain the following physical and biological features that are essential to the conservation of this species and that may require special management considerations or protection: red mangroves and shallow euryhaline habitats characterized by water depths between the MHW line and 3 ft (0.9 m) measured at Mean Lower Low Water (MLLW). No unoccupied areas are proposed for designation of critical habitat.

Activities That May Be Affected

Section 4(b)(8) of the ESA requires that we describe briefly and evaluate, in any proposed or final regulation to designate critical habitat, those activities that may destroy or adversely modify such habitat or that may be affected by such designation. A variety of activities may affect critical habitat that, when carried out, funded, or authorized by a Federal agency, will require an ESA section 7 consultation. Such activities include, but are not limited to, dredging and filling, and other in-water construction (docks, marinas, boat ramps, etc.), and installation of water control structures. Notably, all the activities identified that may affect the critical habitat may also affect the species itself, if present within the action area of a proposed Federal action.

We believe this proposed critical habitat designation will provide Federal agencies, private entities, and the public with clear notification of the nature of critical habitat for smalltooth sawfish and the boundaries of the habitat. This designation will allow Federal agencies and others to evaluate the potential effects of their activities on critical habitat to determine if ESA section 7 consultations with NMFS are needed, given the specific definition of the two essential features. Consistent with recent agency guidance on conducting adverse modification analyses (NMFS, 2005), we will apply the statutory provisions of the ESA, including those in section 3 that define ''critical habitat'' and ''conservation,'' to determine whether a proposed future action might result in the destruction or adverse modification of critical habitat.

Public Comments Solicited

We request that interested persons submit comments, information, maps, and suggestions concerning this proposed rule during the comment period (see **DATE**S). We solicit comments or suggestions from the public, other concerned governments and agencies, the scientific community, industry, or any other interested party concerning this proposed rule. Comments particularly are sought concerning:

(1) Current or planned activities in the areas proposed for designation and their possible impacts on proposed critical habitat;

(2) Any positive or negative economic, national security or other relevant impacts expected to result from the proposed designation and our consideration of these impacts, as well as the benefits to smalltooth sawfish of the designation. (These impacts are described in a report prepared pursuant to section 4(b)(2) of the ESA.);

(3)Types and numbers of Federal activities that may trigger an ESA section 7 consultation, their possible modifications, and potential modification costs that may be required of those activities to avoid destroying or adversely modifying critical habitat.

You may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES**). The proposed rule, references, and other materials relating to this proposal can be found on the NMFS Southeast Region web site at *http://sero.nmfs.noaa.gov/pr/smalltoothsawfish.htm*. We will consider all comments and information received during the comment period in preparing the final rule. Accordingly, the final decision may differ from this proposal.

Public Hearings

50 CFR 424.16(c)(3) requires the Secretary to promptly hold at least one public hearing if any person requests one within 45 days of publication of a

proposed rule to designate critical habitat. Public hearings provide the opportunity for interested individuals and parties to give comments, exchange information and opinions, and engage in a constructive dialogue concerning this proposed rule. We encourage the public's involvement in such ESA matters. Requests for public hearings must be made in writing (see **ADDRESSES**) by January 5, 2009.

Peer Review

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 the OMB Bulletin, we obtained independent peer review of the scientific information that supports this proposal to designate critical habitat for the U.S. DPS of smalltooth sawfish and incorporated the peer review comments prior to dissemination of this proposed rulemaking. The Draft 4(b)(2) Report that supports the proposal to designate critical habitat for the species was also peer reviewed and is available on our web site located at www.fdms.gov.

Classification

We determined that this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management programs of Florida. The determination has been submitted for review by the responsible State agencies under section 307 of the Coastal Zone Management Act.

This proposed rule has been determined to be significant under Executive Order (E.O.) 12866. We have integrated the regulatory principles of the E.O. into the development of this proposed rule to the extent consistent with the mandatory duty to designate critical habitat, as defined in the ESA.

We prepared an initial regulatory flexibility analysis (IRFA) pursuant to section 603 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), which describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and its legal basis are included in the preamble section of this proposed rule.

This proposed rule may affect small businesses, small nonprofit organizations, and small governmental jurisdictions that engage in activities that would affect the essential features identified in this proposed designation, if they receive funding or authorization for such activity from a Federal agency. Such activities would trigger ESA section 7 consultation requirements, and potential modifications to proposed activities to avoid destroying or adversely modifying the critical habitat. The consultation record from which we have projected likely actions occurring over the next 10 years indicates that applicants for Federal permits or funds may have included small entities. For example, marine contractors have been the recipients of USACE permits for dock construction; some of these contractors may be small entities. According to the Small Business Administration, businesses in the Heavy and Civil Engineering Construction subsector (NAICS Code 237990), which includes firms involved in marine construction projects such as breakwater, dock, pier, jetty, seawall and harbor construction, must have average annual receipts of no more than $31 million to qualify as a small business (dredging contractors that perform at least 40% of the volume dredged with their own equipment, or equipment owned by another small concern are considered small businesses if their average annual receipts are less than or equal to $18.5 million). Our consultation database does not track the identity of past permit recipients or whether the recipients were small entities, so we have no basis to determine the percentage of grantees or permittees that may be small businesses in the future.

Small businesses in the tourist and commercial fishing industries may benefit from the rule because avoiding the destruction or adverse modification of the critical habitat features, particularly mangroves, is expected to at minimum prevent loss of current direct and indirect use of, and values derived from, these habitats within the areas included in the proposed designation.

A review of historical ESA section 7 consultations involving projects in the areas proposed for designation is described in Section 3.2.2 of the Draft Section 4(b)(2) Report prepared for this rulemaking. We projected that, on average, about eight Federal projects with non-federal grantees or permittees will be affected by implementation of the proposed critical habitat designation, annually, across both areas proposed for inclusion in the critical habitat designation. Some of these grantees or permittees could be small entities, or could hire small entities to assist in project implementation. Historically, these projects have involved dock/pier construction and repair, water control structure installation or repair, bridge repair and construction, dredging, cable installation, and shoreline stabilization. Potential project modifications we have identified that may be required to prevent these types of projects from adversely modifying critical habitat include: project relocation; environmental conditions monitoring; horizontal directional drilling; road/utility corridor restrictions; alternative shoreline stabilization methods; dock size and width limits; restrictions on structures that modify freshwater flows; and sediment and turbidity control measures. See Table 15 of the Draft Section 4(b)(2) Report.

Even though we cannot determine relative numbers of small and large entities that may be affected by this rule, there is no indication that affected project applicants would be limited to, nor disproportionately comprised of, small entities.

It is unclear whether small entities would be placed at a competitive disadvantage compared to large entities. However, as described in the Draft Section 4(b)(2) Report, consultations and project modifications will be required based on the type of permitted action and its associated impacts on the essential critical habitat feature. Because the costs of many potential project modifications that may be required to avoid adverse modification of critical habitat are unit costs such that total project modification costs would be proportional to the size of the project, it is not unreasonable to assume that larger entities would be involved in implementing the larger projects with proportionally larger project modification costs.

It is also unclear whether the proposed rule will significantly reduce profits or revenue for small businesses. As discussed throughout the Draft Section 4(b)(2) Report, we made assumptions that all of the future consultations will be formal, that all will require project modifications, and that all costs of project modifications will be incremental impacts of the proposed designation and not a requirement of other existing regulatory requirements. These assumptions likely overestimate the impacts of the proposed designation. In addition, as stated above, though it is not possible to determine the exact cost of any given

project modification resulting from consultation, the smaller projects most likely to be undertaken by small entities would likely result in relatively small modification costs.

We encourage all small businesses, small governmental jurisdictions, and other small entities that may be affected by this rule to provide comment on the number of small entities affected and the potential economic impacts of the proposed designation, such as anticipated costs of consultation and potential project modifications, to improve the above analysis.

There are no record-keeping requirements associated with the proposed rule. Similarly, there are no reporting requirements other than those that might be associated with reporting on the progress and success of implementing project modifications. However, third party applicants or permittees would be expected to incur incremental costs associated with participating in the administrative process of consultation along with the permitting Federal agency, beyond the baseline administrative costs that would be required for consultations based on the sawfish itself. Estimates of the cost to third parties from consultations were developed from the estimated Section 7 costs identified in the Economic Analysis of Critical Habitat Designation for the Gulf Sturgeon (IEc, 2003) inflated to 2008 (March) dollars. The incremental third party cost for each consultation would be the difference between the cost of an informal consultation and a formal consultation ($2,000 difference per low complexity consultation and $1,600 difference per high complexity consultation). The total impact on third party costs would be the incremental cost of the formal consultation multiplied by the increased number of formal consultations. The maximum incremental third party costs are estimated to range from $121,600 to $152,000 (depending on complexity) over the 10–year planning period.

No Federal laws or regulations duplicate or conflict with the proposed rule. Existing Federal laws and regulations overlap with the proposed rule only to the extent that they provide protection to natural resources including mangroves generally. However, no existing laws or regulations specifically prohibit destruction or adverse modification of critical habitat for, and focus on the recovery of, the smalltooth sawfish.

The alternatives to the proposed designation considered consisted of three alternatives, a no-action, our preferred alternative, and an alternative with varying numbers of units. NMFS would not designate critical habitat for the smalltooth sawfish under the no action (status quo) alternative. Under this alternative, conservation and recovery of the listed species would depend exclusively upon the protection provided under the ''jeopardy'' provisions of Section 7 of the ESA. Under the status quo, there would be no increase in the number of ESA consultations or project modifications in the future that would not otherwise be required due to the listing of the smalltooth sawfish. However, the physical and biological features forming the basis for our proposed critical habitat designation are essential to sawfish conservation, and conservation for this species will not succeed without the availability of this feature. Thus, the lack of protection of the critical habitat feature from adverse modification could result in continued declines in abundance of smalltooth sawfish, and loss of associated values sawfish provide to society. Further, this alternative is not consistent with the requirement of the ESA to designate critical habitat to the maximum extent prudent and determinable.

Under the preferred alternative two specific areas that provide nursery functions for juvenile sawfish are proposed as critical habitat. These areas are located along peninsular Florida, encompassing portions of Charlotte, Lee, Collier, Monroe, and Miami-Dade counties. This area contains the physical and biological features essential to the conservation of the U.S. DPS of smalltooth sawfish. The essential features are red mangroves and shallow euryhaline habitats characterized by water depths between the MHW line and 3 ft (0.9 m) measured at MLLW that provide nursery area functions to smalltooth sawfish. The preferred alternative was selected because it best implements the critical habitat provisions of the ESA, by defining the specific features that are essential to the conservation of the species, and due to the important conservation benefits are expected to result from this alternative relative to the no action alternative.

Under the varying number of units alternative, we considered both combining the Charlotte Harbor Estuary Unit and the TTI/E Unit into a single unit for designation, and alternatively we considered splitting both units into multiple smaller units.

Under the first scenario, the unit would include the Naples beach area between the two proposed units, and thus would encompass a larger total area than the two proposed units. Though juveniles have been encountered in the Naples beach area, they have not been encountered in high densities. We also do not believe that juveniles move between the Charlotte Harbor Estuary and TTI/E Units along this stretch of beach. Furthermore, while red mangroves exist along this area (though they are much more sparsely distributed than in the two proposed units), the salinity regimes are much more purely marine than estuarine, and the features are not considered to provide the nursery functions essential to the conservation of the species in these areas. Thus, we rejected this alternative because the Naples Beach area is not considered to meet the definition of critical habitat.

Under the second scenario, we considered options to split both the Charlotte Harbor Estuary Unit and the TTI/E Unit into multiple smaller units. We considered designating Charlotte Harbor and the Caloosahatchee Rivers as separate units, including limiting the sizes of each of these areas strictly to locations of past high density encounters of juveniles. We considered the same type of partitioning of the TTI/E Unit into smaller isolated units based on past high density encounters alone. We rejected the alternative of separating Charlotte Harbor and the Caloosahatchee River because state and local water resource managers consider the systems as a single integrated aquatic system. For both proposed units, we rejected the alternative of multiple smaller units drawn around past high density juvenile encounters because we believe it would have omitted habitat that is almost certain nursery habitat for the sawfish between the units. In addition, the proposed essential features are continuously distributed from the harbor into the river, so this option would have omitted areas that meet the definition of critical habitat. Moreover, a designation limited to past encounters would not take into account the limits of this type of data in defining the extent of habitat use by the sawfish, and it would not provide protection for expanded nursery habitat needed for a recovering population. In addition, it was not clear that designating multiple smaller units would result in lower economic impacts of the designation, as the precise location of future consultations within these areas cannot be predicted based on available information.

An environmental analysis as provided for under National Environmental Policy Act for critical habitat designations made pursuant to the ESA is not required. See *Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996).

We do not believe the proposed action contains policies with federalism implications under E.O. 13132. However, the Assistant Secretary for Legislative and Intergovernmental Affairs will provide notice of the proposed action to and request comments from the appropriate official(s) of the State of Florida in which the species occurs.

The proposed action has undergone a pre-dissemination review and determined to be in compliance with applicable information quality guidelines implementing the Information Quality Act (Section 515 of Public Law 106–554).

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

References Cited

A complete list of all references cited in this rulemaking can be found on our Web site at *http://sero.nmfs.noaa.gov/pr/SmalltoothSawfish.htm* and is available upon request from the NMFS Southeast Regional Office in St. Petersburg, Florida (see **ADDRESSES**).

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: November 14, 2008.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, we propose to amend part 226, title 50 of the Code of Federal Regulations as set forth below:

PART 226 [Amended]

1. The authority citation of part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

■ 2. Add § 226.216, to read as follows:

§ 226.216 Critical habitat for the U.S. DPS of smalltooth sawfish (*Pristis pectinata*).

Critical habitat is designated for the U.S. DPS of smalltooth sawfish as described in this section. The textual descriptions in paragraph (b) of this section are the definitive source for determining the critical habitat boundaries. The maps of the critical habitat units provided in paragraph (c) are for illustrative purposes only.

(a) *Physical and Biological Features Essential to the Conservation of the Endangered U.S. DPS of Smalltooth Sawfish.* The physical and biological features essential to the conservation of the U.S. DPS of smalltooth sawfish, which provide nursery area functions are: red mangroves and shallow euryhaline habitats characterized by water depths between the Mean High Water line and 3 ft (0.9 m) measured at Mean Lower Low Water (MLLW). These features are included in critical habitat within the boundaries of the specific areas in paragraph (b), except where the features are currently not physically accessible to sawfish.

(b) *Critical Habitat Boundaries.* Critical habitat includes two areas (units) located along the southwest coast of peninsular Florida. The northern unit is the Charlotte Harbor Estuary Unit and the southern unit is the Ten Thousand Islands/Everglades (TTI/E) Unit. The units encompass portions of Charlotte, Lee, Collier, Monroe, and Miami-Dade Counties.

(1) *Charlotte Harbor Estuary Unit.* The Charlotte Harbor Estuary Unit includes Charlotte Harbor, Gasparilla Sound, Pine Island Sound, Matlacha Pass, San Carlos Bay, Estero Bay, and the Caloosahatchee River. The unit is defined by the following boundaries. It is bounded by the Peace River at the eastern extent at the mouth of Shell Creek at 81 59.467 W, and the northern extent of the Charlotte Harbor Preserve State Park at 26 58.933 N. At the Myakka River the estuary is bounded by the SR–776 Bridge and Gasparilla Sound at the SR–771 Bridge. The COLREGS–72 lines between Gasparilla Island, Lacosta Island, North Captiva Island, Captiva Island, Sanibel Island, and the northern point of Estero Island are used as the coastal boundary for the unit. The southern extent of the area is the Estero Bay Aquatic Preserve, which is bounded on the south by the Lee/Collier County line. Inland waters are bounded at SR–867 (McGregor Blvd) to Fort Myers, SR–80 (Palm Beach Blvd), Orange River Blvd, Buckingham Rd, and SR–80 to the west side of the Franklin Lock and Dam (S–79), which is the eastern boundary on the Caloosahatchee River and a structural barrier for sawfish access. Additional inland water boundaries north and west of the lock are bounded by North River Road, SR–31, SR–78 near Cape Coral, SR–765, US–41, SR–35 (Marion Ave) in Punta Gorda, and Riverside Road to the eastern extent of the Peace River at 81 59.467 W.

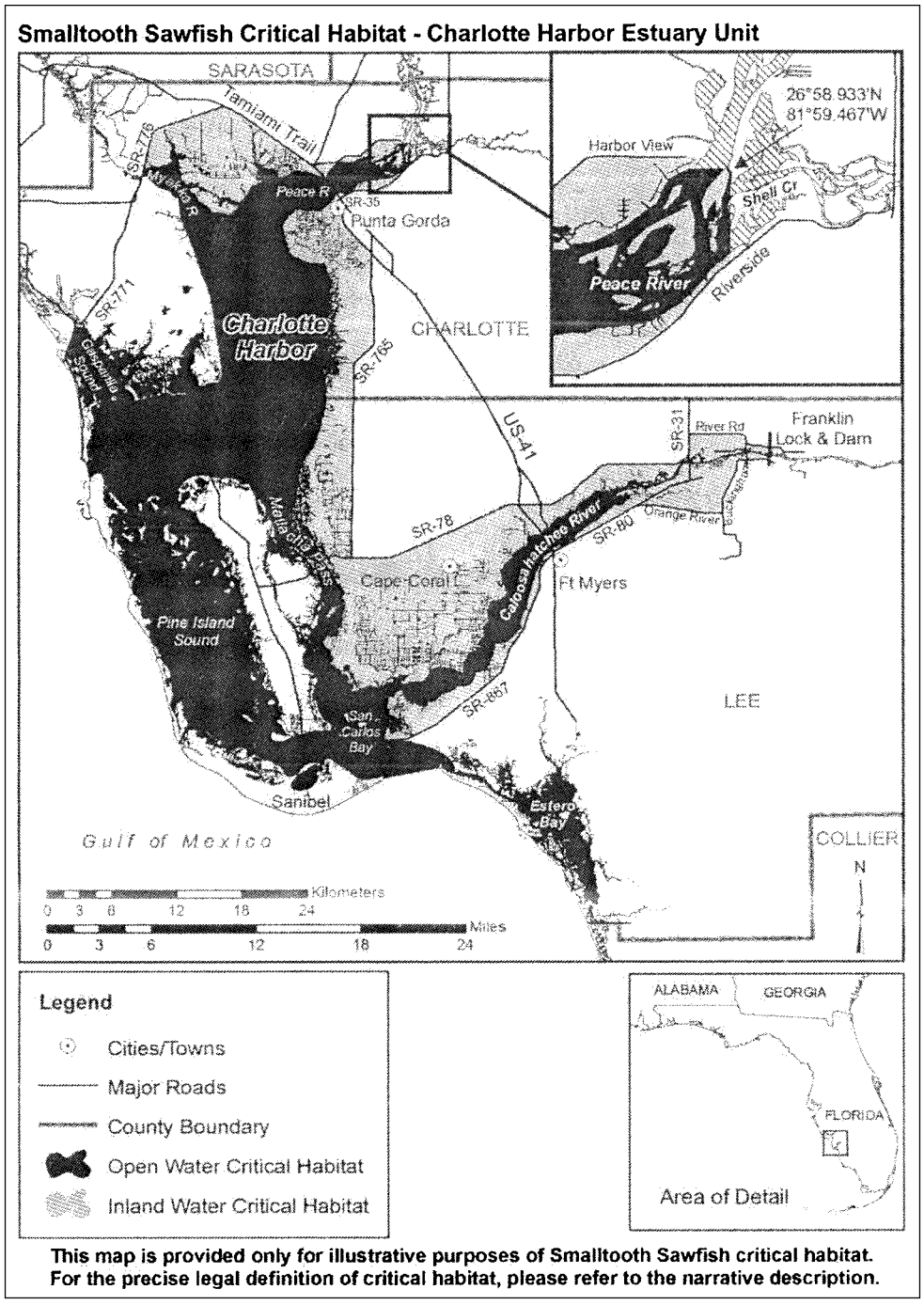
(2) *Ten Thousand Islands/ Everglades Unit.* The TTI/E unit is located within Collier, Monroe, and Miami-Dade Counties, Florida. The unit includes waters within Everglades National Park (ENP), including Florida Bay; in the vicinity of Everglades City; within the Cape Romano-Ten Thousand Islands Aquatic Preserve (AP); and within the portion of Rookery Bay AP south of SR–92. The boundaries match the portion of Rookery Bay AP south of SR–92, and the Cape Romano-Ten Thousand Islands Aquatic Preserve AP. The unit boundaries also match the ENP boundaries with following two exceptions. The unit boundary connects points 55 and 57 which extend beyond the ENP boundary. The unit boundary is located inside the ENP boundary between points 77 and 2, omitting the northeast portion of the ENP. The boundary of the unit is comprised of the following connected points, listed by point number, degrees North latitude, degrees West longitude, and a brief description:

(3) 1, 25.2527, -80.7988, Main Park Road (SR 9336) at Nine Mile Pond; 2, 25.2874, -80.5736, ENP boundary; 3, 25.2872, -80.4448, ENP boundary at US HWY 1; 4, 25.2237, -80.4308, ENP boundary at US HWY 1; 5, 25.1979, -80.4173, ENP boundary at US HWY 1; 6, 25.1846, -80.3887, ENP boundary at US HWY 1; 7, 25.1797, -80.3905, ENP boundary at US HWY 1; 8, 25.148, -80.4179, ENP boundary at Intracoastal Waterway (ICW); 9, 25.1432, -80.4249, ENP boundary at ICW; 10, 25.1352, -80.4253, ENP boundary at ICW; 11, 25.1309, -80.4226, ENP boundary at ICW; 12, 25.1282, -80.4230, ENP boundary at ICW; 13, 25.1265, -80.4268, ENP boundary at ICW; 14, 25.1282, -80.4432, ENP boundary at ICW; 15, 25.0813, -80.4747, ENP boundary at ICW; 16, 25.0676, -80.4998, ENP boundary at ICW; 17, 25.0582, -80.5218, ENP boundary at ICW; 18, 25.0373, -80.5178, ENP boundary at ICW; 19, 25.0326, -80.5188, ENP boundary at ICW; 20, 25.0168, -80.5487, ENP boundary at ICW; 21, 25.0075, -80.5578, ENP boundary at ICW; 22, 24.999, -80.5609, ENP boundary at ICW near Plantation; 23, 24.9962, -80.5648, ENP boundary at ICW; 24, 24.9655, -80.6347, ENP boundary at ICW; 25, 24.943, -80.6585, ENP boundary at ICW; 26, 24.9388, -80.6716, ENP boundary at ICW; 27, 24.9124, -80.7255, ENP boundary at ICW; 28, 24.9006, -80.7348, ENP boundary at ICW; 29, 24.8515, -80.8326, ENP boundary at COLREG–72; 30, 24.873, -80.8875, ENP boundary at Arsenic Bank Light; 31, 24.9142, -80.9372, ENP boundary at Sprigger Bank Light; 32, 25.0004, -81.0221, ENP boundary; 33, 25.0723, -81.0858, ENP boundary; 34, 25.0868, -81.0858, ENP boundary; 35, 25.1567, -81.1620, ENP boundary at Middle Cape Sable; 36, 25.2262, -81.2044, ENP boundary; 37, 25.3304, -81.1776, ENP boundary at Little Shark River; 38, 25.4379, -81.1940, ENP boundary; 39, 25.5682, -81.2581, ENP boundary; 40, 25.7154, -81.3923, ENP boundary at Pavillion Key; 41, 25.8181, -81.5205, ENP

boundary; 42, 25.8326, -81.5205, ENP boundary at Cape Romano-Ten Thousand Islands AP; 43, 25.8315, -81.7450, Rookery Bay AP boundary (southwest corner); 44, 25.9003, -81.7468, Rookery Bay AP boundary; 45, 25.903, -81.6907, Rookery Bay AP boundary; 46, 25.938, -81.6907, Rookery Bay AP boundary at SR 92; 47, 25.9378, -81.6834, Rookery Bay AP boundary at SR 92; 48, 25.9319, -81.6718, Rookery Bay AP boundary at SR 92; 49, 25.933, -81.6508, Rookery Bay AP boundary at SR 92; 50, 25.9351, -81.6483, Rookery Bay AP boundary at SR 92; 51, 25.9464, -81.6433, Rookery Bay AP boundary at SR 92; 52, 25.947, -81.6200, Cape Romano-Ten Thousand Islands AP boundary; 53, 25.9615, -81.6206, Cape Romano-Ten Thousand Islands AP boundary; 54, 25.9689, -81.6041, Cape Romano-Ten Thousand Islands AP boundary; 55, 25.913, -81.4569, Cape Romano-Ten Thousand Islands AP boundary; 56, 25.8916, -81.4082, ENP boundary northwest of Everglades City; 57, 25.863, -81.3590, ENP boundary east of Everglades City; 58, 25.8619, -81.2624, ENP boundary; 59, 25.804, -81.2602, ENP boundary; 60, 25.804, -81.2126, ENP boundary; 61, 25.7892, -81.2128, ENP boundary; 62, 25.7892, -81.1969, ENP boundary; 63, 25.7743, -81.1966, ENP boundary; 64, 25.774, -81.1803, ENP boundary; 65, 25.7591, -81.1803, ENP boundary; 66, 25.7592, -81.1641, ENP boundary; 67, 25.7295, -81.1638, ENP boundary; 68, 25.7299, -81.1165, ENP boundary; 69, 25.7153, -81.1164, ENP boundary; 70, 25.7154, -81.1002, ENP boundary; 71, 25.6859, -81.0997, ENP boundary; 72, 25.6862, -81.0836, ENP boundary; 73, 25.6715, -81.0835, ENP boundary; 74, 25.6718, -81.0671, ENP boundary; 75, 25.6497, -81.0665, ENP boundary; 76, 25.6501, -81.0507, ENP boundary; 77, 25.6128, -81.0497, ENP boundary; return to point 1.

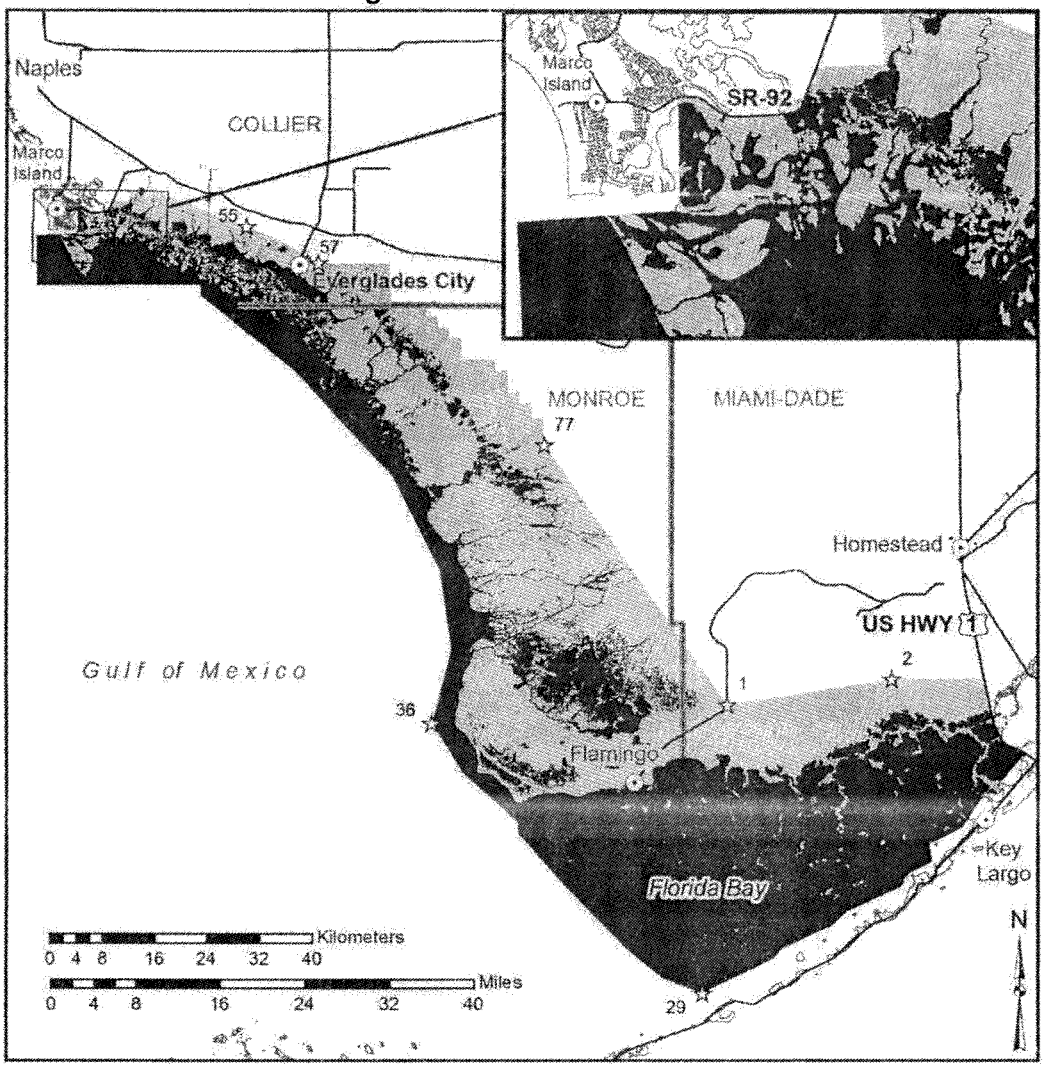
(c) *Maps.* Overview maps of designated critical habitat for the U.S. DPS of smalltooth sawfish follow.

BILLING CODE 3510–22–S



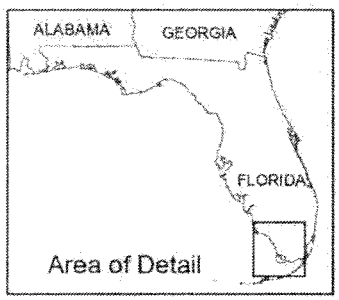
This map is provided only for illustrative purposes of Smalltooth Sawfish critical habitat. For the precise legal definition of critical habitat, please refer to the narrative description.

Smalltooth Sawfish Critical Habitat
Ten Thousand Islands/Everglades Unit



Legend

- ☆ Critical Habitat Boundary Points
- ⊙ Cities/Towns
- Major Roads
- County Boundary
- Open Water Critical Habitat
- Inland Water Critical Habitat



This map is provided only for illustrative purposes of Smalltooth Sawfish critical habitat. For the precise legal definition of critical habitat, please refer to the narrative description.

[FR Doc. E8–27629 Filed 11–19–08; 8:45 am]
BILLING CODE 3510–22–C

Notices

Federal Register
Vol. 73, No. 225
Thursday, November 20, 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

Submission for OMB Review; Comment Request

November 17, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Agricultural Research Service

Title: USDA Biological Shipment Record—Beneficial Organisms.

OMB Control Number: 0518–0013.

Summary of Collection: The Biological Control Documentation Program records the importation and release of foreign biological control agents. Provision of the data is entirely voluntary and is used to populate the USDA ''Release of Beneficial Organisms in the United States and Territories'' (ROBO) database.

Need and Use of the Information: The Agricultural Research Service will collect information using forms AD–941, 942 and 943, on the biological/control and taxonomic research program by recording the introduction and release of non-indigenous biological control organisms in the pollinators in the United States. If information were not collected there would be no systematic method for the collection of such information.

Description of Respondents: Federal Government; State, Local or Tribal Government.

Number of Respondents: 40.

Frequency of Responses: Reporting: On occasion; Annually.

Total Burden Hours: 10.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–27604 Filed 11–19–08; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

November 17, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: User Fee Regulation, 7 CFR 354 and 9 CFR 130.

OMB Control Number: 0579–0094.

Summary of Collection: The Food, Agriculture, Conservation and Trade Act of 1990 authorizes the Secretary of Agriculture and the Animal and Plant Health Inspection Service (APHIS) to prescribe and collect fees to cover the cost of providing certain Agricultural Quarantine and Inspection (AQI) services. The Act gives the Secretary the authority to charge for the inspection of international passengers, commercial vessels, trucks, aircraft, and railroad cars, and to recover the costs of providing the inspection of plants and plant products offered for export. The Secretary is authorized to use the revenue to provide reimbursements to any appropriation accounts that incur costs associated with the AQI services provided. APHIS will collect information using several APHIS forms.

Need and Use of the Information: APHIS collects information, which includes the taxpayer identification number, name, and address and telephone number to collect fees. The procedures and the information requested for the passengers and aircraft are used to ensure that the correct users fees are collected and remitted in full in a timely manner. Without the information, APHIS would not be able to ensure substantial compliance with the statute. Noncompliance with the statute could result in misappropriation of public funds and lost revenue to the Federal Government.

Description of Respondents: Business or other for-profit; Not-for-profit institutions; Individuals or households; Federal Government; State, Local or Tribal Government.

Number of Respondents: 245,122.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 11,876.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–27606 Filed 11–19–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2008–0129]

Public Meetings; National Tuberculosis Program Listening Sessions

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of public meetings.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service will host a series of public meetings to provide the public with an opportunity to offer comments regarding current challenges and new approaches for future tuberculosis control methods and eradication in view of budgetary constraints.

DATES: The public meetings will be held in Michigan on December 8, 2008; in Minnesota on December 10, 2008; in Texas on December 11, 2008; in California on December 12, 2008; and in Washington, DC, on December 16, 2008. The public meetings will be held from 8 a.m. to 4:30 p.m., local time. Meeting registration will be from 7 a.m. to 8 a.m. prior to each public meeting.

ADDRESSES: The public meetings will be held at the following locations:

- Michigan: Holiday Inn South Convention Center, 6820 South Cedar Street, Lansing, MI 48911;
- Minnesota: Hilton Minneapolis, 1001 Marquette Avenue South, Minneapolis, MN 55403;
- Texas: Hilton Garden Inn Austin Downtown, 500 North I H 35, Austin, TX 78701;
- California: Sheraton Grand Sacramento Hotel, 1230 J Street, Sacramento, CA 95814; and
- Washington, DC: Washington Marriott at Metro Center, 775 12th Street NW, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Dr. Alecia L. Naugle, Program Manager, National Tuberculosis Program, VS, APHIS, 4700 River Road Unit 43, Riverdale, MD, 20737; (301) 734–6954.

SUPPLEMENTARY INFORMATION:

The Animal and Plant Health Inspection Service (APHIS) is announcing a series of meetings to discuss its National Tuberculosis (TB) Program. The meetings are designed to assemble a wide range of producers and other stakeholders to discuss current challenges and potential new approaches for TB control and eradication in view of budgetary constraints. The meetings will be held in various geographical locations to facilitate attendance. Participants will have the opportunity to pose questions and offer written and oral comments. Tentative topics and questions for discussion at the upcoming meetings include:

1. *Regulatory Framework.* What is the role of State statuses in the National TB Program of the future? Are there other approaches to establishing movement restrictions and testing requirements that more effectively reduce the risk(s) of disease transmission from affected herds?

2. *Wildlife Issues.* How should the risk of TB associated with disease transmission in wildlife be mitigated?

3. *Biosecurity Issues.* How could producers be encouraged to adopt management and biosecurity practices that reduce the risk of transmission of TB and how could the National TB Program facilitate producers' adoption of these practices?

4. *Budget Concerns.* What alternatives exist for funding National TB Program activities?

5. *Future of Indemnities.* How should limited indemnity funds be used to reduce the risk of continued disease transmission in affected herds?

6. *Import Issues.* How should the risk of transmission of bovine tuberculosis associated with the importation of live cattle into the United States be mitigated?

7. *Eradication vs. Control.* Is eradication of TB in domestic livestock feasible or is control a more appropriate program objective given the availability of program funding?

A list of discussion topics, questions, and meeting details is also available via the APHIS Web site at: *http://www.aphis.usda.gov/newsroom/hot_issuesa/bovine_tuberculosis/bovine_tb.shtml.*

If you require special accommodations, such as a sign language interpreter, please see the contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Done in Washington, DC, this 14th day of November 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–27620 Filed 11–19–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Information Collection; Evaluating Community Knowledge, Beliefs, Attitudes, and Preferences Concerning Fire and Fuels Management in Southwestern Forest, Woodland and Grassland Ecosystems

AGENCY: Forest Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the extension with revision of a currently approved information collection, Evaluating Community Knowledge, Beliefs, Attitudes and Preferences Concerning Fire and Fuels Management in Southwestern Forest, Woodland and Grassland Ecosystems.

DATES: Comments must be received in writing on or before January 20, 2009 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to Dr. Carol Raish, USDA Forest Service, Rocky Mountain Research Station, 333 Broadway, SE., Suite 115, Albuquerque, New Mexico 87102–3497.

Comments also may be submitted via facsimile to 505–724–3688 or by e-mail to: *craish@fs.fed.us.* The public may inspect comments received at USDA Forest Service, Rocky Mountain Research Station, 333 Broadway, SE., Albuquerque, New Mexico 87102–3497, during normal business hours. Visitors are encouraged to call ahead to 505–

724–3666 to facilitate entry to the building.

FOR FURTHER INFORMATION CONTACT: Dr. Carol Raish, 505–724–3666. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 twenty-four hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Title: Evaluating Community Knowledge, Beliefs, Attitudes and Preferences Concerning Fire and Fuels Management in Southwestern Forest, Woodland and Grassland Ecosystems.

OMB Number: 0596–0200.

Expiration Date of Approval: July 31, 2009.

Type of Request: Extension with revision.

Abstract: Increasingly, experts recommend fire as a fuels reduction tool on both public and private lands, though controversy often inhibits its use. Insufficient communication and understanding between land managers and the public frequently contribute to these difficulties. In order to design and implement successful, socially acceptable fire and fuels management policies and programs, managers need a better understanding of the public's knowledge, attitudes, and practices concerning wildfire. Phase I of this project collected information from members of the public residing in Arizona and New Mexico.

Phase I collected information using a mail survey of households located in Arizona and New Mexico. The response rate to the mailed questionnaires (n=2000) was 25.1 percent. The type of information collected included:

(1) Attitudes and preferences toward wildfire and fire management alternatives for public lands,

(2) Risk reduction behaviors that homeowners and individuals have undertaken to minimize wildfire risk, and

(3) Sources of information regarding wildfires and wildfire analyzed by researchers at the Rocky Mountain Research Station and cooperators.

Proponents now wish to renew this information collection and implement Phase II of the project, which will use the same questionnaire to collect data from regional experts in fire risk behavior and mitigation actions. The plan is to interview 50 experts individually or in small focus groups (5–7 participants). Interviews will last one hour per individual and two hours per focus group. Interviewers will emphasize sections A through E of the approved survey instrument of this information collection. These sections focus on wildfire risk-management options for reducing risks to homeowners, the effectiveness of each option, the responsibilities of the various parties for risk reduction actions, and the perceived knowledge of the homeowners regarding wildfire risks.

Estimates are that 60 percent of respondents will consist of State fire representatives from Arizona and New Mexico; local government fire officials at the county and city levels charged with implementing fire mitigation programs; and individual members of the private sector considered wildfire risk-mitigation experts. The remaining respondents (40 percent) will be Federal employees considered experts in this field: U.S. Forest Service in Region 3 (30 percent), and Bureau of Land Management and Bureau of Indian Affairs (10 percent). As the Paperwork Reduction Act does not regulate responses provided by Federal employees, this information collection request is for the portion of the study affecting non-Federal entities (State, county, and city officials, and individuals).

Researchers will compare results of the expert interviews with results of the previously conducted qualitative and quantitative interviews (Phase I). In addition, information from Phase II will assist in development of a more detailed survey instrument for future research. Future research will help statistically verify that there is or is not a statistically significant variation between the experts in wildfire management and homeowners in Region 3. Prior to implementing such a survey, proponents would return to OMB for approval.

This information collection provides information to decision makers, enhancing understanding of the similarities and differences between experts and the public concerning wildfire mitigation options and preferences in Arizona and New Mexico. This information will assist Forest Service land managers in their efforts to interact more effectively with the public and manage the risks associated with wildland fire. If managers do not have adequate information concerning public attitudes and actions concerning wildfire risk reduction behaviors (for example, creating defensible space on their properties by clearing brush and trees from a 30-foot area around the residence), then managers may not make well-informed decisions concerning appropriate communication techniques and needed public education information.

Estimate of Annual Burden: 2 hours.

Type of Respondents: Individuals.

Estimated Annual Number of Respondents: 30.

Estimated Annual Number of Responses per Respondent: One.

Estimated Total Annual Burden on Respondents: 60 hours.

Comment Is Invited

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the agency, including whether the information will have practical or scientific utility; (2) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

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

Dated: November 17, 2008.

Ann Bartuska,

Deputy Chief, Research and Development.

[FR Doc. E8–27587 Filed 11–19–08; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Announcement of Grant Application Deadlines and Funding Levels

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of solicitation of applications.

SUMMARY: USDA Rural Development administers loan and grant programs through the Rural Utilities Service. USDA Rural Development announces the Public Television Digital Transition Grant Program application window for fiscal year (FY) 2009. The FY 2008 funding for the Public Television Station Digital Transition Grant Program was approximately $5 million. This notice is being issued prior to passage of a final appropriations bill, which may or may not provide funding for this program, to allow time to submit

proposals and give the Agency adequate time to process applications within the current fiscal year. A Notice of Funding Availability will be published announcing the funding levels, if any, for Public Television Station Digital Transition grants once an appropriations bill has been enacted. Expenses incurred in developing applications will be at the applicant's risk.

DATES: You may submit completed applications for grants on paper or electronically according to the following deadlines:

- Paper copies must carry proof of shipping no later than February 18, 2009 to be eligible for FY 2009 grant funding. Late applications are not eligible for FY 2009 grant funding.
- Electronic copies must be received by February 18, 2009 to be eligible for FY 2009 grant funding. Late applications are not eligible for FY 2009 grant funding.

ADDRESSES: You may obtain the application guide and materials for the Public Television Station Digital Transition Grant Program via the Internet at the following Web site: *http://www.usda.gov/rus/telecom/.* You may also request the application guide and materials from USDA Rural Development by contacting the appropriate individual listed in section VII of the **SUPPLEMENTARY INFORMATION** section of this notice.

- Submit completed paper applications for grants to the Telecommunications Program, USDA Rural Development, 1400 Independence Ave., SW., Room 2844, STOP 1550, Washington, DC 20250–1550. Applications should be marked ''Attention: Director, Advanced Services Division.''
- Submit electronic grant applications to Grants.gov at the following Web address: *http://www.grants.gov/* (Grants.gov), and follow the instructions you find on that Web site.

FOR FURTHER INFORMATION CONTACT: Gary B. Allan, Chief, Universal Services Branch, Advanced Services Division, Telecommunications Program, USDA Rural Development, telephone: (202) 690–4493, fax: (202) 720–1051.

SUPPLEMENTARY INFORMATION:

Overview

Federal Agency: Rural Utilities Service (RUS).

Funding Opportunity Title: Public Television Station Digital Transition Grant Program.

Announcement Type: Initial announcement.

Catalog of Federal Domestic Assistance (CFDA) Number: 10.861.

Dates: You may submit completed applications for grants on paper or electronically according to the following deadlines:

- Paper copies must carry proof of shipping no later than February 18, 2009, to be eligible for FY 2009 grant funding. Late applications are not eligible for FY 2009 grant funding.
- Electronic copies must be received by February 18, 2009, to be eligible for FY 2009 grant funding. Late applications are not eligible for FY 2009 grant funding.

Items in Supplementary Information

I. *Funding Opportunity:* Brief introduction to the Public Television Station Digital Transition Grant Program.

II. *Award Information:* Maximum amounts.

III. *Eligibility Information:* Who is eligible, what kinds of projects are eligible, what criteria determine basic eligibility.

IV. *Application and Submission Information:* Where to get application materials, what constitutes a completed application, how and where to submit applications, deadlines, items that are eligible.

V. *Application Review Information:* Considerations and preferences, scoring criteria, review standards, selection information.

VI. *Award Administration Information:* Award notice information, award recipient reporting requirements.

VII. *Agency Contacts:* Web, phone, fax, e-mail, contact name.

I. Funding Opportunity

As part of the nation's transition to digital television, the Federal Communications Commission (FCC) requires all television broadcasters to begin broadcasting using digital signals, and to cease analog broadcasting, by February 17, 2009. While most urban public television stations have successfully transitioned to digital, rural public television stations are still lagging behind their urban counterparts. For rural households the digital transition could bring the end of over-the-air public television service. These rural households are the focus of the USDA Rural Development Public Television Station Digital Transition Grant Program.

Most applications to the Public Television Station Digital Transition Grant Program have sought assistance towards the goal of replicating analog coverage areas through transmitter and translator transitions. The first priority has been to initiate digital broadcasting from their main transmitters. As many stations have transitioned their transmitters, the focus has shifted to power upgrades and translators, as well as digital program production equipment and multicasting and datacasting equipment. In FY 2008 awards were made for a transmitter transition, transmitter power maximization, translators, as well as master control and production equipment. When compared with the first few years of the program, as the digital transition progresses, more applications were received for translators and master control and production equipment, than for transmitters. Some stations may not achieve full analog parity in program management and creation until after the February 2009 deadline. Continuation of reliable public television service to all current patrons understandably is still the focus for many broadcasters.

It is important for public television stations to be able to tailor their programs and services (e.g., education services, public health, homeland security, and local news) to the needs of their rural constituents. If public television programming is lost, many school systems may be left without educational programming needed for curriculum compliance.

This notice has been formatted to conform to a policy directive issued by the Office of Federal Financial Management (OFFM) of the Office of Management and Budget (OMB), published in the **Federal Register** on June 23, 2003 (68 FR 37370). This Notice does not change the Public Television Station Digital Transition Grant Program regulation (7 CFR 1740).

II. Award Information

A. Available Funds

1. *General.* The Administrator will determine in a future Notice of Funding Availability the amounts that are available for grants in FY 2009 under 7 CFR 1740.1.

2. *Grants.*

a. The amount available for grants for FY 2009 will be announced in a future Notice of Funding Availability. Under 7 CFR 1740.2, the maximum amount for grants under this program is $750,000 per public television station per year.

b. Assistance instrument: Grant documents appropriate to the project will be executed with successful applicants prior to any advance of funds.

B. Non-Renewal of Public Television Station Digital Transition Grants

Public Television Station Digital Transition grants cannot be renewed. Award documents specify the term of each award, and USDA Rural Development, in its sole discretion, may approve one extension of the expiration date, provided that the Grantee notify USDA Rural Development, in writing at least ten days prior to the expiration date, of the reasons and need for an extension, together with a suggested, revised expiration date.

III. Eligibility Information

A. Who is eligible for grants? (See 7 CFR 1740.3.)

1. Public television stations which serve rural areas are eligible for Public Television Station Digital Transition Grants, regardless of whether urban areas are additionally served. A public television station is a noncommercial educational television broadcast station that is qualified for Community Service Grants by the Corporation for Public Broadcasting under section 396(k) of the Communications Act of 1934.

2. Individuals are not eligible for Public Television Station Digital Transition Grant Program financial assistance directly.

B. What are the basic eligibility requirements for a project?

1. Grants shall be made to perform digital transitions of television broadcasting serving rural areas. Grant funds may be used to acquire, lease, and/or install facilities and software necessary to the digital transition. Specific purposes include:

a. Digital transmitters, translators, and repeaters, including all facilities required to initiate DTV broadcasting. All broadcast facilities acquired with grant funds shall be capable of delivering digital TV (DTV) programming and high-definition television (HDTV) programming, at both the interim and final channel and power authorizations. There is no limit to the number of transmitters or translators that may be included in an application;

b. Power upgrades of existing DTV transmitter equipment, including replacement of existing low-power digital transmitters with digital transmitters capable of delivering the final authorized power level;

c. Studio-to-transmitter links;

d. Equipment to allow local control over digital content and programming, including master control equipment;

e. Digital program production equipment, including cameras, editing, mixing and storage equipment;

f. Multicasting and datacasting equipment;

g. Cost of the lease of facilities, if any, for up to three years; and,

h. Associated engineering and environmental studies necessary to implementation.

2. Matching contributions: There is no requirement for matching funds in this program (see 7 CFR 1740.5).

3. To be eligible for a grant, the Project must not do any of the following (see 7 CFR 1740.7):

a. Include funding for ongoing operations or for facilities that will not be owned by the applicant, except for leased facilities as provided above;

b. Include costs of salaries, wages, and employee benefits of public television station personnel unless they are for construction or installation of eligible facilities;

c. Have been funded by any other source; or

d. Include items bought or built prior to the application deadline specified in this Notice of Solicitation of Applications.

C. See paragraph IV.B of this notice for a discussion of the items that comprise a completed application. You may also refer to 7 CFR 1740.9 for completed grant application items.

IV. Application and Submission Information

A. Where to get application information. The application guide, copies of necessary forms and samples, and the Public Television Station Digital Transition Grant Program regulation are available from these sources:

1. The Internet: *http://www.usda.gov/rus/telecom/*, or *http://www.grants.gov.*

2. The USDA Rural Development Advanced Services Division, for paper copies of these materials: (202) 690–4493.

B. What constitutes a completed application?

1. Detailed information on each item required can be found in the Public Television Station Digital Transition Grant Program regulation and application guide. Applicants are strongly encouraged to read and utilize the application guide in addition to the regulation. This Notice does not change the requirements for a completed application specified in the program regulation. The program regulation and application guide provide specific guidance on each of the items listed and the application guide provides all necessary forms and sample worksheets.

2. A completed application must include the following documentation, studies, reports and information in form satisfactory to USDA Rural Development. Applications should be prepared in conformance with the provisions in 7 CFR part 1740, subpart A, and applicable USDA regulations including 7 CFR parts 3015, 3016, and 3019. Applicants must use the application guide for this program containing instructions and all necessary forms, as well as other important information, in preparing their application. Completed applications must include the following:

a. An application for federal assistance, Standard Form 424.

b. An executive summary, not to exceed two pages, describing the public television station, its service area and offerings, its current digital transition status, and the proposed project.

c. Evidence of the applicant's eligibility to apply under this Notice, proving that the applicant is a Public Television Station as defined in this Notice, and that it is required by the FCC to perform the digital transition.

d. A spreadsheet showing the total project cost, with a breakdown of items sufficient to enable USDA Rural Development to determine individual item eligibility.

e. A coverage contour map showing the digital television coverage area of the application project. This map must show the counties (or county) comprising the Core Coverage Area by shading and by name. Partial counties included in the applicant's Core Coverage Area must be identified as partial and must contain an attachment with the applicant's estimate of the percentage that its coverage contour comprises of the total area of the county (total area is available from American Factfinder, referenced above). If the application is for a translator, the coverage area may be estimated by the applicant through computer modeling or some other reasonable method, and this estimate is subject to acceptance by USDA Rural Development.

f. The applicant's own calculation of its Rurality score, supported by a worksheet showing the population of its Core Coverage Area, and the urban and rural populations within the Core Coverage Area. The data source for the urban and rural components of that population must be identified. If the application includes computations made by a consultant or other organization outside the public television station, the application shall state the details of that collaboration.

g. The applicant's own calculation of its Economic Need score, supported by a worksheet showing the National School Lunch Program eligibility levels for all school districts within the Core

Coverage Area and averaging these eligibility percentages. The application must include a statement from the state or local organization that administers the NSLP program certifying the school district scores used in the computations.

h. If applicable, a presentation not to exceed five pages demonstrating the Critical Need for the project.

i. Evidence that the FCC has authorized the initiation of digital broadcasting at the project sites. In the event that an FCC construction permit has not been issued for one or more sites, USDA Rural Development may include those sites in the grant, and make advance of funds for that site conditional upon the submission of a construction permit.

j. Compliance with other Federal statutes. The applicant must provide evidence or certification that it is in compliance with all applicable Federal statutes and regulations, including, but not limited to the following:

(1) Executive Order (E.O.) 11246, Equal Employment Opportunity, as amended by E.O. 11375 and as supplemented by regulations contained in 41 CFR part 60;

(2) Architectural barriers;

(3) Flood hazard area precautions;

(4) Assistance and Real Property Acquisition Policies Act of 1970;

(5) Drug-Free Workplace Act of 1998 (41 U.S.C. 701);

(6) E.O.s 12549 and 12689, Debarment and Suspension; and

(7) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352).

k. Environmental impact and historic preservation. The applicant must provide details of the digital transition's impact on the environment and historic preservation, and comply with 7 CFR Part 1794, which contains the Agency's policies and procedures for implementing a variety of federal statutes, regulations, and executive orders generally pertaining to the protection of the quality of the human environment. This must be contained in a separate section entitled ''Environmental Impact of the Digital Transition,'' and must include the Environmental Questionnaire/Certification, available from USDA Rural Development, describing the impact of its digital transition. Submission of the Environmental Questionnaire/Certification alone does not constitute compliance with 7 CFR part 1794.

3. DUNS Number. As required by the OMB, all applicants for grants must now supply a Dun and Bradstreet Data Universal Numbering System (DUNS) number when applying. The Standard Form 424 (SF–424) contains a field for you to use when supplying your DUNS number. Obtaining a DUNS number costs nothing and requires a short telephone call to Dun and Bradstreet. Please see the Public Television Station Digital Transmitter Grant Program Web site or Grants.gov for more information on how to obtain a DUNS number or how to verify your organization's number.

C. How many copies of an application are required?

1. Applications submitted on paper: Submit the original application and two (2) copies to USDA Rural Development.

2. Electronically submitted applications: The additional paper copies for USDA Rural Development are not necessary if you submit the application electronically through Grants.gov.

D. How and Where To Submit an Application

Grant applications may be submitted on paper or electronically.

1. Submitting Applications on Paper

a. Address paper applications for grants to the Telecommunications Program, USDA Rural Development, 1400 Independence Ave., SW., Room 2844, STOP 1550, Washington, DC 20250–1550. Applications should be marked ''Attention: Director, Advanced Services Division.''

b. Paper applications must show proof of mailing or shipping consisting of one of the following:

(i) A legibly dated postmark applied by the U.S. Postal Service;

(ii) A legible mail receipt with the date of mailing stamped by the USPS; or

(iii) A dated shipping label, invoice, or receipt from a commercial carrier.

c. Non-USPS-applied postage dating, i.e. dated postage meter stamps, do not constitute proof of the date of mailing.

d. Due to screening procedures at the Department of Agriculture, packages arriving via the USPS are irradiated, which can damage the contents. USDA Rural Development encourages applicants to consider the impact of this procedure in selecting their application delivery method.

2. Electronically Submitted Applications

a. Applications will not be accepted via facsimile machine transmission or electronic mail.

b. Electronic applications for grants will be accepted if submitted through the Federal government's Grants.gov Web site at *http://www.grants.gov.*

c. How to use Grants.gov:

(i) Navigate your Web browser to *http://www.grants.gov.*

(ii) Follow the instructions on that Web site to find grant information.

(iii) Download a copy of the application package.

(iv) Complete the package off-line.

(v) Upload and submit the application via the Grants.gov Web site.

d. Grants.gov contains full instructions on all required passwords, credentialing and software.

e. USDA Rural Development encourages applicants who wish to apply through Grants.gov to submit their applications in advance of the deadline. Difficulties encountered by applicants filing through Grants.gov will not justify filing deadline extensions.

f. If a system problem occurs or you have technical difficulties with an electronic application, please use the customer support resources available at the Grants.gov Web site.

E. Deadlines

1. Paper applications must be postmarked and mailed, shipped, or sent overnight no later than February 18, 2009 to be eligible for FY 2009 grant funding. Late applications are not eligible for FY 2009 grant funding.

2. Electronic grant applications must be received by February 18, 2009 to be eligible for FY 2009 funding. Late applications are not eligible for FY 2009 grant funding.

V. Application Review Information

A. Criteria

1. Grant applications are scored competitively and subject to the criteria listed below.

2. Grant application scoring criteria are detailed in 7 CFR 1740.8. There are 100 points available, broken down as follows:

a. The Rurality of the Project (up to 50 points);

b. The Economic Need of the Project's Service Area (up to 25 points); and

c. The Critical Need for the project, and of the applicant, including the benefits derived from the proposed service (up to 25 points).

B. Review Standards

1. All applications for grants must be delivered to USDA Rural Development at the address and by the date specified in this notice to be eligible for funding. USDA Rural Development will review each application for conformance with the provisions of this part. USDA Rural Development may contact the applicant for additional information or clarification.

2. Incomplete applications as of the deadline for submission will not be considered. If an application is

determined to be incomplete, the applicant will be notified in writing and the application will be returned with no further action.

3. Applications conforming with this part will be evaluated competitively by a panel of USDA Rural Development employees selected by the Utilities Programs Administrator, and will be awarded points as described in the scoring criteria in 7 CFR 1740.8. Applications will be ranked and grants awarded in rank order until all grant funds are expended.

4. Regardless of the score an application receives, if USDA Rural Development determines that the Project is technically or financially infeasible, USDA Rural Development will notify the applicant, in writing, and the application will be returned with no further action.

C. Scoring Guidelines

1. The applicant's self scores in Rurality and Economic Need will be verified and, if necessary, corrected by USDA Rural Development.

2. The Critical Need score will be determined by USDA Rural Development based on information presented in the application. This score is intended to capture from the rural public's standpoint the necessity and usefulness of the proposed project. This scoring category will also recognize that some transition purchases are more essential than others, so that first time transmitter transitions and power upgrades of previously installed transmitters will receive scoring advantages. Master control equipment is very important to a station's operation and first time master control equipment will also get a high priority. Local production equipment can be a high priority especially if it produces an area's only local news or if the station has been historically active in producing local programming. Translators always deliver a great deal of rural benefit and a full digital conversion of a translator will receive recognition in the project's critical need score.

VI. Award Administration Information

A. Award Notices

USDA Rural Development recognizes that each funded project is unique, and therefore may attach conditions to different projects' award documents. The Agency generally notifies applicants whose projects are selected for awards by faxing an award letter. USDA Rural Development follows the award letter with a grant agreement that contains all the terms and conditions for the grant. An applicant must execute and return the grant agreement, accompanied by any additional items required by the grant agreement.

B. Administrative and National Policy Requirements

The items listed in the program regulation at 7 CFR 1740.9(j) implement the appropriate administrative and national policy requirements.

C. Performance Reporting

All recipients of Public Television Station Digital Transition Grant Program financial assistance must provide annual performance activity reports to USDA Rural Development until the project is complete and the funds are expended. A final performance report is also required; the final report may serve as the last annual report. The final report must include an evaluation of the success of the project.

VII. Agency Contacts

A. *Web site: http://www.usda.gov/rus/.* The Web site maintains up-to-date resources and contact information for the Public Television Station Digital Transition Grant Program.

B. *Phone:* 202–690–4493.

C. *Fax:* 202–720–1051.

D. *Main point of contact:* Gary B. Allan, Chief, Universal Services Branch, Advanced Services Division, Telecommunications Program, USDA Rural Development, telephone: (202) 690–4493, fax: (202) 720–1051.

October 28, 2008.

James M. Andrew,

Administrator, Rural Utilities Service.

[FR Doc. E8–27608 Filed 11–19–08; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Household Water Well System Grant Program Announcement of Application Deadlines and Funding

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of funding availability and solicitation of applications.

SUMMARY: USDA Rural Development administers rural utilities programs through the Rural Utilities Service. USDA Rural Development announces the availability of grants from the Household Water Well System (HWWS) Grant Program for fiscal year (FY) 2009, to be competitively awarded. This notice is being issued prior to passage of a final appropriations bill, which may or may not provide for funding this program, to allow applicants sufficient time to leverage financing and submit applications. USDA Rural Development will publish a subsequent notice identifying the amount received in the appropriations, if any. The HWWS Grant Program is authorized under Section 6010 of the Food Conservation and Energy Act of 2008 (The Act), Public Law 110–234. The CONACT authorizes USDA Rural Development to make grants to qualified private non-profit organizations to establish lending programs for household water wells. The non-profit organizations will use the grants to make loans to individual homeowners to construct or upgrade a household water well system for an existing home. The organizations must contribute an amount equal to at least 10 percent of the grant request to capitalize the loan fund. Applications may be submitted in paper or electronic format. The HWWS Grant Program regulations are contained in 7 CFR part 1776.

DATES: The deadline for completed applications for a HWWS grant is May 31, 2009. Applications in either paper or electronic format must be postmarked or time-stamped electronically on or before the deadline. Late applications will be ineligible for grant consideration.

ADDRESSES: Submit electronic grant applications through *http://www.grants.gov* (Grants.gov), following the instructions on that Web site. Submit completed paper applications to the U.S. Department of Agriculture, USDA Rural Development Utilities Programs, Mail Stop #1570, Room 2233–S, 1400 Independence Ave., SW., Washington, DC 20250–1570. Applications should be marked ''Attention: Water and Environmental Programs.''

Application guides and materials for the HWWS Grant Program may be obtained electronically through *http://www.usda.gov/rus/water/well.htm*. Call (202) 720–9589 to request paper copies of application guides and materials from the Water and Environmental Programs staff.

FOR FURTHER INFORMATION CONTACT: Cheryl Francis, Loan Specialist, U.S. Department of Agriculture, Rural Development Programs, Water and Environmental Programs, telephone: (202) 720–1937, fax: (202) 690–0649, e-mail: *cheryl.francis@wdc.usda.gov*.

SUPPLEMENTARY INFORMATION:

Overview

Federal Agency: Rural Utilities Service (RUS).

Funding Opportunity Title: Household Water Well System Grant Program.

Announcement Type: Grant—Initial.

Catalog of Federal Domestic Assistance (CFDA) Number: 10.862.

Due Date for Applications: May 31, 2009.

Items in Supplementary Information

I. Funding Opportunity: Description of the Household Water Well System Grant Program.

II. Award Information: Available funds.

III. Eligibility Information: Who is eligible, what kinds of projects are eligible, what criteria determine basic eligibility.

IV. Application and Submission Information: Where to get application materials, what constitutes a completed application, how and where to submit applications, deadlines, items that are eligible.

V. Application Review Information: Considerations and preferences, scoring criteria, review standards, selection information.

VI. Award Administration Information: Award notice information, award recipient reporting requirements.

VII. Agency Contacts: Web, phone, fax, e-mail, contact name.

I. Funding Opportunity

A. Program Description

The Household Water Well System (HWWS) Grant Program has been established to help individuals with low to moderate incomes finance the costs of household water wells that they own or will own. The HWWS Grant Program is authorized under Section 306E of the Consolidated Farm and Rural Development Act (CONACT), 7 U.S.C. 1926e, as amended by Section 6010 of the Food, Conservation and Energy Act of 2008 (2008 Farm Bill, Pub. L. 110–234. The CONACT authorizes the USDA Rural Development through the Rural Utilities Service to make grants to qualified private non-profit organizations to establish lending programs for household water wells.

As the grant recipients, non-profit organizations will receive HWWS grants to establish lending programs that will provide water well loans to individuals. The individuals, as loan recipients, may use the loans to construct, refurbish, and service their household well systems. A loan may not exceed $11,000 and will have a term up to 20 years at a one percent annual interest rate.

B. Background

The USDA Rural Development supports the sound development of rural communities and the growth of our economy without endangering the environment. The USDA Rural Development provides financial and technical assistance to help communities bring safe drinking water and sanitary, environmentally sound waste disposal facilities to rural Americans in greatest need.

Central water systems may not be the only or best solution to drinking water problems. Distance or physical barriers make public central water systems expensive in remote areas. A significant number of geographically isolated households without water service might require individual wells rather than connections to new or existing community systems. The goal of the USDA Rural Development is not only to make funds available to those communities most in need of potable water but also to ensure that facilities used to deliver drinking water are safe and affordable. There is a role for private wells in reaching this goal.

C. Purpose

The purpose of the HWWS Grant Program is to provide funds to non-profit organizations to assist them in establishing loan programs from which individuals may borrow money for household water well systems. Applicants must show that the project will provide technical and financial assistance to eligible individuals to remedy household well problems. Priority will be given to the non-profit organizations that:

1. Demonstrate experience in promoting safe, productive uses of household water wells and ground water.

2. Demonstrate significant management experience in making and servicing loans to individuals.

3. Contribute more than 50 percent of the grant amount in cash or other liquid assets in order to capitalize the revolving loan fund.

4. Propose to serve rural areas containing the smallest communities with a high percentage of low-income individuals eligible for loans.

5. Target areas which lack running water, flush toilets, and modern sewage disposal systems.

Due to the limited amount of funds available under the HWWS Program, three or four applications may be funded from FY 2009 funds. Previously funded grant recipients must apply for a different target area to be considered for funding under this announcement.

II. Award Information

Funding Instrument Type: Grant.

Anticipated Total Priority Area Funding: Undetermined at this time.

Anticipated Number of Awards: 3 or 4.

Length of Project Periods: 12-month project.

Assistance Instrument: Grant Agreement with successful applicants before any grant funds are disbursed.

III. Eligibility Information

A. Who Is Eligible for Grants?

1. An organization is eligible to receive a Household Water Well grant if it:

a. Is a private, non-profit organization that has tax-exempt status from the United States Internal Revenue Service (IRS). Faith-based organizations are eligible and encouraged to apply for this program.

b. Is legally established and located within one of the following:

(1) A state within the United States

(2) The District of Columbia

(3) The Commonwealth of Puerto Rico

(4) A United States territory

c. Has the legal capacity and authority to carry out the grant purpose;

d. Has sufficient expertise and experience in lending activities;

e. Has sufficient expertise and experience in promoting the safe and productive use of individually-owned household water well systems and ground water;

f. Has no delinquent debt to the Federal Government or no outstanding judgments to repay a Federal debt;

g. Demonstrates that it possesses the financial, technical, and managerial capability to comply with Federal and State laws and requirements.

2. An individual is ineligible to receive a Household Water Well grant. An individual may receive only a loan.

B. What are the basic eligibility requirements for a project?

1. *Project Eligibility.* To be eligible for a grant, the project must:

a. Be a revolving loan fund created to provide loans to eligible individuals to construct, refurbish, and service individually-owned household water well systems (see 7 CFR 1776.11 and 1776.12). Loans may not be provided for home sewer or septic system projects.

b. Be established and maintained by a private, non-profit organization.

c. Be located in a rural area. Rural area is defined as locations other than cities or towns of more than 50,000 people and the adjacent urbanized area of such towns and cities.

2. *Required Matching Contributions.* Grant applicants must provide written evidence of a matching contribution of

at least 10 percent from sources other than the proceeds of a HWWS grant. In-kind contributions will not be considered for the matching requirement. Please see 7 CFR 1776.9 for the requirement.

3. *Other—Requirements*

a. DUNS Number. An organization must have a Dun and Bradstreet Data Universal Numbering System (DUNS) number. A DUNS number will be required whether an applicant is submitting a paper application or an electronic application through *http://www.grants.gov*. To verify that your organization has a DUNS number or to receive one at no cost, call the dedicated toll-free request line at 1–866–705–5711 or request one on-line at *http://www.dnb.com*.

b. Eligibility for Loans. Individuals are not eligible for grants but are eligible for loans. To be eligible for a loan, an individual must:

(1) Be a member of a household of which the combined household income of all members does not exceed 100 percent of the median non-metropolitan household income for the State or territory in which the individual resides. Household income is the total income from all sources received by each adult household member for the most recent 12-month period for which the information is available. It does not include income earned or received by dependent children under 18 years old or other benefits that are excluded by Federal law. The non-metropolitan household income must be based on the most recent decennial census of the United States.

USDA Rural Development publishes a list of income exclusions in 7 CFR 3550.54(b). Also, a list of federally Mandated Exclusions from Income, published by the Department of Housing and Urban Development may be found in the **Federal Register**, April 20, 2001 at 66 FR 20318.

(2) Own and occupy the home being improved with the proceeds of the Household Water Well loan or be purchasing the home to occupy under a legally enforceable land purchase contract which is not in default by either the seller or the purchaser.

(3) Own the home in a rural area.

(4) Not use the loan for a water well system associated with the construction of a new dwelling.

(5) Not use the loan to substitute a well for water service available from collective water systems. (For example, a loan may not be used to restore an old well abandoned when a dwelling was connected to a water district's water line.)

(6) Not be suspended or debarred from participation in Federal programs.

IV. Application and Submission Information

A. Where to Get Application Information

The application guide, copies of necessary forms and samples, and the HWWS Grant regulation are available from these sources:

1. On-line for electronic copies: *http://www.grants.gov* or *http://www.usda.gov/rus/water/well.htm*, and

2. USDA Rural Development for paper copies. USDA Rural Development Utilities Programs, Water Programs Division, Room 2234 South, Stop 1570, 1400 Independence Avenue, SW., Washington, DC 20250–1570, Telephone: (202) 720–9589; Fax (202) 690–0649.

B. Content and Form of Application Submission

1. Rules and Guidelines

a. Detailed information on each item required can be found in the Household Water Well System Grant Program regulation (7 CFR part 1776) and the Household Water Well System Grant Application Guide. Applicants are strongly encouraged to read and apply both the regulation and the application guide. This Notice does not change the requirements for a completed application for any form of HWWS financial assistance specified in the regulation. The regulation and application guide provide specific guidance on each of the items listed.

b. Applications should be prepared in conformance with the provisions in 7 CFR part 1776, subpart B, and applicable USDA regulations including 7 CFR parts 3015 and 3019. Applicants should use the Household Water Well System Grant Application Guide which contains instructions and other important information in preparing their application. Completed applications must include the items found in the checklist in the next paragraph.

2. Checklist of Items in Completed Application Packages

The forms in items 1 through 6 must be completed and signed where appropriate by an official of your organization who has authority to obligate the organization legally. The forms may be found on-line at the USDA Rural Development Web site: *http://www.usda.gov/rus/water/wwforms.htm*. See section V, ''Application Review Information,'' for instructions and guidelines on preparing Items 7 through 13.

Application Items

1. SF–424, ''Application for Federal Assistance.''

2. SF–424A, ''Budget Information—Non-Construction Programs.''

3. SF–424B, ''Assurances—Non-Construction Programs.''

4. SF–LLL, ''Disclosure of Lobbying Activity.''

5. Form RD 400–1, ''Equal Opportunity Agreement.''

6. Form RD 400–4, ''Assurance Agreement (Under Title VI, Civil Rights Act of 1964).''

7. Project Proposal. Project Summary. Needs Assessment. Project Goals and Objectives. Project Narrative.

8. Work Plan.

9. Budget and Budget Justification.

10. Evidence of Legal Authority and Existence.

11. Documentation of non-profit status and IRS Tax Exempt Status.

12. List of Directors and Officers.

13. Financial information and sustainability (narrative).

14. Assurances and Certifications of Compliance with Other Federal Statutes.

3. Compliance with Other Federal Statutes. The applicant must provide evidence of compliance with other Federal statutes and regulations, including, but not limited to the following:

a. 7 CFR part 15, subpart A—Nondiscrimination in Federally Assisted Programs of the Department of Agriculture—Effectuation of Title VI of the Civil Rights Act of 1964.

b. 7 CFR part 3015—Uniform Federal Assistance Regulations.

c. 7 CFR part 3017—Governmentwide Debarment and Suspension (Non-procurement).

d. 7 CFR part 3018—New Restrictions on Lobbying.

e. 7 CFR part 3019—Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals, and Non-profit Organizations.

f. 7 CFR part 3021—Governmentwide Requirements for Drug-Free Workplace (Financial Assistance).

g. Executive Order 13166, ''Improving Access to Services for Persons with Limited English Proficiency.'' For information on limited English proficiency and agency-specific guidance, go to *http://www.LEP.gov.*

h. Federal Obligation Certification on Delinquent Debt.

C. How Many Copies of an Application Are Required?

1. Applications Submitted on Paper. Submit one signed original and two

additional copies. The original and each of the two copies must include all required forms, certifications, assurances, and appendices, be signed by an authorized representative, and have original signatures. Do not include organizational brochures or promotional materials.

2. Applications Submitted Electronically. The additional paper copies are unnecessary if the application is submitted electronically through *http://www.grants.gov*.

D. How and Where To Submit an Application

1. Submitting Paper Applications

a. For paper applications mail or ensure delivery of an original paper application (no stamped, photocopied, or initialed signatures) and two copies by the deadline date to: USDA Rural Development Utilities Programs, Water Programs Division, Room 2234 South, Stop 1570, 1400 Independence Avenue, SW., Washington, DC 20250–1570.

b. Applications must show proof of mailing or shipping by one of the following:

(1) A legibly dated U.S. Postal Service (USPS) postmark;

(2) A legible mail receipt with the date of mailing stamped by the USPS; or

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

c. If a deadline date falls on a weekend, it will be extended to the following Monday. If the date falls on a Federal holiday, it will be extended to the next business day.

d. Due to screening procedures at the Department of Agriculture, packages arriving via the USPS are irradiated, which can damage the contents. USDA Rural Development encourages applicants to consider the impact of this procedure in selecting an application delivery method.

2. Submitting Electronic Applications

a. Applications will not be accepted via facsimile machine transmission or electronic mail.

b. Electronic applications for grants will be accepted if submitted through Grants.gov at *http://www.grants.gov.*

c. Applicants who apply through Grants.gov should submit their applications before the deadline.

d. Grants.gov contains full instructions on all required passwords, credentialing, and software. Follow the instructions at Grants.gov for registering and submitting an electronic application. USDA Rural Development may request original signatures on electronically submitted documents later.

e. To use Grants.gov:

(1) Follow the instructions on the Web site to find grant information.

(2) Download a copy of an application package.

(3) Complete the package off-line.

(4) Upload and submit the application via the Grants.gov Web site.

f. You must be registered with Grants.gov before you can submit a grant application.

(1)You will need a DUNS number to access or register at any of the services. In addition to the DUNS number required of all grant applicants, your organization must be listed in the Central Contractor Registry (CCR). If you have not used Grants.gov before, you will need to register with the CCR and the Credential Provider. Setting up a CCR listing (a one-time procedure with annual updates) takes up to five business days. USDA Rural Development recommends that you obtain your organization's DUNS number and CCR listing well in advance of the deadline specified in this notice.

(2) The CCR registers your organization, housing your organizational information and allowing Grants.gov to use it to verify your identity. You may register for the CCR by calling the CCR Assistance Center at 1–888–227–2423 or you may register online at *http://www.ccr.gov*.

(3) The Credential Provider gives you or your representative a username and password, as part of the Federal Government's e-Authentication to ensure a secure transaction. You will need the username and password when you register with Grants.gov or use Grants.gov to submit your application. You must register with the Central Provider through Grants.gov at *https://apply.grants.gov/OrcRegister.*

(4) If a system problem or technical difficulty occurs with an electronic application, please use the customer support resources available at the Grants.gov Web site.

E. Deadlines

The deadline for paper and electronic submissions is May 31, 2009. Paper applications must be postmarked and mailed, shipped, or sent overnight no later than the closing date to be considered for FY 2009 grant funding. Electronic applications must have an electronic date and time stamp by midnight of May 31, 2009, to be considered on time. USDA Rural Development will not accept applications by fax or e-mail. Applications that do not meet the criteria above are considered late applications and will not be considered. USDA Rural Development will notify each late applicant that its application will not be considered.

F. Funding Restrictions

1. Eligible Grant Purposes

a. Grant funds must be used to establish and maintain a revolving loan fund to provide loans to eligible individuals for household water well systems.

b. Individuals may use the loans to construct, refurbish, rehabilitate, or replace household water well systems up to the point of entry of a home. Point of entry for the well system is the junction where water enters into a home water delivery system after being pumped from a well.

c. Grant funds may be used to pay administrative expenses associated with providing Household Water Well loans.

2. Ineligible Grant Purposes

a. Administrative expenses incurred in any calendar year that exceed 10 percent of the HWWS loans made during the same period do not qualify for reimbursement.

b. Administrative expenses incurred before USDA Rural Development executes a grant agreement with the recipient do not qualify for reimbursement.

c. Delinquent debt owed to the Federal Government.

d. Grant funds may not be used to provide loans for household sewer or septic systems.

e. Household Water Well loans may not be used to pay the costs of water well systems for the construction of a new house.

f. Household Water Well loans may not be used to pay the costs of a home plumbing system.

V. Application Review Information

A. Criteria

This section contains instructions and guidelines on preparing the project proposal, work plan, and budget sections of the application. Also, guidelines are provided on the additional information required for USDA Rural Development to determine eligibility and financial feasibility.

1. Project Proposal. The project proposal should outline the project in sufficient detail to provide a reader with a complete understanding of the loan program. Explain what will be accomplished by lending funds to individual well owners. Demonstrate the feasibility of the proposed loan program in meeting the objectives of this grant program. The proposal should include the following elements:

a. Project Summary. Present a brief project overview. Explain the purpose of

the project, how it relates to USDA Rural Development's purposes, how the project will be executed, what the project will produce, and who will direct it.

b. Needs Assessment. To show why the project is necessary, clearly identify the economic, social, financial, or other problems that require solutions. Demonstrate the well owners' need for financial and technical assistance. Quantify the number of prospective borrowers or provide statistical or narrative evidence that a sufficient number of borrowers will exist to justify the grant award. Describe the service area. Provide information on the household income of the area and other demographical information. Address community needs.

c. Project Goals and Objectives. Clearly state the project goals. The objectives should clearly describe the goals and be concrete and specific enough to be quantitative or observable. They should also be feasible and relate to the purpose of the grant and loan program.

d. Project Narrative. The narrative should cover in more detail the items briefly described in the Project Summary. Demonstrate the grant applicant's experience and expertise in promoting the safe and productive use of individually-owned household water well systems. The narrative should address the following points:

(1) Document the grant applicant's ability to manage and service a revolving fund. The narrative may describe the systems that are in place for the full life cycle of a loan from loan origination through servicing. If a servicing contractor will service the loan portfolio, the arrangement and services provided must be discussed.

(2) Show evidence that the organization can commit financial resources the organization controls. This documentation should describe the sources of funds other than the HWWS grant that will be used to pay your operational costs and provide financial assistance for projects.

(3) Demonstrate that the organization has secured commitments of significant financial support from other funding sources, if appropriate.

(4) List the fees and charges that borrowers will be assessed.

2. Work Plan. The work plan or scope of work must describe the tasks and activities that will be accomplished with available resources during the grant period. It must include who will carry out the activities and services to be performed and specific timeframes for completion. Describe any unusual or unique features of the project such as innovations, reductions in cost or time, or extraordinary community involvement.

3. Budget and Budget Justification. Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative justification. ''Federal resources'' refers only to the HWWS grant for which you are applying. ''Non Federal resources'' are all other Federal and non-Federal resources.

a. Provide a budget with line item detail and detailed calculations for each budget object class identified in section B of the Budget Information form (SF–424A). Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. Also include a breakout by the funding sources identified in Block 15 of the SF–424.

b. Provide a narrative budget justification that describes how the categorical costs are derived for all capital and administrative expenditures, the matching contribution, and other sources of funds necessary to complete the project. Discuss the necessity, reasonableness, and allocability of the proposed costs. Consult OMB Circular A–122: ''Cost Principles for Non-Profit Organizations'' for information about appropriate costs for each budget category.

c. If the grant applicant will use a servicing contractor, the fees may be reimbursed as an administrative expense as provided in 7 CFR 1776.13. These fees must be discussed in the budget narrative. If the grant applicant will hire a servicing contractor, it must demonstrate that all procurement transactions will be conducted in a manner to provide, to the maximum extent practical, open and free competition. Recipients must justify any anticipated procurement action that is expected to be awarded without competition and exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000).

d. The indirect cost category should be used only when the grant applicant currently has an indirect cost rate approved by the Department of Agriculture or another cognizant Federal agency. A grant applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the grant applicant is in the process of initially developing or renegotiating a rate, the grant applicant shall submit its indirect cost proposal to the cognizant agency immediately after the applicant is advised that an award will be made. In no event, shall the indirect cost proposal be submitted later than three months after the effective date of the award. Consult OMB Circular A–122 for information about indirect costs.

4. Evidence of Legal Authority and Existence. The applicant must provide satisfactory documentation that it is legally recognized under state and Federal law as a non-profit organization. The documentation also must show that it has the authority to enter into a grant agreement with the Rural Utilities Service and to perform the activities proposed under the grant application. Satisfactory documentation includes, but is not limited to, certificates from the Secretary of State, or copies of state statutes or laws establishing your organization. Letters from the IRS awarding tax-exempt status are not considered adequate evidence.

5. List of Directors and Officers. The applicant must submit a certified list of directors and officers with their respective terms.

6. IRS Tax Exempt Status. The applicant must submit evidence of tax exempt status from the Internal Revenue Service.

7. Financial Information and Sustainability. The applicant must submit pro forma balance sheets, income statements, and cash flow statements for the last three years and projections for three years. Additionally, the most recent audit of the applicant's organization must be submitted.

B. Evaluation Criteria

Grant applications that are complete and eligible will be scored competitively based on the following scoring criteria:

Scoring criteria	Points
Degree of expertise and experience in promoting the safe and productive use of individually-owned household water well systems and ground water.	Up to 30 points.
Degree of expertise and successful experience in making and servicing loans to individuals	Up to 20 points.

Scoring criteria	Points
Percentage of applicant contributions. Points allowed under this paragraph will be based on written evidence of the availability of funds from sources other than the proceeds of a HWWS grant to pay part of the cost of a loan recipient's project. In-kind contributions will not be considered. Funds from other sources as a percentage of the HWWS grant and points corresponding to such percentages are as follows:	
0 to 9 percent	ineligible.
10 to 25 percent	5 points.
26 to 30 percent	10 points.
31 to 50 percent	15 points.
51 percent or more	20 points.
Extent to which the work plan demonstrates a well thought out, comprehensive approach to accomplishing the objectives of this part, clearly defines who will be served by the project, and appears likely to be sustainable.	Up to 20 points.
Extent to which the goals and objectives are clearly defined, tied to the work plan, and measurable	Up to 10 points.
Lowest ratio of projected administrative expenses to loans advanced	Up to 10 points.
Administrator's discretion, considering such factors as:	
Creative outreach ideas for marketing HWWS loans to rural residents	Up to 10 points.
The amount of needs demonstrated in the work plan;	
Previous experiences demonstrating excellent utilization of a revolving loan fund grant; and	
Optimizing the use of agency resources.	

C. Review Standards

1. Incomplete applications as of the deadline for submission will not be considered. If an application is determined to be incomplete, the applicant will be notified in writing and the application will be returned with no further action.

2. Ineligible applications will be returned to the applicant with an explanation.

3. Complete, eligible applications will be evaluated competitively by a review team, composed of at least two USDA Rural Development employees selected from the Water Programs Division. They will make overall recommendations based on the program elements found in 7 CFR part 1776 and the review criteria presented in this notice. They will award points as described in the scoring criteria in 7 CFR 1776.9 and this notice. Each application will receive a score based on the averages of the reviewers' scores and discretionary points awarded by the Rural Utilities Service Administrator.

4. Applications will be ranked and grants awarded in rank order until all grant funds are expended.

5. Regardless of the score an application receives, if USDA Rural Development determines that the project is technically infeasible, USDA Rural Development will notify the applicant, in writing, and the application will be returned with no further action.

VI. Award Administration Information

A. Award Notices

USDA Rural Development will notify a successful applicant by an award letter accompanied by a grant agreement. The grant agreement will contain the terms and conditions for the grant. The applicant must execute and return the grant agreement, accompanied by any additional items required by the award letter or grant agreement.

B. Administrative and National Policy Requirements

1. This notice, the 7 CFR part 1776, and Household Water Well System Grant Program Application Guide implement the appropriate administrative and national policy requirements. Grant recipients are subject to the requirements in 7 CFR part 1776.

2. Direct Federal grants, sub-award funds, or contracts under the HWWS Program shall not be used to fund inherently religious activities, such as worship, religious instruction, or proselytization. Therefore, organizations that receive direct USDA assistance should take steps to separate, in time or location, their inherently religious activities from the services funded under the HWWS Program. USDA regulations pertaining to the Equal Treatment for Faith-based Organizations, which include the prohibition against Federal funding of inherently religious activities, can be found either at the USDA Web site at *http://www.usda.gov/fbci/finalrule.pdf* or 7 CFR part 16.

C. Reporting

1. Performance Reporting. All recipients of HWWS Grant Program financial assistance must provide quarterly performance activity reports to USDA Rural Development until the project is complete and the funds are expended. A final performance report is also required. The final report may serve as the last annual report. The final report must include an evaluation of the success of the project.

2. Financial Reporting. All recipients of Household Water Well System Grant Program financial assistance must provide an annual audit, beginning with the first year a portion of the financial assistance is expended. The grantee will provide an audit report or financial statements as follows:

a. Grantees expending $500,000 or more Federal funds per fiscal year will submit an audit conducted in accordance with OMB Circular A–133. The audit will be submitted within 9 months after the grantee's fiscal year. Additional audits may be required if the project period covers more than one fiscal year.

b. Grantees expending less than $500,000 will provide annual financial statements covering the grant period, consisting of the organization's statement of income and expense and balance sheet signed by an appropriate official of the organization. Financial statements will be submitted within 90 days after the grantee's fiscal year.

VII. Agency Contacts

A. Web site: http://www.usda.gov/rus/water. The USDA Rural Development's Web site maintains up-to-date resources and contact information for the Household Water Well program.

B. Phone: 202–720–9589.

C. Fax: 202–690–0649.

D. E-mail: *cheryl.francis@wdc.usda.gov.*

E. Main point of contact: Cheryl Francis, Loan Specialist, Water and Environmental Programs, Water Programs Division, USDA Rural Development Utilities Programs, U.S. Department of Agriculture.

Dated: October 28, 2008.

James M. Andrew,

Administrator, Rural Utilities Service.

[FR Doc. E8–27586 Filed 11–19–08; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: International Trade Administration.

Title: Application for Insular Watch and Jewelry Program Benefits.

OMB Control Number: 0625–0040.

Form Number(s): ITA–334P, 334P–1, 334P–2, 334P–3.

Type of Request: Regular submission.

Burden Hours: 30.

Number of Respondents: 5.

Average Hours per Response: 3 hours.

Needs and Uses: Public Law 97–446, as amended by Public Law 103–465, Public Law 106–36 and Public Law 108–429 requires the Departments of Commerce and the Interior to administer the distribution of watch duty exemptions and watch and jewelry duty refunds to program producers in the U.S. insular possessions and the Northern Mariana Islands. The primary consideration in collecting information is to enforce the law, prevent abuse of the program, and permit a fair and equitable distribution of its benefits. The form used to collect the information is the principal program form to record the annual and mid-year operational data, on the basis of which program entitlements are calculated and distributed among the producers. A proposed modification to the form (ITA–334P) is planned, by dividing it into four forms, so that there is an annual and mid-year application for watch producers and an annual and mid-year application for jewelry producers. This would not involve any increase in the amount of information collected. This will allow program producers to receive their duty refund benefit on a biannual basis rather than solely on an annual basis.

Affected Public: Business and other for-profit organizations.

Frequency: Biannually.

Respondent's Obligation: Required to obtain or retain benefit.

OMB Desk Officer: Wendy Liberante, (202) 395–3647.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Wendy Liberante, OMB Desk Officer, Fax number (202) 395–7285 or via the Internet at *Wendy_L._Liberante@omb.eop.gov*.

Dated: November 17, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–27589 Filed 11–19–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: International Trade Administration.

Title: Export Trading Companies Contact Facilitation Services.

OMB Control Number: 0625–0120.

Form Number(s): ITA 4094P.

Type of Request: Regular submission.

Burden Hours: 4,500.

Number of Respondents: 18,000.

Average Hours per Response: 15 minutes.

Needs and Uses: Many U.S. firms do not export because of a fear of the risks involved in exporting, lack of knowledge about the international marketplace, and insufficient resources. These firms need a venue to find one another and share the risks and costs of exporting, and they need the assistance of companies that specialize in providing export trade facilitation services. The Export Trading Company Act of 1982 directs the U.S. Department of Commerce (DOC) to (a) encourage the formation of export associations and export service firms, and (b) provide an exporter referral service that will facilitate contact between producers and export service firms. DOC fulfills its mandate through the Contact Facilitation Service (CFS). The CFS provides a platform for U.S. producers to (a) find one another and form export alliances, to achieve economies of scale, and (b) locate export service firms and attract foreign importers.

The current CFS registration form is available online via the Internet at *http://www.exportyellowpages.com*. The Export Yellow Pages®, a DOC program, produces two directories that draw upon CFS data collection (a) ''The Export Yellow Pages®'', a directory of U.S. producers of goods and services, and (b) the ''U.S. Trade Assistance Directory,'' a directory of export trade facilitation firms and other providers of export assistance. These directories are accessible by international traders worldwide, via the Internet at *http://www.exportyellowpages.com*, and as a single print directory published on an annual basis. The print directory is distributed to Commerce Export Assistance Centers and U.S. embassies and consulates worldwide.

Affected Public: Business or other for-profit organizations; State, local or tribal government.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefit.

OMB Desk Officer: Wendy Liberante, (202) 395–3647.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Wendy Liberante, OMB Desk Officer, Fax number (202) 395–7285 or via the Internet at *Wendy_L._Liberante@omb.eop.gov*.

Dated: November 17, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–27602 Filed 11–19–08; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Proposed Information Collection; Comment Request; Trade Adjustment Assistance for Firms Program

AGENCY: Economic Development Administration (EDA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before January 20, 2009.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Diane Rodriguez, Program Analyst, Performance and National Programs Division, Room 7009, Economic Development Administration, Washington, DC 20230, telephone (202) 482–4495, facsimile (202) 482–2838 (or via the Internet at *drodriguez@eda.doc.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

The Economic Development Administration (EDA) administers the Trade Adjustment Assistance for Firms Program, which is authorized by chapters 3 and 5 of title II of the Trade Act of 1974, as amended (19 U.S.C. 2341 *et seq.*) (Trade Act). EDA certifies firms as eligible to apply for Trade Adjustment Assistance (TAA), provides technical adjustment assistance to firms and other recipients, and provides assistance to organizations representing trade injured industries. In order to certify a firm as eligible to apply for TAA, EDA must verify: (1) A significant reduction in the number or proportion of the workers in the firm, a reduction in the workers' wage or work hours, or an imminent threat of such reductions; (2) sales or production of the firm have decreased absolutely, as defined in EDA's regulations, or sales or production, or both, of any article accounting for at least twenty-five (25) percent of the firm's sales or production have decreased absolutely; and (3) an increase in imports of articles like or directly competitive with those produced by the petitioning firm, which has contributed importantly to the decline in employment and sales or production of that firm. Additionally, the firm must demonstrate that U.S. customers have reduced or declined purchases from the firm in favor of buying imported items. EDA uses information collected from Form ED–840P, and its attachments, to determine if a firm is eligible to apply for TAA. The use of the form standardizes and limits the information collected as part of the certification process and eases the burden on applicants and reviewers alike.

II. Method of Collection

The ED–840P form is downloadable from EDA's Web site at *http://www.eda.gov/InvestmentsGrants/Directives.xml* and can be e-mailed or submitted in hard copy to EDA.

III. Data

OMB Control Number: 0610–0091.

Form Number(s): ED–840P.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 200.

Estimated Time per Response: 8 hours.

Estimated Total Annual Burden Hours: 1,600.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 14, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–27558 Filed 11–19–08; 8:45 am]

BILLING CODE 3510–34–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 0810231385–81390–01]

Request for Public Comments on the Prospect of Removing 7A Commodities From De Minimis Eligibility

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Notice of Inquiry.

SUMMARY: The Bureau of Industry and Security (BIS) is seeking public comment on the prospect of removing from de minimis eligibility commodities controlled for missile technology (MT) reasons under Category 7—Product Group A on the Commerce Control List except when the 7A commodities are incorporated as standard equipment in Federal Aviation Administration (FAA) (or national equivalent) certified civilian transport aircraft. If such a policy were implemented, foreign made items that incorporate U.S.-origin 7A commodities would be subject to the Export Administration Regulations, except when the 7A commodities are incorporated as standard equipment in FAA (or national equivalent) certified civilian transport aircraft. Specifically, BIS is seeking public input on the impact such a change would have on U.S. manufacturers of category 7A commodities, as well as the impact such a change would have on foreign manufacturers that incorporate U.S.-origin 7A commodities into their foreign-made products.

DATES: Comments must be received no later than January 20, 2009.

ADDRESSES: Written comments may be submitted via *http://www.regulations.gov*, by e-mail directly to BIS at *publiccomments@bis.doc.gov* or on paper to U.S. Department of Commerce, Bureau of Industry and Security, Regulatory Policy Division, Room H–2705, Washington DC 20230. Please input ''7A/De minimis'' in the subject line.

FOR FURTHER INFORMATION CONTACT: Sharron Cook, Office of Exporter Services, Regulatory Policy Division, Bureau of Industry and Security at 202–482–2440, or fax 202–482–3355, or e-mail at *scook@bis.doc.gov*.

SUPPLEMENTARY INFORMATION:

Background

The term ''*de minimis*'' generally refers to matters that are of minor significance. The *de minimis* provisions of the Export Administration Regulations (EAR) promote U.S. export

control objectives as set forth in the Export Administration Act of 1979, as amended, (EAA) while limiting U.S. jurisdiction over non-U.S. products containing a *de minimis* percentage, by value, of U.S. content. To prevent the diversion of controlled U.S. items and foreign-made items incorporating a significant amount of U.S. content, a foreign-made item that contains more than the *de minimis* amount of controlled U.S.-origin content by value is subject to the EAR, i.e., a license may be required from BIS for the export abroad to another foreign country or in-country transfer of the foreign-made item. Prior to March 1987, the EAR set no *de minimis* levels for U.S. content in foreign-made items; foreign-made items were subject to the EAR if they contained any amount of U.S.-origin content, no matter how small. A rule published March 23, 1987 (52 FR 9147) revised what were then called the ''parts and components'' provisions to establish thresholds at which the amount of U.S.-origin commodities in foreign-made items would warrant exercise of U.S. jurisdiction over the foreign-made item when located outside the United States. The rule was established to alleviate a major trade dispute with allies who strenuously objected to U.S. assertion of jurisdiction over all reexports of non-U.S. items that contained even small amounts of U.S. content. A major revision of the EAR in 1996 (61 FR 12714) introduced the term ''*de minimis*'' and established *de minimis* thresholds for software and technology. The most recent revisions to the *de minimis* rules occurred on October 1, 2008, when BIS published a rule to change the *de minimis* calculation for foreign produced hardware bundled with U.S.-origin software, clarify the definition of 'incorporate' as it is applied to the *de minimis* rules, and to make certain other changes.

Commodities controlled by Category 7—Product Group A in the Commerce Control List are certain equipment and components related to navigation and avionics. Reviewing agencies have raised concerns that such commodities, when controlled for MT reasons, have the potential to provide a foreign product with unique military capabilities, even if the value of the commodity is below normal *de minimis* levels. Airline and national aviation safety controls help to minimize the risk of diversion for Category 7—Product Group A commodities installed in civilian aircraft. It is expected the commodities will remain in the aircraft and free from tampering with such safety controls. However, when the commodities are exported in less costly end items with no national aviation safety authority controls, there may be a higher risk of diversion.

Requests for Comments

BIS is seeking public comments on the expected impact on U.S. manufacturers of commodities controlled by Category 7—Product Group A, as well as the expected impact on foreign manufacturers that incorporate U.S.-origin 7A commodities into their foreign-made products, if BIS were to remove from *de minimis* eligibility commodities controlled for MT reasons under Category 7—Product Group A, except when the commodities are incorporated as standard equipment in FAA (or national equivalent) certified civilian transport aircraft. Specific estimates related to number of exports, revenue, jobs, etc. that would be affected would be very useful. Also, the impact such a change would have on decisions to incorporate U.S.-origin items in future foreign products would also be useful. Examples of commercial foreign products that incorporate commodities controlled by Category 7—Product Group A would be helpful as well. Comments that include rational argument in support of the position taken in the comment are likely to be more useful than comments that merely assert a position without such support.

Finally, BIS is interested in concrete information (URL addresses, technical specifications, etc.) about the availability of equivalent commodities from foreign sources.

Dated: November 14, 2008.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. E8–27588 Filed 11–19–08; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–894]

Certain Tissue Paper Products From the People's Republic of China: Extension of Time Limit for Preliminary Results of 2007–2008 Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: November 20, 2008.

FOR FURTHER INFORMATION CONTACT: Brian Smith or Gemal Brangman, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–1766 or (202) 482–3773, respectively.

Background

On April 25, 2008, the Department of Commerce (''the Department'') published in the **Federal Register** a notice of initiation of administrative review of the antidumping duty order on certain tissue products from the People's Republic of China (''PRC''), covering the period March 1, 2007, through February 29, 2008. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 FR 22337 (April 25, 2008). The preliminary results for this administrative review are currently due no later than December 1, 2008.

Extension of Time Limits for Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires the Department to issue the preliminary results of an administrative review within 245 days after the last day of the anniversary month of the date of publication of an order for which a review is requested. If it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend this deadline to a maximum of 365 days.

In this review, the respondents, Max Fortune Industrial Limited and Max Fortune (FETDE) Paper Products Co., Ltd. (collectively referred to as ''Max Fortune''), requested that the Department revoke the antidumping duty order on certain tissue paper products from the PRC with respect to them pursuant to 19 CFR 351.222(b). The Department requires additional time to review and analyze the revocation request and the factors of production information submitted by Max Fortune in this administrative review and, if necessary, issue an additional supplemental questionnaire. The Department also requires additional time to conduct verification of Max Fortune's questionnaire responses. Thus, it is not practicable to complete this review within the original time limit. Therefore, the Department is fully extending the time limit for completion of the preliminary results by 120 days to 365 days, in accordance with section 751(a)(3)(A) of the Act. The preliminary results are now due no later than March 31, 2009. The final results continue to

be due 120 days after publication of the preliminary results.

We are issuing and publishing this notice in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2).

Dated: November 14, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–27623 Filed 11–19–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–853]

Citric Acid and Certain Citrate Salts from Canada: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (the Department) preliminarily determines that citric acid and certain citrate salts (citric acid) from Canada are being, or are likely to be, sold in the United States at less than fair value (LTFV), as provided in section 733(b) of the Tariff Act of 1930, as amended (the Act). The estimated margins of sales at LTFV are listed in the ''Suspension of Liquidation'' section of this notice. Interested parties are invited to comment on this preliminary determination. Pursuant to a request from the respondent, we are postponing for 60 days the final determination and extending provisional measures from a four–month period to not more than six months. Accordingly, we will make our final determination not later than 135 days after publication of the preliminary determination.

EFFECTIVE DATE: November 20, 2008.

FOR FURTHER INFORMATION CONTACT: Terre Keaton Stefanova or Rebecca Trainor, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–1280 and (202) 482–4007, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 5, 2008, the Department initiated the antidumping duty investigation of citric acid from Canada. *See Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China: Initiation of Antidumping Duty Investigations*, 73 FR 27492 (May 13, 2008) (*Initiation Notice*). The petitioners in this investigation are Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Americas, Inc.

The Department set aside a period of time for parties to raise issues regarding product coverage and encouraged all parties to submit comments within 20 calendar days of publication of the *Initiation Notice*. *See Initiation Notice*, 73 FR at 27493. *See also Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27323 (May 19, 1997). For further details, see the ''Scope Comments'' section of this notice, below. The Department also set aside a time for parties to comment on product characteristics for use in the antidumping duty questionnaire. On May 27, 2008, we received product characteristic comments from the petitioners. In June 2008, we received comments from Shandong TTCA Co., Ltd (TTCA), and Jungbunzlauer Technology GMBH & Co KG, (JBLT) regarding the petitioners' product characteristic comments. Also in June 2008, the petitioners filed comments in response to TTCA's submission. For an explanation of the product–comparison criteria used in this investigation, see the ''Product Comparisons'' section of this notice, below.

On June 11, 2008, the International Trade Commission (ITC) published its affirmative preliminary determination that there is a reasonable indication that imports of citric acid and certain citrate salts from Canada are materially injuring the U.S. industry, and the ITC notified the Department of its finding. *See Citric Acid and Certain Citrate Salts from Canada and China; Determinations*, Investigation Nos. 701–TA–456 and 731–TA–1151–1152, 73 FR 33115 (June 11, 2008).

On June 17, 2008, we selected JBLT as the sole mandatory respondent in this investigation. *See* Memorandum from James Maeder, Office Director, to Stephen J. Claeys, Deputy Assistant Secretary, entitled: ''Antidumping Duty Investigation of Citric Acid and Certain Citrate Salts from Canada - Selection of Respondents for Individual Review,'' dated June 17, 2008. We subsequently issued the antidumping questionnaire to JBLT on June 26, 2008. On August 19, 2008, the petitioners made a timely request pursuant to section 733(c)(1)(A) of the Act and 19 CFR 351.205(e) for a 50–day postponement of the preliminary determination. On August 29, 2008, pursuant to section 733(c)(1)(A) of the Act, the Department postponed the preliminary determination of this investigation until November 12, 2008. *See Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China: Postponement of Preliminary Determinations of Antidumping Duty Investigations*, 73 FR 50941 (August 29, 2008).

In August and September 2008, we received JBLT's questionnaire responses. In September and October 2008, we issued supplemental questionnaires, and we received JBLT's responses to these questionnaires in October and November 2008. We note that JBLT's questionnaire response that was due on November 7, 2008, was not received in time for consideration in the preliminary determination, but will be considered in the final determination.

On October 22, 2008, JBLT requested that in the event of an affirmative preliminary determination in this investigation, the Department: 1) postpone its final determination by 60 days in accordance with 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii); and 2) extend the application of the provisional measures prescribed under 19 CFR 351.210(e)(2) from a four–month period to a six–month period. On October 24, 2008, the petitioner requested that in the event of a negative preliminary determination in this investigation, the Department postpone the final determination by 60 days. For further discussion, see the ''Postponement of Final Determination and Extension of Provisional Measures'' section of this notice, below.

On October 28, 2008, the petitioners submitted comments for consideration in the preliminary determination.

Period of Investigation

The period of investigation (POI) is April 1, 2007, to March 31, 2008. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition. *See* 19 CFR 351.204(b)(1).

Scope of Investigation

The scope of this investigation includes all grades and granulation sizes of citric acid, sodium citrate, and potassium citrate in their unblended forms, whether dry or in solution, and regardless of packaging type. The scope also includes blends of citric acid, sodium citrate, and potassium citrate; as well as blends with other ingredients, such as sugar, where the unblended form(s) of citric acid, sodium citrate, and potassium citrate constitute 40 percent or more, by weight, of the blend. The scope of this investigation also includes all forms of crude calcium citrate, including dicalcium citrate

monohydrate, and tricalcium citrate tetrahydrate, which are intermediate products in the production of citric acid, sodium citrate, and potassium citrate. The scope of this investigation does not include calcium citrate that satisfies the standards set forth in the United States Pharmacopeia and has been mixed with a functional excipient, such as dextrose or starch, where the excipient constitutes at least 2 percent, by weight, of the product. The scope of this investigation includes the hydrous and anhydrous forms of citric acid, the dihydrate and anhydrous forms of sodium citrate, otherwise known as citric acid sodium salt, and the monohydrate and monopotassium forms of potassium citrate. Sodium citrate also includes both trisodium citrate and monosodium citrate, which are also known as citric acid trisodium salt and citric acid monosodium salt, respectively. Citric acid and sodium citrate are classifiable under 2918.14.0000 and 2918.15.1000 of the Harmonized Tariff Schedule of the United States (HTSUS), respectively. Potassium citrate and crude calcium citrate are classifiable under 2918.15.5000 and 3824.90.9290 of the HTSUS, respectively. Blends that include citric acid, sodium citrate, and potassium citrate are classifiable under 3824.90.9290 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Scope Comments

In accordance with the preamble to the Department's regulations (*see Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27323 (May 19, 1997)), in our *Initiation Notice* we set aside a period of time for parties to raise issues regarding product coverage, and encouraged all parties to submit comments within 20 calendar days of publication of the *Initiation Notice*. On May 23, 2008, and June 3, 2008, respectively, Chemrom Inc. and L. Perrigo Company timely filed comments concerning the scope of this investigation and the concurrent antidumping duty and countervailing duty investigation of citric acid and certain citrate salts from the People's Republic of China. The petitioners responded to these comments on June 16, 2008.

On August 6, 2008, the Department issued a memorandum to the file regarding the petitioners' proposed amendments to the scope of the investigations. In response, on August 11, 2008, L. Perrigo Company and the petitioners submitted comments to provide clarification of the term ''unrefined'' calcium citrate. We analyzed the comments of the interested parties regarding the scope of this investigation. *See* September 10, 2008, Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, re: Antidumping Duty Investigations of Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China (PRC), and Countervailing Duty Investigation of Citric Acid and Certain Citrates Salts from the PRC, ''Whether to Amend the Scope of these Investigations to Exclude Monosodium Citrate and to Further Define the Product Referred to as Unrefined Calcium Citrate''' (Scope Memo). Our position on these comments, as set out in the Scope Memo, are incorporated in the ''Scope of the Investigation'' section above.

Product Comparisons

We have taken into account the comments that were submitted by the interested parties concerning product–comparison criteria. In accordance with section 771(16) of the Act, all products produced by the respondent covered by the description in the ''Scope of Investigation'' section, above, and sold in Canada during the POI are considered to be foreign like product for purposes of determining appropriate product comparisons to U.S. sales. We have relied on four criteria to match U.S. sales of subject merchandise to comparison–market sales of the foreign like product: 1) type, 2) form, 3) grade, and 4) particle size. Where there were no sales of identical merchandise in the home market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics listed above.

Date of Sale

The Department normally will use the date of invoice, as recorded in the producer's or exporter's records kept in the ordinary course of business, as the date of sale. However, the Department's regulations provide that the Department may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale (*e.g.*, price and quantity). *See* 19 CFR 351.401(i); *see* also *Allied Tube and Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090–92 (CIT 2001). In this case, JBLT indicated in its questionnaire responses that it made certain sales subject to long–term contracts in both the United States and Canada during the POI. For the sales covered by these agreements, JBLT reported the contract date as the date of sale in its home market and U.S. sales listings, claiming that the material terms of sale were fixed at the time these contracts were signed. For all other sales that were not covered by these agreements, JBLT reported the date of invoice as the date of sale. In its responses to the Department's questionnaires, JBLT provided sample documentation of the types of long–term contracts that were in effect during the POI, and a detailed explanation of the nature of these agreements. JBLT stated that: 1) in some instances the invoice price differed from the price established in the contract, usually as a result of extra services being provided to the customer that were not covered by the contract[1]; 2) customers might change delivery destinations, packaging, granulation, or lead times after a contract was signed, which would result in a change to the price; and 3) the contracts were not ''take or pay'' contracts; therefore, the actual volumes sold for the contracted period might be more or less than the contracted volumes. *See* JBLT's October 15, 2008, Supplemental Questionnaire Response at 6–9.

As the information on the record indicates that the material terms of sale (*e.g.*, price and quantity) are subject to change after the date the sales contracts are signed, we preliminary determine that the invoice date better reflects the date on which the producer/exporter established the material terms of sale. Therefore, for purposes of the preliminary determination, we used the invoice date as the date of sale for all home market and U.S. sales, in accordance with our normal practice.

Fair Value Comparisons

To determine whether sales of citric acid from Canada to the United States were made at LTFV, we compared the constructed export price (CEP)[2] to normal value (NV), as described in the ''Constructed Export Price'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(1) of the Act, we compared POI weighted–average CEPs to POI weighted–average NVs.

Constructed Export Price

In accordance with section 772(b) of the Act, we calculated CEP for those sales where the subject merchandise

[1] Such changes to price between date of contract and date of invoice are evident in JBLT's revised home market and U.S. sales databases submitted on October 14, 2008.

[2] All of JBLT's sales in the U.S. market during the POI were CEP sales.

was first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

We based CEP on packed, ex–factory or delivered prices to unaffiliated purchasers in the United States. When appropriate, we adjusted the starting prices for billing adjustments, rebates and interest revenue, in accordance with 19 CFR 351.401(c). We made deductions for movement expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act; these expenses included foreign inland freight from the plant to the port of exportation, foreign inland insurance, foreign brokerage and handling, U.S. brokerage and handling, U.S. inland freight from port to warehouse, U.S. warehousing, U.S. inland freight from warehouse to the unaffiliated customer, and U.S. inland insurance. In accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (*i.e.*, credit expenses), and indirect selling expenses (including inventory carrying costs). We also deducted from CEP an amount for profit in accordance with sections 772(d)(3) and (f) of the Act.

For discussion of adjustments made to JBLT's reported U.S. sales data, see Memorandum to The File entitled: ''Preliminary Determination Margin Calculation for Jungbunzlauer Technology GMBH & Co KG (JBLT),'' dated November 12, 2008.

Normal Value

A. Home Market Viability and Comparison–Market Selection

To determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), we compared JBLT's volume of home market sales of the foreign like product to its volume of U.S. sales of the subject merchandise. *See* section 773(a)(1)(C) of the Act. Based on this comparison, we determined that JBLT had a viable home market during the POI. Consequently, we based NV on home market sales.

B. Level of Trade

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the export price (EP) or CEP. Pursuant to 19 CFR 351.412(c)(1), the NV LOT is based on the starting price of the sales in the comparison market or, when NV is based on constructed value, the starting price of the sales from which we derive selling, general and administrative expenses, and profit. For EP sales, the U.S. LOT is based on the starting price of the sales in the U.S. market, which is usually from exporter to importer. For CEP sales, the U.S. LOT is based on the starting price of the U.S. sales, as adjusted under section 772(d) of the Act, which is from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP or CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. *See* 19 CFR 351.412(c)(2). If the comparison–market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP–offset provision). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut–to-Length Carbon Steel Plate from South Africa*, 62 FR 61731 - 61733 (Nov. 19, 1997).

In this investigation, we obtained information from JBLT regarding the marketing stages involved in making its reported home market and U.S. sales, including a description of the selling activities performed by the respondent and its affiliates for each channel of distribution.

During the POI, JBLT reported that it sold citric acid to end–users and distributors through two channels of distribution in both the U.S. and home markets. JBLT stated that its selling process was basically the same for all channels of distribution. As the details of JBLT's reported selling functions for each channel of distribution are business proprietary, our analysis of these selling functions for purposes of determining whether different LOTs exist is contained in a separate memorandum to James Maeder, Director, AD/CVD Operations Office 2, from the Team entitled ''Preliminary Level–of-Trade Analysis,'' dated November 12, 2008.

Based on our analysis, we find that the selling functions JBLT performed for each of its channels of distribution in the U.S. market were essentially the same, but for one selling function which we determined was not sufficient to warrant an LOT distinction between these channels. Therefore, we determined preliminarily that there is only one LOT (for CEP sales) in the U.S. market. Similarly, we found that the selling functions that JBLT (and its affiliates) performed for each of the channels of distribution in the home market were essentially the same, with the exception of certain selling activities which we determined were not sufficient to warrant a LOT distinction between these channels. Therefore, we determined preliminarily that there is only one LOT in the home market.

In comparing the home market LOT to the CEP LOT, we found that the selling activities performed by JBLT for its CEP sales were significantly fewer than the selling activities that it performed for its home market sales, and that the home–market LOT was more remote from the factory than the CEP LOT. Accordingly, we considered the CEP LOT to be different from the home–market LOT and to be at a less advanced stage of distribution than the home–market LOT.

Therefore, we could not match CEP sales to sales at the same LOT in the home market, nor could we determine an LOT adjustment based on JBLT's home market sales because there is only one LOT in the home market, and it is not possible to determine if there is a pattern of consistent price differences between the sales on which NV is based and home market sales at the LOT of the export transaction. *See* section 773(a)(7)(A) of the Act. Furthermore, we have no other information that provides an appropriate basis for determining an LOT adjustment. Consequently, because the data available do not form an appropriate basis for making an LOT adjustment but the home market LOT is at a more advanced stage of distribution than the CEP LOT, we made a CEP offset to NV in accordance with section 773(a)(7)(B) of the Act. The CEP offset is calculated as the lesser of: (1) the indirect selling expenses incurred on the home market sales, or (2) the indirect selling expenses deducted from the starting price in calculating CEP.

C. Cost of Production Analysis

Based on our analysis of the petitioners' sales below cost of production (COP) allegation filed in the

petition,[3] we found reasonable grounds to believe or suspect that citric acid sales were made in Canada at prices below the COP, and initiated a country–wide cost investigation. *See* section 773(b)(2)(A)(i) of the Act and *Initiation Notice* at 27494. Accordingly, pursuant to section 773(b) of the Act, we conducted a sales–below-cost investigation to determine whether JBLT's sales were made at prices below their respective COPs.

1. Calculation of Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the cost of materials and fabrication for the foreign like product, plus an amount for general and administrative expenses (G&A), interest expenses, and home market packing costs (see ''Test of Home Market Sales Prices'' section below for treatment of home market selling expenses and packing costs). We relied on the COP data submitted by JBLT in its October 27, 2008, supplemental response to section D of the questionnaire, except where noted below.

We adjusted the total cost of manufacturing for a major input used in the production of citric acid purchased from an affiliated company to reflect the higher of transfer price, market price, or cost in accordance with section 773(f)(3) of the Act. We recalculated the G&A expense ratio to include capital tax and consulting services. We applied the revised G&A expense ratio and the financial expense ratio to the total cost of manufacturing before our major input adjustment. For further discussion, see Memorandum from James Balog to Neal Halper, Director, Office of Accounting, Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – Jungbunzlauer Technology GMBH & Co KG dated November 12, 2008.

2. Test of Comparison–Market Sales Prices

On a product–specific basis, we compared the adjusted weighted–average COP to the home market sales of the foreign like product, as required under section 773(b) of the Act, to determine whether the sale prices were below the COP. For purposes of this comparison, we used the COP exclusive of selling and packing expenses. The prices were adjusted for billing adjustments and interest revenue, and were exclusive of any applicable movement charges, direct and indirect selling expenses, and packing expenses.

3. Results of the COP Test

Pursuant to section 773(b)(2)(C)(i) of the Act, where less than 20 percent of the respondent's sales of a given product were at prices less than the COP, we do not disregard any below–cost sales of that product because we determined that the below–cost sales were not made in ''substantial quantities.'' Where 20 percent or more of the respondent's sales of a given product during the POI were at prices less than COP, we determine that such sales have been made in ''substantial quantities.'' *See* section 773(b)(2)(C) of the Act. Further, we determine that the sales were made within an extended period of time, in accordance with section 773(b)(2)(B) of the Act, because we examine below–cost sales occurring during the entire POI. In such cases, because we compare prices to POI–average costs, we also determine that such sales were not made at prices which would permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

In this case, we found that, for certain specific products, more than 20 percent of JBLT's sales were at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time. We therefore excluded these sales and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

D. Calculation of Normal Value Based on Comparison–Market Prices

We based NV for JBLT on packed, ex–factory or delivered prices to unaffiliated customers in the home market. We made adjustments to the starting price, where appropriate, for billing adjustments and interest revenue in accordance with 19 CFR 351.401(c). We made deductions, where appropriate, for movement expenses, including inland freight and inland insurance, under section 773(a)(6)(B)(ii) of the Act.

Pursuant to section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410(b), we made, where appropriate, circumstance–of-sale adjustments for imputed credit expenses. We also deducted home market packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B) of the Act. Finally, we made a CEP offset pursuant to section 773(a)(7)(B) of the Act and 19 CFR 351.412(f). We calculated the CEP offset as the lesser of the indirect selling expenses on the home–market sales or the indirect selling expenses deducted from the starting price in calculating CEP.

Currency Conversion

It is our normal practice to make currency conversions into U.S. dollars in accordance with section 773A(a) of the Act based on exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

In the antidumping questionnaire, we instructed JBLT to report prices and expenses in the currency in which they were incurred. Nevertheless, in this case, JBLT reported data that had been converted from multiple currencies into Canadian dollars (CAD) in the home market, and U.S. dollars (USD) in the U.S. market because its company–wide electronic data processing system automatically converts all foreign currency transactions into the currency of the respective JBL Group entity at the moment of posting. According to JBLT, the entry of data and the currency conversion is a simultaneous process in its accounting system. As a result, its system does not retain the original foreign currency amount in the sales database or in the general ledger. *See* JBLT's October 15, 2008, supplemental questionnaire response at pages 4–6.

Because it appears that the currency conversion process is a company–wide procedure that is done in the normal course of business, we have accepted JBLT's data as reported for the preliminary determination. However, at verification we intend to examine JBLT's accounting system, and the reasonableness of its price and expense reporting based on this system.

Verification

As provided in section 782(i)(1) of the Act, we intend to verify the information relied upon in making our final determination for JBLT.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we will direct Customs and Border Protection (CBP) to suspend liquidation of all entries of citric acid from Canada that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We will also instruct CBP to require a cash deposit or the posting of a bond equal to the weighted–average dumping margins, as indicated in the chart below. These suspension–of-liquidation instructions will remain in effect until further notice.

The weighted–average dumping margins are as follows:

[3] *See* the Petition on Citric Acid and Certain Citrate Salts from Canada, Vol. II at 4-9, filed on April 14, 2008.

Manufacturer/Exporter	Weighted–Average Margin (percent)
Jungbunzlauer Technology GMBH & Co KG	20.88
All–Others	20.88

All–Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated ''All Others'' rate shall be an amount equal to the weighted average of the estimated weighted–average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely under section 776 of the Act. JBLT is the only respondent in this investigation for which the Department calculated a company–specific rate. Therefore, for purposes of determining the all–others rate and pursuant to section 735(c)(5)(A) of the Act, we are using the weighted–average dumping margin calculated for JBLT, as referenced above. *See*, *e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Italy*, 64 FR 30750, 30755 (June 8, 1999); and *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Coated Free Sheet Paper from Indonesia*, 72 FR 30753, 30757 (June 4, 2007); (unchanged in final determination, 72 FR 60636) (October 25, 2007).

Disclosure

We will disclose the calculations performed in our preliminary analysis to parties to this proceeding in accordance with 19 CFR 351.224(b).

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of the Department's preliminary affirmative determination. If the Department's final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether imports of citric acid from Canada are materially injuring, or threatening material injury to, the U.S. industry (*see* section 735(b)(2) of the Act). Because we are postponing the deadline for our final determination to 135 days from the date of the publication of this preliminary determination (*see* below), the ITC will make its final determination no later than 45 days after our final determination.

Public Comment

Interested parties are invited to comment on the preliminary determination. Interested parties may submit case briefs to the Department no later than seven days after the date of the issuance of the last verification report in this proceeding. Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days from the deadline date for the submission of case briefs. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Further, we request that parties submitting briefs and rebuttal briefs provide the Department with a copy of the public version of such briefs on diskette. In accordance with section 774 of the Act, the Department will hold a public hearing, if timely requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a timely request for a hearing is made in this investigation, we intend to hold the hearing two days after the rebuttal brief deadline date at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, at a time and in a room to be determined. Parties should confirm by telephone, the date, time, and location of the hearing 48 hours before the scheduled date.

Interested parties who wish to request a hearing, or to participate in a hearing if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the publication of this notice. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. At the hearing, oral presentations will be limited to issues raised in the briefs.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters, who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. The Department's regulations, at 19 CFR 351.210(e)(2), require that requests by respondents for postponement of a final determination be accompanied by a request for extension of provisional measures from a four–month period to not more than six months.

On October 22, 2008, JBLT requested that in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination by 60 days. At the same time, JBLT requested that the Department extend the application of the provisional measures prescribed under section 733(d) of the Act and 19 CFR 351.210(e)(2), from a four–month period to a six–month period. In accordance with section 735(a)(2) of the Act and 19 CFR 351.210(b)(2), because (1) our preliminary determination is affirmative, (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise, and (3) no compelling reasons for denial exist, we are granting this request and are postponing the final determination until no later than 135 days after the publication of this notice in the **Federal Register**. Suspension of liquidation will be extended accordingly.

This determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act.

Dated: November 12, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–27621 Filed 11–19–08; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–937]

Citric Acid and Certain Citrate Salts from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: November 20, 2008.

SUMMARY: We preliminarily determine that citric acid and certain citrate salts (''citric acid'') from the People's Republic of China (''PRC'') are being, or are likely to be, sold in the United States at less than fair value (''LTFV''), as provided in section 733 of the Tariff Act of 1930, as amended (''the Act''). The estimated margins of sales at LTFV are

shown in the ''Preliminary Determination'' section of this notice. Pursuant to requests from interested parties, we are postponing the final determination and extending the provisional measures from a four-month period to not more than six months. Accordingly, we will make our final determination not later than 135 days after publication of the preliminary determination.

FOR FURTHER INFORMATION CONTACT: Marin Weaver or Andrea Staebler Berton, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC, 20230; telephone: (202) 482–2336 or 482–4037, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 14, 2008, the Department of Commerce (''the Department'') received a petition concerning imports of citric acid and certain citrate salts from the People's Republic of China (''PRC Petition'') filed in proper form by Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Americas, Inc. (collectively, ''Petitioners''). The Department of Commerce (''the Department'') initiated this investigation on May 13, 2008. *See Citric acid and Certain Citrate Salts from Canada and the People's Republic of China: Initiation of Antidumping Duty Investigations (''Notice of Initiation'')*, 73 FR 27492 (May 13, 2008). In the Notice of Initiation, the Department explained that, in order to demonstrate separate–rate eligibility, entities were required to submit a separate–rate application (''SRA'') not later than sixty days from the publication of the *Notice of Initiation*. The deadlines and requirements for submitting certifications and SRAs applied equally to NME–owned firms, wholly foreign–owned firms, and foreign sellers that purchase the subject merchandise and export it to the United States. The SRA for this investigation was posted on the Import Administration web site on May 13, 2008; thus, the due date for submitting a SRA was July 13, 2008. See http://ia.ita.doc.gov/ia–highlights-and–news.html.

On May 13, 2008, the Department requested comments from interested parties regarding the appropriate physical characteristics of citric acid and certain citrate salts to be reported in response to the Department's antidumping questionnaires. *See Notice of Initiation*. On June 2, 11, and 13, 2008, the Department received comments on the proposed product characteristics criteria and matching hierarchy, respectively, from TTCA Co., Ltd., (a.k.a. Shandong TTCA Biochemistry Co., Ltd.) (''TTCA''), a PRC exporter and mandatory respondent, Petitioners, and Jungbunzlauer Technology GMBH & Co.KG, a Canadian exporter and respondent in the LTFV investigation of citric acid from Canada.

On June 11, 2008, the United States International Trade Commission (''ITC'') published its affirmative preliminary determination that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of citric acid from the PRC. *See Investigation Nos. 701 TA 456 and 731 TA 1151 1152 (Preliminary), Citric Acid and Certain Citrate Salts from Canada and China (''ITC Preliminary'')*, 73 FR 33115 (June 11, 2008).

On June 23, 2008, the Department issued quantity and value (''Q&V'') questionnaires to over 100 companies, which Petitioners identified in the PRC Petition as potential producers and/or exporters of citric acid from the PRC.[1] On May 23, 2008, and on June 5, 2008, the Department extended the deadline for filing Q&V responses until June 26, 2008. From May 22, 2008 through July 7, 2008,[2] the Department received Q&V responses from 17 companies[3] that exported merchandise under investigation to the United States during the POI.

From July 1, 2008 through July 15, 2008,[4] the Department received SRAs from 10 exporters of Chinese citric acid: High Hope, Penglai Marine, A.H.A., Weifang Ensign, Shuren Scientific, BBCA Biochemical, RZBC Group Ltd.[5], Laiwu Taihe Biochemistry, Xinghua Biochemical, and Changyun Biochemical. The Department issued supplemental questionnaires and received timely responses from the following separate–rate applicants: High Hope, Penglai Marine, Shuren Scientific, BBCA Biochemical, Laiwu Taihe Biochemistry, and Xinghua Biochemical. In addition the Department received an SRA from TTCA on July 15, 2008. The Department granted an extension of time for Yixing Union to file its SRA and on July 21, 2008, it timely filed its SRA. The Department granted an extension for Lianyungang JF International Trade Co., Ltd. (''JF International'') to file an SRA. The Department received JF International's SRA on October 14, 2008.

On July 9, 2008, the Department determined that India, Thailand, Indonesia, the Philippines, and Columbia are countries comparable to the PRC in terms of economic development. See Memorandum entitled ''Antidumping Duty Investigation of Citric Acid and Citrate Salts (''Citric Acid'') from the People's Republic of China (PRC): Request for a List of Surrogate Countries,'' (July 9, 2008) (''Office of Policy Surrogate Countries Memorandum'').

On August 5, 2008, the Department issued its respondent selection memorandum, selecting TTCA and Yixing Union as mandatory respondents in this investigation. *See* Memorandum entitled ''Selection of Respondents for the Antidumping Investigation of Citric Acid and Citrate Salts from the People's Republic of China'' (''Respondent Selection Memo'') (August 5, 2008); *see also* ''Selection of Respondents'' section, below. On August 6, 2008, the Department issued its antidumping questionnaire to TTCA and Yixing Union. TTCA and Yixing Union submitted timely responses to the questionnaire.

On August 19, 2008, Petitioners requested that the Department postpone the preliminary determination by 50 days, *i.e.*, until November 12, 2008, and

[1] *See* Volume I of the ''Petition for the Imposition of Antidumping and Countervailing Duties on Citric Acid and Certain Citrate Salts from the People's Republic of China'' (April 14, 2008), at Exhibit I-8.

[2] The Department accepted the Q&V response submitted by Wuxi Harvest Imp & Exp Trdg (''Wuxi Harvest'') on July 7, 2008.

[3] Three companies: Shandong Yinfeng Chemical Industry Group Co., Ltd., Dis Company, and Hangzhou Apex Import & Export, reported that they did not export the merchandise under investigation to the United States during the POI. The 14 companies who reported shipments of Citric Acid are: A.H.A. International (''A.H.A''); Anhui BBCA Biochemical Co., Ltd. (''BBCA Biochemical''); China Tianyu Chemical Co., Ltd.; International Group Jiangsu Native Produce IMPT & EXP Co., Ltd. (''High Hope''); Huangshi Xinghua Biochemical Co., Ltd. (''Xinghua Biochemical''); Laiwu Taihe Biochemistry Co., Ltd. (''Laiwu Taihe Biochemistry''); Lianyungang Shuren Scientific Creation Import & Export Co., Ltd. (''Shuren Scientific''); Penglai Marine Bio-Technology Co., Ltd. (''Penglai Marine''); RZBC Imp. & Exp. Co., Ltd; TTCA; Shihezi City Changyun Biochemical Co., Ltd. (''Changyun Biochemical''); Weifang Ensign Industry Co., Ltd. (''Weifang Ensign''); Wuxi Harvest Imp. & Exp. Co.; and Yixing Union Biochemical Co., Ltd. (''Yixing Union''). Yixing Union was not identified in the petition, thus, the Department did not send it a Q&V questionnaire. However, Yixing Union sent the Department a Q&V response.

[4] July 13, 2008, was a Sunday. Thus, SRAs filed July 14, 2008 or filed using the one-day lag rule on July 15, 2008, were timely.

[5] RZBC Group includes RZBC Imp. & Exp. Co., Ltd., RZBC Co., Ltd., and RZBC (Juxian) Co., Ltd.

on August 29, 2008, the Department extended the preliminary determination deadline. *See Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China: Postponement of Preliminary Determinations of Antidumping Duty Investigations*, 73 FR 50941 (August 29, 2008).

On October 6, 2008, Petitioners and TTCA submitted surrogate value data.[6] Petitioners submitted surrogate value data for Indonesia, while TTCA and Yixing Union submitted surrogate value data for Thailand. On October 8, 2008, TTCA submitted English translations for some of the information it submitted on October 6, 2008. We have preliminarily chosen Indonesia as our primary surrogate country for this investigation. *See* Memorandum entitled ''Antidumping Investigation of Citric Acid and Certain Citrate Salts from the People's Republic of China: Selection of a Surrogate Country'' (November 12, 2008).

Period of Investigation

The POI is October 1, 2007, through March 31, 2008. This period corresponds to the two most recent fiscal quarters prior to the month of the filing of the petition, which was April 2008.[7]

Scope of Investigation

The scope of this investigation includes all grades and granulation sizes of citric acid, sodium citrate, and potassium citrate in their unblended forms, whether dry or in solution, and regardless of packaging type. The scope also includes blends of citric acid, sodium citrate, and potassium citrate; as well as blends with other ingredients, such as sugar, where the unblended form(s) of citric acid, sodium citrate, and potassium citrate constitute 40 percent or more, by weight, of the blend. The scope of this investigation also includes all forms of crude calcium citrate, including dicalcium citrate monohydrate, and tricalcium citrate tetrahydrate, which are intermediate products in the production of citric acid, sodium citrate, and potassium citrate. The scope of this investigation does not include calcium citrate that satisfies the standards set forth in the United States Pharmacopeia and has been mixed with a functional excipient, such as dextrose or starch, where the excipient constitutes at least 2%, by weight, of the product. The scope of this investigation includes the hydrous and anhydrous forms of citric acid, the dihydrate and anhydrous forms of sodium citrate, otherwise known as citric acid sodium salt, and the monohydrate and monopotassium forms of potassium citrate. Sodium citrate also includes both trisodium citrate and monosodium citrate, which are also known as citric acid trisodium salt and citric acid monosodium salt, respectively. Citric acid and sodium citrate are classifiable under 2918.14.0000 and 2918.15.1000 of the Harmonized Tariff Schedule of the United States (HTSUS), respectively. Potassium citrate and crude calcium citrate are classifiable under 2918.15.5000 and 3824.90.9290 of the HTSUS, respectively. Blends that include citric acid, sodium citrate, and potassium citrate are classifiable under 3824.90.9290 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Scope Comments

In accordance with the preamble to the Department's regulations (*see Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997)), in our *Notice of Initiation* we set aside a period of time for parties to raise issues regarding product coverage, and encouraged all parties to submit comments within 20 calendar days of publication of the *Notice of Initiation*. On May 23, 2008, and June 3, 2008, respectively, Chemrom Inc., and L. Perrigo Company, both of which are importers of the merchandise under investigation, timely filed comments concerning the scope of the antidumping duty and countervailing duty investigations of citric acid from Canada and the People's Republic of China. Petitioners responded to these comments on June 16, 2008.

On August 6, 2008, the Department issued a memorandum to the file regarding Petitioners' proposed amendments to the scope of the investigations. In response, on August 11, 2008, L. Perrigo Company and Petitioners submitted comments to provide clarification of the term ''unrefined'' calcium citrate. We have analyzed the comments of the interested parties regarding the scope of this investigation. *See* Memorandum entitled ''Antidumping Duty Investigations of Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China (PRC), and Countervailing Duty Investigation of Citric Acid and Certain Citrate Salts from the PRC: Whether to Amend the Scope of these Investigations to Exclude Monosodium Citrate and to Further Define the Product Referred to as ''Unrefined Calcium Citrate'' (September 10, 2008) (''Scope Memo''). Our position on these comments, as set out in the Scope Memo, is incorporated in the ''Scope of the Investigation'' section above.

Surrogate Country

When the Department is investigating imports from an NME, section 773(c)(1) of the Act directs it to base normal value, in most circumstances, on the NME producer's factors of production (''FOP'') valued in a surrogate market–economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the factors of production, the Department shall utilize, to the extent possible, the prices or costs of factors of production in one or more market–economy countries that are at a level of economic development comparable to that of the NME country and are significant producers of comparable merchandise.

For purposes of the instant investigation, in accordance with section 773(c) of the Act and 19 CFR 351.408, the Department has preliminarily selected Indonesia as the primary surrogate country. See Memorandum to the File: Antidumping Investigation of Citric Acid and Certain Citrate Salts from the People's Republic of China: Selection of a Surrogate Country, dated November 12, 2008.

Selection of Respondents

Section 777A(c)(1) of the Act directs the Department to calculate individual weighted–average dumping margins for each known exporter and producer of the subject merchandise. Section 777A(c)(2) of the Act gives the Department discretion, when faced with a large number of exporters or producers and where it is not practicable to examine all known exporters or producers of subject merchandise, to investigate either (1) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the Department at the time of selection, or (2) exporters accounting for the largest volume of the merchandise under investigation that can reasonably be examined. After consideration of the complexities of this investigation and the resources available to it, the Department determined that it was not practicable in this investigation to examine all known exporters of subject

[6] On October 7, 2008, we received a surrogate value submission from Yixing Union containing a single company's financial statements which was also included in TTCA's October 6, 2008, surrogate value submission.

[7] *See* 19 CFR 351.204(b)(1).

merchandise. We determined we had the resources to examine two exporters. We further determined to limit our examination to the two exporters accounting for the largest volume of the subject merchandise pursuant to section 777A(c)(2)(B) of the Act. Our analysis indicates that TTCA and Yixing Union are the two largest PRC exporters of subject merchandise by volume (measured by weight), and account for a significant percentage of all exports of the subject merchandise from the PRC during the POI. As a result, we selected these companies as the mandatory respondents in this investigation.[8]

Non–Market Economy Country

For purposes of initiation, Petitioners submitted an LTFV analysis for the PRC as an NME.[9] In every case conducted by the Department involving the PRC, the PRC has been treated as an NME country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority.[10] Therefore, we have treated the PRC as an NME country for purposes of this preliminary determination.

Separate Rates

In proceedings involving NME countries, the Department has a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single antidumping duty rate. It is the Department's policy to assign all exporters of merchandise subject to investigation in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. Exporters can demonstrate this independence through the absence of both *de jure* and *de facto* governmental control over export activities. The Department analyzes each entity exporting the subject merchandise under a test arising from *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (''*Sparklers*''), as further developed in *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (''*Silicon Carbide*'').[11] However, if the Department determines that a company is wholly foreign–owned or located in a market economy, then a separate–rate analysis is not necessary to determine whether it is independent from government control.

A. Separate–Rate Recipients

A.H.A, BBCA Biochemical, Changyun Biochemical, High Hope, Laiwu Taihe Biochemical, Penglai Marine, Shuren Scientific, Weifan Ensign, Xinghua Biochemical, JF International, and RZBC Group (collectively, ''SR Applicants'') and TTCA and Yixing Union (the mandatory respondents) all stated that they are either joint ventures between Chinese and foreign companies, or are wholly Chinese–owned companies. Therefore, the Department must analyze whether these respondents can demonstrate the absence of both *de jure* and *de facto* governmental control over export activities.

a. Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies.

The mandatory respondents and SR Applicants provided evidence demonstrating: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies.[12]

b. Absence of De Facto Control

Typically the Department considers four factors in evaluating whether each respondent is subject to *de facto* governmental control of its export functions: (1) Whether the export prices are set by or are subject to the approval of a governmental agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.[13] The Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of governmental control which would preclude the Department from assigning separate rates.

The mandatory respondents and the SR Applicants provided evidence demonstrating: (1) that the export prices are not set by, and are not subject to, the approval of a governmental agency; (2) they have authority to negotiate and sign contracts and other agreements; (3) they have autonomy from the government in making decisions regarding the selection of management; and (4) they retain the proceeds of their export sales and make independent decisions regarding disposition of profits or financing of losses.

Therefore, the evidence placed on the record of this investigation by the mandatory respondents and the SR Applicants demonstrates an absence of *de jure* and *de facto* government control with respect to each of the exporters' exports of the merchandise under investigation, in accordance with the criteria identified in *Sparklers and Silicon Carbide*.

Application of Facts Available for the PRC Wide Entity

Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information that has been requested by the Department, (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act, (C) significantly impedes a proceeding under the antidumping statute, or (D) provides such information but the

[8] *See* Respondent Selection Memo.

[9] *See Notice of Initiation*.

[10] *See, e.g., Lightweight Thermal Paper From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 57329 (October 2, 2008) (*''LWTP Final''*).

[11] *See also* Policy Bulletin 05.1, which states: ''[w]hile continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME investigations will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non-investigated firms receiving the weighted-average of the individually calculated rates. This practice is referred to as the application of ''combination rates'' because such rates apply to specific combinations of exporters and one or more producers. The cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question and produced by a firm that supplied the exporter during the period of investigation.'' See Policy ulletin 05.1 at 6.

[12] *See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR at 20589 (May 6, 1991).

[13] *See Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994); *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Information on the record of this investigation indicates that the PRC–wide entity was non–responsive. Certain companies did not respond to our questionnaire requesting Q&V information. *See* Respondent Selection Memo. Specifically, we issued the Q&V questionnaire to 129 identified PRC exporters of the subject merchandise.[14] Evidence on the record indicates that 65 identified PRC exporters of subject merchandise received our Q&V questionnaire but did not respond to the Department. *See* Respondent Selection Memo at Attachment III. Based on the above facts, the Department preliminarily determines that there were exports of the subject merchandise under investigation from PRC exporters that did not respond to the Department's questionnaire. In addition, such exporters did not demonstrate entitlement to separate rates status. Thus, we are treating these PRC exporters as part of the countrywide entity. As a result, use of facts available pursuant to section 776(a)(2) of the Act is warranted for the PRC entity.[15]

Section 776(b) of the Act provides that if an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information, the Department may employ adverse inferences.[16] We find that, because the PRC–wide entity did not respond to our request for information, it has failed to cooperate to the best of its ability. Therefore, the Department preliminarily finds that, in selecting from among the facts available, an adverse inference is appropriate.

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) provide that the Department may rely on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any information placed on the record. In selecting a rate for AFA, the Department selects a rate that is sufficiently adverse ''as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.''[17] It is further the Department's practice to select a rate that ensures ''that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.''[18]

It is the Department's practice to select, as AFA, the higher of a) the highest margin alleged in the petition, or b) the highest calculated rate of any respondent in the investigation.[19] As AFA, we have preliminarily assigned to the PRC–wide entity a rate of 156.87 percent, the highest rate from the petition, as revised by the Department.[20] The Department preliminarily determines that this information is the most appropriate from the available sources to effectuate the purposes of AFA. The Department's reliance on the initiation rate to determine an AFA rate is subject to the requirement to corroborate secondary information.

Corroboration

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation as facts available, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal. Secondary information is described in the SAA as ''information derived from the petition that gave rise to the investigation or review, the final determination concerning subject merchandise, or any previous review under section 751 concerning the subject merchandise.''[21] The SAA provides that to ''corroborate'' means simply that the Department will satisfy itself that the secondary information to be used has probative value.[22] The SAA also states that independent sources used to corroborate may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation.[23] To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.[24]

The AFA rate that the Department used is from the petition, as revised by the Department, and is thus secondary information subject to the corroboration requirement.[25] Petitioners' methodology for calculating the export price (''EP'') and normal value (''NV'') in the petition is discussed in the initiation notice.[26] To corroborate the AFA margin we have selected, we compared that margin to the control number specific margins we found for the mandatory respondents that cooperated. We found that the margin of 156.87 percent has probative value because it is in the range of control number–specific margins we found for the mandatory respondents. Accordingly, we find that the rate of 156.87 percent is corroborated within the meaning of section 776(c) of the Act.

Consequently, we are applying a single antidumping rate the PRC–wide rate to exporters that failed to respond to the Department's the Q&V questionnaire, or did not apply for a separate rate, as applicable. The PRC–wide rate applies to all entries of the merchandise under investigation except for entries from mandatory respondents TTCA and Yixing Union, and the remaining the separate–rate recipients. These companies and their corresponding antidumping duty cash deposit rates are listed below in the ''Preliminary Determination'' section of this notice.

Margin for the Separate–Rate Applicants

We have established a simple–average margin for all separate–rate recipients

[14] Of these PRC exporters of subject merchandise 64 Q&V questionnaires were not delivered and thus returned to the Department. *See* Respondent Selection Memo at 1 and Attachment III. Out of the group of PRC exporters whose Q&V questionnaires were returned to the Department, six of these PRC exporters nonetheless submitted a timely Q&V questionnaire response. Of the PRC exporters who received the Q&V questionnaire we received responses from seven exporters who claimed shipments and three exporters of whom claimed no shipments. One PRC exporter entered a timely Q&V questionnaire response but was not on the list of 129 identified PRC exporters of the subject merchandise. The 14 PRC exporters who reported shipments of Citric Acid to the United States did not account for all imports into the United States from the PRC during the POI.

[15] *See, e.g., LWTP Final.*

[16] *See, e.g., LWTP Final. See also Statement of Administrative Action accompanying the URAA, H.R. Rep No. 103-316 (''SAA'') at 870.*

[17] *See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8932 (February 23, 1998).

[18] *See SAA* at 870. *See also, Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 FR 69937, 69939 (November 18, 2005).

[19] *See, e.g., Final Determination od Sales at Less Than Fair Value: Sodium Hexametaphosphate From the People's Republic of China*, 73 FR 6479, 6481 (February 4, 2008).

[20] *See Notice of Initiation.*

[21] *See SAA* at 870.

[22] *See id.*

[23] *See id.*

[24] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996), unchanged in *Final Results of Antidumping Duty Administrative Reviews and Termination in Part: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan*, 62 FR 11825 (March 13, 1997).

[25] *See Notice of Initiation.*

[26] *See Notice of Initiation.*

that were not selected as mandatory respondents, based on the rates we calculated for the mandatory respondents, excluding any rates that are zero, *de minimis*, or based entirely on AFA. That rate is 134.75 percent and these parties are identified by name in the ''Preliminary Determination'' section of this notice.

Fair Value Comparisons

To determine whether sales of citric acid to the United States by the mandatory respondents were made at LTFV, we compared export price (''EP'') to NV, as described in the ''Export Price'' and ''Normal Value'' sections of this notice.

Export Price

In accordance with section 772(a) of the Act, EP is the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under section 772(c) of the Act. In accordance with section 772(a) of the Act, we used EP for TTCA's and Yixing Union's U.S. sales because the subject merchandise was sold directly to the unaffiliated customers in the United States prior to importation and because constructed export price (''CEP'') was not otherwise indicated. Neither mandatory respondent reported CEP sales.

We calculated EP based on the packed FOB, CFR, or CIF prices to unaffiliated purchasers in, or for exportation to, the United States. We made deductions, as appropriate, for any movement expenses (*e.g.*, foreign inland freight from the plant to the port of exportation, brokerage and handling, marine insurance, and ocean freight) in accordance with section 772(c)(2)(A) of the Act. For a detailed description of all adjustments, see Memorandum to the File entitled ''Investigation of Citric Acid and Citrate Salts from the People's Republic of China: Analysis of the Preliminary Determination Margin Calculation for TTCA Co., Ltd., (a.k.a. Shandong TTCA Biochemistry Co., Ltd.)'' (November 12, 2008) and Memorandum to the File entitled ''Investigation of Citric Acid and Citrate Salts from the People's Republic of China: Analysis of the Preliminary Determination Margin Calculation for Yixing Union Biochemical Co., Ltd. '' (November 12, 2008).

Normal Value

We compared NV to weighted–average EPs in accordance with section 777A(d)(1) of the Act. Further, section 773(c)(1) of the Act provides that the Department shall determine the NV using an FOP methodology if the merchandise is exported from an NME and the information does not permit the calculation of NV using home–market prices, third–country prices, or constructed value under section 773(a) of the Act. The Department bases NV on the FOPs because the presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under its normal methodologies.

Factor Valuations

In accordance with section 773(c) of the Act, we calculated NV based on FOPs reported by mandatory respondents for the POI. To calculate NV, we multiplied the reported per–unit factor–consumption rates by publicly available Indonesian surrogate values. For a detailed discussion of the surrogate values used in this investigation, *see* Surrogate Value Memorandum. In selecting the surrogate values, consistent with our practice, we considered the quality, specificity, and contemporaneity of the data.[27] As appropriate, we adjusted input prices by including freight costs to make them delivered prices. Specifically, we added to Indonesian import surrogate values a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory, where appropriate. This adjustment is in accordance with the Federal Circuit decision in *Sigma Corp. v. United States*, 117 F. 3d 1401, 1407–1408 (Fed. Cir. 1997).

In accordance with 19 C.F.R. 351.301(c)(3)(i), for the final determination in an antidumping investigation, interested parties may submit within 40 days after the date of publication of the preliminary determination publicly available information to value the factors of production (''FOP'').[28]

For this preliminary determination for direct material inputs, packing material inputs, some by–products, and a utility input, we used Indonesian import values from the World Trade Atlas (''WTA'') online, which were published by Statistics Indonesia. The WTA Indonesian import statistics used to calculate surrogate values for the mandatory respondents' material inputs are reported in U.S. dollars and are contemporaneous with the POI. Where we could not use WTA Indonesian import statistics, we used Indian import statistics from the WTA. In selecting the best available information for valuing FOPs in accordance with section 773(c)(1) of the Act, the Department's practice is to select, to the extent practicable, surrogate values which are non–export average values, most contemporaneous with the POI, product–specific, and tax–exclusive.[29]

Where we could not obtain publicly available information contemporaneous with the POI with which to value FOPs, we adjusted the surrogate values using, where appropriate, the Indonesian or Indian Wholesale Price Index (''WPI'') as published in the *International Financial Statistics* of the International Monetary Fund (''IMF'').

Furthermore, with regard to the Indonesian and Indian import–based surrogate values, we have disregarded import prices that we have reason to believe or suspect may be subsidized. We have reason to believe or suspect that prices of inputs from Indonesia, India, South Korea, and Thailand may have been subsidized.[30] We have found in other proceedings that these countries maintain broadly available, non–industry-specific export subsidies and, therefore, it is reasonable to infer that all exports to all markets from these

[27] *See e.g., Lightweight Thermal Paper From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 73 FR 27504, (May 13, 2008) (''*LWTP Prelim*'') unchanged at *LWTP Final*.

[28] In accordance with 19 CFR 351.301(c)(1), for the final determination of this investigation, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by an interested party less than ten days before, on, or after, the applicable deadline for submission of such factual information. However, the Department notes that 19 CFR 351.301(c)(1) permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record. The Department generally will not accept the submission of additional, previously absent-from-the-record alternative surrogate value information pursuant to 19 CFR 351.301(c)(1). *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part*, 72 FR 58809 (October 17, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

[29] *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 FR 42672, 42682 (July 16, 2004), unchanged in *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 FR 71005 (December 8, 2004).

[30] *See, e.g., LWTP Prelim unchanged at LWTP Final.*

countries may be subsidized.[31] We are also guided by the legislative history not to conduct a formal investigation to ensure that such prices are not subsidized.[32] Rather, Congress directed the Department to base its decision on information that is available to it at the time it makes its determination. Therefore, we have not used prices from these countries in calculating the Indonesian and Indian import–based surrogate values. In addition, we excluded Indonesian and Indian import data from NME countries from our surrogate value calculations.

We calculated freight costs for truck freight or inland boat freight, as appropriate, using an Indian per–unit average rate calculated from data on the following Web site: http://www.infobanc.com/logistics/logtruck.htm. The logistics section of this Web site contains inland freight truck rates between many large Indian cities. Since this value is not contemporaneous with the POI, we deflated the rate using WPI. Since the only inland boat value on the record is almost 12 years old, we used the Indian truck freight from 2008 to value inland boat freight consistent with *Certain Cut–to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 70 FR 12651 (March 15, 2005) and accompanying Issues and Decision Memorandum at Comment 14.

For labor, consistent with 19 CFR 351.408(c)(3), we used the PRC regression–based wage rate as reported on Import Administration's home page, Import Library, Expected Wages of Selected NME Countries, revised in May 2008, available at http://ia.ita.doc.gov/wages/index.html. Because this regression–based wage rate does not separate the labor rates into different skill levels or types of labor, we have applied the same wage rate to all skill levels and types of labor reported by the respondents. If the NME wage rates are updated by the Department prior to issuance of the final determination, we will use the updated wage rate in the final determination.

We valued electricity using rates from Energy Information Administration's International Electricity Prices and Fuel Costs ''Electricity Price for Industry'' table. The listed Indonesian rate for electricity is for 2005, so we applied the appropriate WPI inflator to make the rate contemporaneous with the POI. We valued water using the average water rate charged by the *United Nations Human Development Report 2006: Disconnected: Poverty, Water Supply, and Development in Jakarta Indonesia* (''UN Report''). The water rate is based on the 2005 average water tariff for the tariff group made up of ''large hotels, highrise buildings, banks, and factories'' in Indonesia. Since the information was not contemporaneous with the POI, we applied the appropriate WPI inflator.

We valued steam using a January 2006 Indonesian price for natural gas published by the American Chemistry Council following the methodology in *Goldlink Industries Co., Ltd., Trust Chem Co., Ltd., Tianjin Hanchem International Trading Co., Ltd. v. United States*, 431 F. Supp. 2d 1323 (CIT 2006). Because the information was not contemporaneous with the POI, we applied the appropriate WPI inflator.

To value factory overhead, selling, general, and administrative expenses, and profit, we used audited financial statements for the year ending December 2007 of PT Budi Acid Jaya TBK, a producer of comparable merchandise from Indonesia. The Department may consider other publicly available financial statements for the final determination, as appropriate.

TTCA claimed five by–product offsets consisting of high protein feed stuff, low protein feedstuff, granular mud, electricity, and steam. TTCA claimed it produced and sold all five types of by–products. However, TTCA did not support the reported production quantities for low protein feedstuff as requested in the Department's September 29, 2008, supplemental questionnaire. Therefore, we have not granted a by–product offset for TTCA's low protein feed stuff. Additionally, granular mud and electricity were not generated directly from the production of citric acid, but rather are generated from processing a by–product of citric acid.[33] With regards to granular mud and electricity, TTCA has not, as requested in the questionnaire issued on August 6, 2008, explained any further processing of these by–products or co–products or identified the factors and quantities used in the further processing. Therefore, we have not granted a by–product offset for TTCA's granular mud and electricity. We are preliminarily granting a by–product offset for TTCA's high protein feedstuff and steam.

Currency Conversion

As appropriate, we made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

Verification

As provided in section 782(i)(1) of the Act, we intend to verify the information submitted by TTCA and Yixing Union upon which we will rely in making our final determination. Additionally, we may also verify the information on the record submitted by selected separate–rate applicants.

Combination Rates

In the *Notice of Initiation*, the Department stated that it would calculate combination rates for respondents that are eligible for a separate rate in this investigation.[34] This practice is described in Policy Bulletin 05.1.[35]

Preliminary Determination

The weighted–average dumping margins are as follows:

EXPORTER	PRODUCER	MARGIN
TTCA Co., Ltd., (a.k.a. Shandong TTCA Biochemistry Co., Ltd.)	TTCA Co., Ltd., (a.k.a. Shandong TTCA Biochemistry Co., Ltd.)	150.09
Yixing Union Biochemical Co., Ltd.	Yixing Union Biochemical Co., Ltd.	119.41
Anhui BBCA Biochemical Co., Ltd.	Anhui BBCA Biochemical Co., Ltd.	134.75
Anhui BBCA Biochemical Co., Ltd.	China BBCA Maanshan Biochemical Corp.	134.75
A.H.A. International Co., Ltd.	Yixing Union Biochemical Co., Ltd.	134.75
A.H.A. International Co., Ltd.	Nantong Feiyu Fine Chemical Co., Ltd.	134.75
High Hope International Group Jiangsu Native Produce IMP & EXP Co., Ltd.	Yixing Union Biochemical Co., Ltd.	134.75

[31] *See id.*

[32] *See Omnibus Trade and Competitiveness Act of 1988, Conference Report to Accompanying H.R. 3, H.R. Rep.* 100-576 at 590 (1988).

[33] *See* TTCA's October 22, 2008, submission at 17 and October 28, 2008 questionnaire response at 4-5.

[34] *See Notice of Initiation.*

[35] *See* Footnote 36, *supra.*

EXPORTER	PRODUCER	MARGIN
Huangshi Xinghua Biochemical Co., Ltd.	Huangshi Xinghua Biochemical Co., Ltd.	134.75
Lianyungang JF International Trade Co., Ltd	TTCA Co., Ltd., (a.k.a. Shandong TTCA Biochemistry Co., Ltd.)	134.75
Laiwu Taihe Biochemistry Co., Ltd.	Laiwu Taihe Biochemistry Co., Ltd.	134.75
Lianyungang Shuren Scientific Creation Import & Export Co., Ltd.	Lianyungang Great Chemical Industry Co., Ltd.	134.75
Penglai Marine Bio–Tech Co. Ltd.	Penglai Marine Bio–Tech Co. Ltd.	134.75
RZBC Imp & Exp. Co., Ltd./ RZBC Co., Ltd./ RZBC (Juxian) Co., Ltd.	RZBC Co., Ltd.	134.75
RZBC Imp & Exp. Co., Ltd./ RZBC Co., Ltd./ RZBC (Juxian) Co., Ltd.	RZBC (Juxian) Co., Ltd.	134.75
RZBC Imp & Exp. Co., Ltd./ RZBC Co., Ltd./ RZBC (Juxian) Co., Ltd.	Lianyungang Great Chemical Industry Co., Ltd.	134.75
Shihezi City Changyun Biochemical Co., Ltd.	Shihezi City Changyun Biochemical Co., Ltd.	134.75
Weifang Ensign Industry Co., Ltd.	Weifang Ensign Industry Co., Ltd.	134.75
PRC–Entity		156.87

Disclosure

We will disclose to parties the calculations performed in this proceeding within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Suspension of Liquidation

In accordance with section 733(d) of the Act, we will instruct CBP to suspend liquidation of all entries of merchandise subject to this investigation, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. The Department has determined in its *Citric Acid and Certain Citrate Salts From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination* 73 FR 54367 (September 19, 2008) (''*CVD Citric Acid Prelim*''), that the product under investigation, exported and produced by TTCA, benefitted from an export subsidy. Normally, where the product under investigation is also subject to a concurrent countervailing duty investigation, we instruct CBP to require an antidumping cash deposit or posting of a bond equal to the weighted–average amount by which the NV exceeds the EP, as indicated above, minus the amount determined to constitute an export subsidy. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 From India*, 69 FR 67306, 67307 (November 17, 2007). Therefore, for merchandise under consideration exported and produced by TTCA entered or withdrawn from warehouse, for consumption on or after publication date of this preliminary determination, we will instruct CBP to require an antidumping cash deposit or the posting of a bond for each entry equal to the weighted–average margin indicated above, adjusted for the export subsidy rate determined in *CVD Citric Acid Prelim (i.e.*, Other Policy Bank Loan countervailable subsidy of 0.48 percent *ad valorem*). Furthermore, for all separate–rate recipients that were not selected as mandatory respondents, we will instruct CBP to require an antidumping cash deposit or the posting of a bond for each entry equal to the average of the margins calculated for the mandatory respondents, adjusted for their respective export subsidy rates, if applicable, from *CVD Citric Acid Prelim*.

For the remaining exporters, the following cash deposit requirements will be effective upon publication of the preliminary determination for all shipments of merchandise under consideration entered or withdrawn from warehouse for consumption on or after publication date: (1) The rate for the exporter/producer combinations listed in the chart above will be the rate we have determined in this preliminary determination, adjusted as noted above where appropriate; (2) for all PRC exporters of merchandise subject to this investigation that have not received their own rate, the cash–deposit rate will be the PRC–wide rate; (3) for all non–PRC exporters of merchandise subject to this investigation that have not received their own rate, the cash–deposit rate will be the rate applicable to the PRC exporter/producer combination that supplied that non–PRC exporter. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted–average amount by which the NV exceeds U.S. price, as indicated above. The suspension of liquidation will remain in effect until further notice.

International Trade Commission Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our preliminary affirmative determination of sales at LTFV. Section 735(b)(2) of the Act requires the ITC to make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of citric acid, or sales (or the likelihood of sales) for importation, of the subject merchandise within 45 days of our final determination.

Postponement of Final Determination

Section 735(a)(2)(A) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise. Section 351.210(e)(2) of the Department's regulations requires that exporters requesting postponement of the final determination must also request an extension of the provisional measures referred to in section 733(d) of the Act from a four-month period until not more than six months. We received a request to postpone the final determination from TTCA on November 3, 2008 and from Yixing Union on November 10, 2008. In addition, TTCA consented to the extension of provisional measures from a four-month period to not longer than six months. Because this preliminary determination is affirmative, the request for postponement was made by an exporter who accounts for a significant proportion of exports of the subject merchandise,[36] and there is no compelling reason to deny the respondent's request, we have extended the deadline for issuance of the final determination until the 135 days after the date of publication of this preliminary determination in the **Federal Register** and have extended provisional measures to not longer than six months.

[36] *See* Memorandum to the File: Selection of Respondents for the Antidumping Investigation of Citric Acid and Citrate Salts from the People's Republic of China (August 8, 2008).

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Import Administration no later than seven days after the date on which the final verification report is issued in this proceeding and rebuttal briefs, limited to issues raised in case briefs may be submitted no later than five days after the deadline date for case briefs. *See* 19 CFR 351.309. A table of contents, list of authorities used and an executive summary of issues should accompany any briefs submitted to the Department. This summary should be limited to five pages total, including footnotes.

In accordance with section 774 of the Act, we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days after the date of publication of this notice.[37] Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 14th Street and Constitution Ave, NW, Washington, DC 20230. *See* 19 CFR 351.310. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

We will make our final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act.

Dated: November 12, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–27633 Filed 11–19–08; 8:45 am]

BILLING CODE 3510–DS–S

[37] *See* 19 CFR 351.310(c).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Extension of Deadline for Seats for the Channel Islands National Marine Sanctuary Advisory Council

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: NOAA is extending the deadline for applications for the following seats on the Channel Islands National Marine Sanctuary Advisory Council (Council): Commercial Fishing alternate, Business alternate. Applicants are chosen based upon: Their particular expertise and experience in relation to the seat for which they are applying, community and professional affiliations, views regarding the protection and management of marine resources, and the length of residence in the communities located near the Sanctuary. Applicants who are chosen as members should expect to serve in a volunteer capacity for 2-year terms, pursuant to the Council's Charter.

DATES: Applications are due by December 8th, 2008.

ADDRESSES: Application kits may be obtained at *http://www.channelislands.noaa.gov/sac/news.html.* Completed applications should be sent to *Danielle.lipski@noaa.gov* or 113 Harbor Way, Suite 150, Santa Barbara, CA 93109.

FOR FURTHER INFORMATION CONTACT: Michael Murray, Channel Islands National Marine Sanctuary, 113 Harbor Way, Suite 150, Santa Barbara, CA 93109–2315, 805–966–7107, extension 464, *michael.murray@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Council was originally established in December 1998 and has a broad representation consisting of 21 members, including ten government agency representatives and eleven members from the general public. The Council functions in an advisory capacity to the Sanctuary Superintendent. The Council works in concert with the Sanctuary Superintendent by keeping him or her informed about issues of concern throughout the Sanctuary, offering recommendations on specific issues, and aiding the Superintendent in achieving the goals of the National Marine Sanctuary Program. Specifically, the Council's objectives are to provide advice on: (1) Protecting natural and cultural resources and identifying and evaluating emergent or critical issues involving Sanctuary use or resources; (2) Identifying and realizing the Sanctuary's research objectives; (3) Identifying and realizing educational opportunities to increase the public knowledge and stewardship of the Sanctuary environment; and (4) Assisting to develop an informed constituency to increase awareness and understanding of the purpose and value of the Sanctuary and the National Marine Sanctuary Program.

Authority: 16 U.S.C. Section 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: November 10, 2008.

Daniel J. Basta,

Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. E8–27259 Filed 11–19–08; 8:45 am]

BILLING CODE 3510–22–M

COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION

[OJP (OJJDP) Docket No. 1492]

Meeting of the Coordinating Council on Juvenile Justice and Delinquency Prevention

AGENCY: Coordinating Council on Juvenile Justice and Delinquency Prevention.

ACTION: Notice of meeting.

SUMMARY: The Coordinating Council on Juvenile Justice and Delinquency Prevention (Council) is announcing its December, 2008 meeting.

DATES: Friday, December 5, 2008, 9 a.m. to 12:30 p.m.

ADDRESSES: The meeting will take place in the third floor main conference room at the U.S. Department of Justice, Office of Justice Programs, 810 7th St., NW., Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: Visit the Web site for the Coordinating Council at *http://www.juvenilecouncil.gov* or contact Robin Delany-Shabazz, Designated Federal Official, by telephone at 202–307–9963 [**Note:** this is not a toll-free telephone number], or by e-mail at *Robin.Delany-Shabazz@usdoj.gov.* The meeting is open to the public.

SUPPLEMENTARY INFORMATION: The Coordinating Council on Juvenile

Justice and Delinquency Prevention, established pursuant to Section 3(2)A of the Federal Advisory Committee Act (5 U.S.C. App. 2) will meet to carry out its advisory functions under Section 206 of the Juvenile Justice and Delinquency Prevention Act of 2002, 42 U.S.C. 5601, *et seq.* Documents such as meeting announcements, agendas, minutes, and reports will be available on the Council's Web page, *http://www.juvenilecouncil.gov,* where you may also obtain information on the meeting.

Although designated agency representatives may attend, the Council membership is composed of the Attorney General (Chair), the Secretary of Health and Human Services, the Secretary of Labor, the Secretary of Education, the Secretary of Housing and Urban Development, the Administrator of the Office of Juvenile Justice and Delinquency Prevention (Vice Chair), the Director of the Office of National Drug Control Policy, the Chief Executive Officer of the Corporation for National and Community Service, and the Assistant Secretary of Homeland Security for U.S. Immigration and Customs Enforcement. Up to nine additional members are appointed by the Speaker of the House of Representatives, the Senate Majority Leader, and the President of the United States.

Meeting Agenda

The agenda for this meeting will include: (a) A presentation on the Council sponsored Web-based toolkit to help federal program managers plan, manage and sustain comprehensive community initiatives and a discussion of making effective use of this resource across member agencies; (b) approval of the Council's summative report and member agency youth activity report; (c) a retrospective of Council activities over this Administration; (d) a discussion of future activities and priorities; and (e) applicable legislative and program updates; announcements and other business.

Registration

For security purposes, members of the public who wish to attend the meeting must pre-register online at *http://www.juvenilecouncil.gov/meetings.html* no later than Monday, December 1, 2008. Should problems arise with Web registration, call Daryel Dunston at 240–221–4343 or send a request to register for the December 5, 2008 Council meeting to Mr. Dunston. Include name, title, organization or other affiliation, full address and phone, fax and e-mail information and send to his attention either by fax to 301–945–4295, or by e-mail to *ddunston@edjassociates.com.* [**Note:** these are not toll-free telephone numbers.] Additional identification documents may be required. Space is limited.

Note: Photo identification will be required for admission to the meeting.

Written Comments

Interested parties may submit written comments and questions by Monday, December 1, 2008, to Robin Delany-Shabazz, Designated Federal Official for the Coordinating Council on Juvenile Justice and Delinquency Prevention, at *Robin.Delany-Shabazz@usdoj.gov.* The Coordinating Council on Juvenile Justice and Delinquency Prevention expects that the public statements presented will not repeat previously submitted statements.

Greg Harris,

Principal Deputy Administrator.

[FR Doc. E8–27656 Filed 11–19–08; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the Uniform Formulary Beneficiary Advisory Panel

AGENCY: Department of Defense, Assistant Secretary of Defense (Health Affairs).

ACTION: Notice of meeting.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended) and the Government in the Sunshine Act of 1976 (U.S.C. 552b, as amended), the Department of Defense announces the following Federal Advisory Committee Meeting of the Uniform Formulary Beneficiary Advisory Panel (hereafter referred to as the Panel).

DATES: January 8, 2009 from 8 a.m. to 4 p.m.

ADDRESSES: Naval Heritage Center Theater, 701 Pennsylvania Avenue NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Lt Col Thomas Bacon, Designated Federal Officer, Uniform Formulary Beneficiary Advisory Panel, Skyline 5, Suite 810, 5111 Leesburg Pike, Falls Church, VA 22041–3206; Telephone: (703) 681–2890; Fax: (703) 681–1940; E-mail address: *baprequests@tma.osd.mil.*

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: The Panel will review and comment on recommendations made to the Director, TRICARE Management Activity, by the Pharmacy and Therapeutics Committee regarding the Uniform Formulary.

Meeting Agenda: Sign-In; Welcome and Opening Remarks; Public Citizen Comments; Scheduled Therapeutic Class Reviews—Short Acting Beta Agonists, Nasal Allergy Drugs and Designated Newly Approved Drugs; Panel Discussions and Vote, and comments following each therapeutic class review.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is limited and will be provided only to the first 220 people signing in. All persons must sign in legibly.

Administrative Work Meeting: Prior to the public meeting, the Panel will conduct an Administrative Work Meeting from 7 a.m. to 7:50 a.m. to discuss administrative matters of the Panel. The Administrative Work Meeting will be held at the Naval Heritage Center Conference Room, 701 Pennsylvania Avenue, NW., Washington, DC 20004. Pursuant to 41 CFR 102–3.160, the Administrative Work Meeting will be closed to the public.

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the membership of the Panel at any time or in response to the stated agenda of a planned meeting. Written statements should be submitted to the Panel's Designated Federal Officer; the Designated Federal Officer's contact information can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

Written statements that do not pertain to the scheduled meeting of the Panel may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at a planned meeting, then these statements must be submitted no later than 5 business days prior to the meeting in question. The Designated Federal Officer will review all submitted written statements and provide copies to all the committee members.

Public Comments: In addition to written statements, the Panel will set aside 1 hour for individual or interested groups to address the Panel. To ensure consideration of their comments, individuals and interested groups should submit written statements as outlined in this notice, but if they still want to address the Panel, then they will be afforded the opportunity to register to address the Panel. The

Panel's Designated Federal Officer will have a ''Sign Up Roster'' available at the Panel meeting, for registration on a first-come, first-serve basis. Those wishing to address the Panel will be given no more than 5 minutes to present their comments, and at the end of the 1 hour time period, no further public comments will be accepted. Anyone who signs up to address the Panel but is unable to do so due to the time limitation may submit their comments in writing; however, they must understand that their written comments may not be reviewed prior to the Panel's deliberation. Accordingly, the Panel recommends that individuals and interested groups consider submitting written statements instead of addressing the Panel.

Dated: November 14, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–27583 Filed 11–19–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before December 22, 2008.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name, e.g., ''Upward Bound Evaluation'']. Persons submitting comments electronically should not submit paper copies.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: November 17, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Communications and Outreach

Type of Review: Extension.

Title: Application: No Child Left Behind—Blue Ribbon Schools Program.

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs; Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 413.

Burden Hours: 16,420.

Abstract: The purpose of the NCLB-Blue Ribbon Schools Program is to recognize and present as models elementary and secondary schools in the United States with high numbers of students from disadvantaged backgrounds that dramatically improved student performance to high levels on state or nationally-normed assessments and to recognize schools whose students achieve in the top 10 percent on state or nationally-normed assessments.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3810. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–27661 Filed 11–19–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–345]

Application To Export Electric Energy; New Brunswick Power Generation Corporation

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of application.

SUMMARY: New Brunswick Power Generation Corporation (NB Power) has applied for authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests, or requests to intervene must be submitted on or before December 5, 2008.

ADDRESSES: Comments, protests, or requests to intervene should be addressed as follows: Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350 (FAX 202–586–8008).

FOR FURTHER INFORMATION CONTACT: Ellen Russell (Program Office), 202–586–9624 or Michael Skinker (Program Attorney), 202–586–2793.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the FPA (16 U.S.C. 824a(e)).

On October 17, 2008, DOE received an application from NB Power for authority to transmit electric energy from the United States to Canada. NB Power, a Canadian corporation, is a generation, transmission, and distribution company in New Brunswick Province, Canada. NB Power proposes to export surplus

electric energy purchased from electric utilities and other suppliers within the U.S. and export the energy on its own behalf to Canada. NB Power has requested an electricity export authorization with a 5-year term. NB Power does not own or control any electric generation, transmission, or distribution assets, nor does it have a franchised service area. The electric energy which NB Power proposes to export to Canada would be surplus energy purchased from electric utilities, Federal power marketing agencies, and other entities within the United States.

NB Power will arrange for the delivery of exports to Canada over the international transmission facilities owned by Basin Electric Power Cooperative, Bonneville Power Administration, Eastern Maine Electric Cooperative, International Transmission Co., Joint Owners of the Highgate Project, Long Sault, Inc., Maine Electric Power Company, Maine Public Service Company, Minnesota Power, Inc., Minnkota Power Cooperative, Inc., New York Power Authority, Niagara Mohawk Power Corp., Northern States Power Company, Vermont Electric Power Company, and Vermont Electric Transmission Co.

The construction, operation, maintenance, and connection of each of the international transmission facilities to be utilized by NB Power has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

NB Power has recently been granted market-based rate authority by the Federal Energy Regulatory Commission and is scheduled to become a member of ISO New England on December 1, 2008. Accordingly, NB Power has requested expedited consideration of its export application in order that it may participate in the ISO New England market as soon as its membership in ISO New England becomes effective. In response to NB Power's request, DOE has shortened the public comment period to 15 days.

Procedural Matters: Any person desiring to become a party to these proceedings or to be heard by filing comments or protests to this application should file a petition to intervene, comment, or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the Federal Energy Regulatory Commission's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with DOE on or before the date listed above.

Comments on the NB Power application to export electric energy to Canada should be clearly marked with Docket No. EA–345. Additional copies are to be filed directly with Bonnie A. Suchman, Troutman Sanders LLP, 401 9th Street, NW., Suite 1000, Washington, DC 20004.

A final decision will be made on this application after the environmental impacts have been evaluated pursuant to the National Environmental Policy Act of 1969 and a determination is made by DOE that the proposed action will not adversely impact the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at *http://www.oe.energy.gov/permits_pending.htm*, or by e-mailing Odessa Hopkins at *Odessa.hopkins@hq.doe.gov*.

Issued in Washington, DC, on November 14, 2008.

Anthony J. Como,

Director, Permitting and Siting, Office of Electricity Delivery and Energy Reliability.

[FR Doc. E8–27590 Filed 11–19–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[IC09–598–000, FERC–598]

Commission Information Collection Activities, Proposed Collection; Comment Request; Extension

November 14, 2008.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507, the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Comments on the information collection are due by January 22, 2009.

ADDRESSES: An example of this information collection may be obtained from the Commission's Web site (*http://www.ferc.gov/docs-filings/elibrary.asp*) under the ''EG'' or ''FC'' docket prefix heading. Comments may be filed either electronically or in paper format. Those parties filing electronically do not need to make a paper filing. For a paper filing an original and 14 copies of such comments should be submitted to the Secretary of the Commission, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, and both the electronic and paper filings should refer to Docket No. IC09–598–000.

Documents filed electronically via the Internet must be prepared in an acceptable filing format and in compliance with the Commission's submission guidelines. Complete filing instructions and acceptable filing formats are available at *http://www.ferc.gov/help/submission-guide.asp*. To file the document, access the Commission's Web site at *http://www.ferc.gov*, choose the Documents & Filings tab, click on E-Filing (*http://www:ferc.gov/docs-filing/efiling.asp*), and then follow the instructions for each screen. First time users will have to establish a user name and password (*http://www.ferc.gov/docs-filing/eregistration.asp*). The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments.

All comments may be viewed, printed or downloaded remotely via the Internet through the Commission's homepage using the eLibrary link. For user assistance, contact FERC Online Support (e-mail *ferconlinesupport@ferc.gov* or call toll free at (866) 208–3676 or for TTY, contact (202) 502–8659. In addition, users interested in tracking the docket activity, may do so through eSubscription (*http://www.ferc.gov/docs-filing/esubscription.asp*).

FOR FURTHER INFORMATION CONTACT: Michael Miller, Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426. He may be reached by telephone at (202) 502–8415, by fax at (202) 273–0873, and by e-mail at *michael.miller@ferc.gov*.

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC–598 ''Self Certification for Entities Seeking Exempt Wholesale Generator or Foreign Utility Company Status'' (OMB Control No. 1902–0166) is used by the Commission to implement the statutory provisions of Title XII, subchapter F of the Energy Policy Act of 2005 (EPAct 2005).[1]

EPAct 2005 repealed the Public Utility Holding Company Act of 1935 (PUHCA 1935) in its entirety, including section 32, which provided for the Commission to exempt wholesale generators from PUHCA 1935 on a case-by-case basis, upon application.

[1] Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594 (2005) (codified at 42 U.S.C. 16451, *et seq.*).

Following the repeal of PUHCA 1935 and the enactment of PUHCA 2005, in Order No. 667 [2] the Commission amended its regulations to add procedures for self-certification by entities seeking exempt wholesale generator (EWG) and foreign utility company (FUCO) status. This self-certification is similar to the process available to entities that seek qualifying facility status.

An EWG is a ''person engaged directly or indirectly through one or more affiliates, and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale.'' [3] A FUCO is a company that ''owns or operates facilities that are not located in any state and that are used for the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, if such company: (1) Derives no part of its income, directly or indirectly, from the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, within the United States; and (2) neither the company nor any of its subsidiary companies is a public-utility company operating in the United States''.[4]

An exempt EWG or FUCO or its representative may file with the Commission a notice of self certification demonstrating that it satisfies the definition of exempt wholesale generator or foreign utility company. In the case of EWGs, the person filing a notice of self certification must also file a copy of the notice of self certification with the state regulatory authority of the state in which the facility is located and that person must also represent to the Commission in its submission that it has filed a copy of the notice with the appropriate state regulatory authority.[5]

A submission of the information is necessary for the Commission to carry out its responsibilities under EPAct 2005.[6] The Commission implements its responsibilities through the Code of Federal Regulations 18 CFR Part 366. These filing requirements are mandatory.

Action: The Commission is requesting a three-year extension of the current expiration date without any changes to the reporting requirements.

Burden Statement: Public reporting burden for this collection is estimated as:

Number of respondents annually	Number of responses per respondent	Average burden hours per response	Total annual burden hours
(1)	(2)	(3)	(1)x(2)x(3)
199	1	6	1,194

The estimated total cost to respondents is $72,549 [1,194 hours ÷ 2080 [7] hours per year × $126,384 [8] per year = $72,549]. The cost per respondent is equal to $364.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) training personnel to respond to an information collection; (4) searching data sources; (5) preparing and reviewing the information collection; and (6) transmitting or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect or overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Kimberly Bose,

Secretary.

[FR Doc. E8–27563 Filed 11–19–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2242–078]

Eugene Water and Electric Board; Notice of Settlement Agreement and Soliciting Comments, Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions, and Revised Schedule for Environmental Assessment

November 14, 2008.

Take notice that the following hydroelectric application has been filed

[2] Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005, 70 FR 75,592 (2005), FERC Statutes and Regulations ¶ 31,197 (2005), *order on reh'g*, 71 FR 28,446 (2006), FERC Statutes and Regulations ¶ 31,213 (2006), *order on reh'g*, 71 FR 42,750 (2006), FERC Statutes and Regulations ¶ 31,224 (2006), *order on reh'g*, FERC ¶ 61,133 (2007).

[3] 18 CFR 366.1.

[4] 18 CFR 366.1.

[5] 18 CFR 366.7.

[6] 42 U.S.C. 16451 *et seq.*

[7] Number of hours an employee works per year.

[8] Average annual salary per employee.

with the Commission and is available for public inspection:

a. *Type of Application:* New Major License and Settlement Agreement.

b. *Project No.:* 2242–078.

c. *Date Filed:* The license application was filed on November 24, 2006. The settlement agreement was filed on October 23, 2008.

d. *Applicant:* Eugene Water and Electric Board.

e. *Name of Project:* Carmen-Smith Hydroelectric Project.

f. *Location:* On the McKenzie River in Lane and Linn Counties, near McKenzie Bridge, Oregon. The project occupies approximately 560 acres of the Willamette National Forest.

g. *Filed Pursuant to:* The license application was filed pursuant to Federal Power Act, 16 U.S.C. 791(a)–825(r). The settlement agreement was filed pursuant to Rule 602 of the Commission's Rules of Practice and Procedure, 18 CFR 385.602.

h. *Applicant Contact:* Randy L. Berggren, General Manager, Eugene Water and Electric Board, 500 East 4th Avenue, P.O. Box 10148, Eugene, OR 97440, (541) 484–2411.

i. *FERC Contact:* Bob Easton, (202) 502–6045 or *robert.easton@ferc.gov*.

j. *Deadlines for Filing Comments:* Comments on the settlement agreement are due 20 days from the issuance date of this notice, with reply comments due 30 days from the issuance date of this notice. Comments, recommendations, terms and conditions, and prescriptions are due 60 days from the issuance date of this notice, with reply comments due 105 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Comments, recommendations, terms and conditions, and prescriptions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

k. This application has been accepted for filing and is now ready for environmental analysis.

l. The Carmen-Smith Hydroelectric Project consists of two developments, the Carmen development and the Trail Bridge development. The Carmen development includes: (1) A 25-foot-high, 2,100-foot-long, and 10-foot-wide earthen Carmen diversion dam with a concrete weir spillway, (2) a 11,380-foot-long by 9.5-foot-diameter concrete Carmen diversion tunnel located on the right abutment of the spillway, (3) a 235-foot-high, 1,100-foot-long, and 15-foot-wide earthen Smith diversion dam with a gated Ogee spillway, (4) a 7,275-foot-long by 13.5-foot-diameter concrete-lined Smith power tunnel, (5) a 1,160-foot-long by 13-foot-diameter steel underground Carmen penstock, (6) a 86-foot-long by 79-foot-wide Carmen powerhouse, (7) two Francis turbines each with a generating capacity of 52.25 megawatts (MW) for a total capacity of 104.50 MW, (8) a 19-mile, 115-kilovolt (kV) transmission line that connects the Carmen powerhouse to the Bonneville Power Administration's Cougar-Eugene transmission line; and (9) appurtenant facilities.

The Trail Bridge development includes: (1) A 100-foot-high, 700-foot-long, and 24-foot-wide earthen Trail Bridge dam section with a gated Ogee spillway, (2) a 1,000-foot-long and 20-foot-wide emergency spillway section, (3) a 300-foot-long by 12-foot-diameter concrete penstock at the intake that narrows to a diameter of 7 feet, (4) a 66-foot-long by 61-foot-wide Trail Bridge powerhouse, (5) one Kaplan turbine with a generating capacity of 9.975 MW; (6) a one-mile, 11.5-kV distribution line that connects the Trail Bridge powerhouse to the Carmen powerhouse; and (7) appurtenant facilities.

m. EWEB filed the Relicensing Settlement Agreement on behalf of itself and the National Marine Fisheries Service, U.S. Fish and Wildlife Service, U.S. Department of Agriculture Forest Service, Oregon Department of Environmental Quality, Oregon Department of Fish and Wildlife, Oregon Parks and Recreation Department, Confederated Tribes of the Grand Ronde Community of Oregon, Confederated Tribes of Siletz Indians of Oregon, Confederated Tribes of the Warm Springs Reservation of Oregon, American Whitewater, Cascadia Wildlands Project, Oregon Hunters Association, Oregon Wild, Rocky Mountain Elk Foundation, McKenzie Flyfishers, and Trout Unlimited. The purpose of the agreement is to balance the interests of all the parties and to provide a balance between the resources affected by the project and project operations. The agreement is also designed to satisfy the interests of state and federal agencies with statutory authority, trust responsibility, and obligations associated with resources that may be affected by the project. The agreement includes environmental protection, mitigation, and enhancement measures through a series of proposed license articles and exhibits to the agreement, as well as other provisions related to items such as the duration of the new license, coordination and decision making, commitments of governmental parties under related statutory authorities, dispute resolution and agreement termination, and other general provisions. EWEB requests on behalf of all the parties that the proposed license articles be incorporated into the new license by the Commission without material modification.

n. A copy of the application and the settlement agreement is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. A license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

p. Procedural schedule: At this time we anticipate preparing one environmental assessment (EA). Recipients will have 30 days to provide the Commission with any written comments on the EA. A revised EA may be prepared based on the comments received. The application will be processed according to the following schedule. Revisions to the schedule will be made as appropriate.

Comments, terms and conditions due.	January 2009
Reply comments due	March 2009
Notice of the Availability of the EA.	May 2009
End of public comment period on EA.	June 2009
Final decision on license	February 2010

Kimberly D. Bose,

Secretary.

[FR Doc. E8–27566 Filed 11–19–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3015–012]

Four Dam Pool Power, Agency Southeast Alaska Power Agency; Notice of Application for Transfer of License, and Soliciting Comments, Motions to Intervene, and Protests

November 14, 2008.

On October 6, 2008, Four Dam Pool Power Agency (Transferor) and Southeast Alaska Power Agency (Transferee) filed an application, for transfer of license of the Lake Tyee Project, located on Tyee Creek in Wrangell-Peterson, Alaska.

Applicants seek Commission approval to transfer the license for the Four Dam Pool Power Agency to Southeast Alaska Power Agency.

Applicant Contact: Mr. William H. Prentice, Ater Wynne LLP, 222 SW Columbia Street, Suite 1800, Portland, OR 97201–6618, phone (503) 226–1191

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene: 30 days from the issuance of this notice. Comments, motions to intervene, and notices of intent may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–3015–012) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–27561 Filed 11–19–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2742–036]

Four Dam Pool Power Agency; Cooper Valley Electric Association, Inc.; Notice of Application for Transfer of License, and Soliciting Comments, Motions To Intervene, and Protests

November 14, 2008.

On October 6, 2008, Four Dam Pool Power Agency (Transferor) and Cooper Valley Electric Association, Inc. (Transferee) filed an application for transfer of license of the Solomon Gulch Project, located on the Solomon Gulch Creek in Valdez-Cordova Area, Alaska.

Applicants seek Commission approval to transfer the license for the Four Dam Pool Power Agency to Cooper Valley Electric Association, Inc.

Applicant Contact: Mr. William H. Prentice, Ater Wynne LLP, 222 SW Columbia Street, Suite 1800, Portland, OR 97201–6618, phone (503) 226–1191 and Mr. Robert A. Wilkinson, CEO, Cooper Valley Electric Association, Inc., P.O. Box 45, Glennallen, AK 99588–0045.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for Filing Comments, Motions To Intervene: 30 days from the issuance of this notice. Comments, motions to intervene, and notices of intent may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings, please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–2742–036) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–27568 Filed 11–19–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2911–035]

Four Dam Pool Power Agency, Southeast Alaska Power Agency; Notice of Application for Transfer of License, and Soliciting Comments, Motions To Intervene, and Protests

November 14, 2008.

On October 6, 2008, Four Dam Pool Power Agency (Transferor) and Southeast Alaska Power Agency (Transferee) filed an application, for transfer of license of the Swan Lake Project, located on Falls Creek in Ketchikan, Alaska.

Applicants seek Commission approval to transfer the license for the Four Dam Pool Power Agency to Southeast Alaska Power Agency.

Applicant Contact: Mr. William H. Prentice, Ater Wynne LLP, 222 SW Columbia Street, Suite 1800, Portland, OR 97201–6618, phone (503) 226–1191.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene: 30 days from the issuance of this notice. Comments, motions to intervene, and notices of intent may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–2911–035) in the docket number field to access the document.

For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–27569 Filed 11–19–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–19–000]

Port Barre Investments, LLC (d/b/a Bobcat Gas Storage); Notice of Amendment Application

November 14, 2008.

On November 5, 2008, Bobcat Gas Storage (Bobcat), pursuant to section 7(c) of the Natural Gas Act, as amended, and parts 157 and 284 of the Federal Energy Regulatory Commission's (Commission) regulations, filed to amend its certificate. The requested amendment would expand the Bobcat Gas Storage Project certificated in CP06–66–000 on April 19, 2007, as amended, to add working gas capacity totaling 24 billion cubic feet (Bcf) in three new salt dome storage caverns. The amendment would expand total storage project working gas capacity to 39.6 Bcf and add additional compression and pipeline interconnection facilities. Compression additions would increase maximum gas deliverability to 3.0 Bcf/d. Bobcat requests a finding that after the amendment the storage project's operation will not exercise market power with respect to the storage and hub services provided and that market-based rates may continue to be charged for these services.

Questions concerning this application should be directed to Paul Bieniawski, Bobcat Gas Storage, 11200 Westheimer, Suite 625, Houston, TX 77042, (713) 800–3535 or Lisa Tonery, Fulbright & Jaworski L.L.P., 666 Fifth Avenue, New York, NY 10103, (212) 318–3009.

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.

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 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 comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 5, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–27562 Filed 11–19–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1881–050]

PPL Holtwood, LLC, Pennsylvania; Notice of Availability of the Final Environmental Impact Statement for the Holtwood Project

November 14, 2008.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the capacity related amendment application for PPL Holtwood LLC's 107.2-megawatt Holtwood Hydroelectric Project (Project No. 1881), located on the Susquehanna River in the counties of Lancaster and York, Pennsylvania. Based upon this review, the Office of Energy Projects has prepared a Final Environmental Impact Statement (final EIS) for the project.

The final EIS contains staff's evaluation of the applicant's proposal and alternatives. The proposal is for the construction of a new powerhouse, installation of turbines, construction of a new skimmer wall, enlargement of the forebay, and reconfiguration of the project facilities to enhance upstream fish passage through modifications of the existing fishway and excavation in the tailrace channel. The installed capacity would increase by approximately 80 MW. Additionally, PPL Holtwood LLC requested a 16-year extension of the current license term until August 31, 2030. The final EIS documents the views of governmental agencies, non-governmental organizations, affected Indian tribes, the public, and Commission staff.

A copy of the final EIS is available for review in the Commission's Public Reference Branch, Room 2A, located at 888 First Street, NE., Washington, DC 20426. The final EIS also may be viewed on the Commission's Web site at *http://www.ferc.gov* under the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects.

For assistance, contact FERC Online Support.

For Further Information Contact: Blake Condo at (202) 502–8914 or *blake.condo@ferc.gov.*

Kimberly D. Bose,

Secretary.

[FR Doc. E8–27565 Filed 11–19–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2677–019]

City of Kaukauna, WI; Notice of Staff Participation in Meeting

November 14, 2008.

On December 1, 2008, Office of Energy Projects staff will participate by teleconference in a work group meeting to discuss information needs for an assessment of recreational boating flows in the bypassed reach of the Badger Development for the relicensing of the Badger-Rapide Croche Hydroelectric Project (FERC No. 2677–019). The meeting will begin at 1 p.m. CST.

For parties wishing to participate in the teleconference, the call-in number is 608–443–0390 (PIN# 7608). For further information please contact Arie DeWaal, Project Manager, Mead & Hunt, Inc., at (608) 273–6380, or e-mail at *arie.dewaal@meadhunt.com*, or John Smith, FERC, at (202) 502–8972, or e-mail at *john.smith@ferc.gov*.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–27567 Filed 11–19–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. OA08–62–000; ER08–1113–000]

California Independent System Operator Corporation; Notice of FERC Staff Attendance

November 14, 2008.

The Federal Energy Regulatory Commission (Commission) hereby gives notice that on the following dates members of its staff will attend stakeholder meetings of the California Independent System Operator (CAISO). Unless otherwise noted, these meetings will be held at the CAISO, 151 Blue Ravine Road, Folsom, CA or by teleconference. The agenda and other documents for the meetings are available on the CAISO's Web site, *http://www.caiso.com*.

November 19, 2008: Integrated Balancing Authority Area compliance filing.

November 20, 2008: CAISO 2009 Transmission Plan.

Sponsored by the CAISO, these meetings are open to all market participants, and staff's attendance is part of the Commission's ongoing outreach efforts. The meetings may discuss matters at issue in the above captioned dockets.

For further information, contact Saeed Farrokhpay at *saeed.farrokhpay@ferc.gov*; (916) 294–0233 or Maury Kruth at *maury.kruth@ferc.gov*; (916) 294–0275.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–27564 Filed 11–19–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD08–12–000]

State of the Natural Gas Infrastructure Conference; Supplemental Notice of Commission Conference

November 14, 2008.

On October 7, 2008, the Federal Energy Regulatory Commission (Commission) issued a notice announcing a conference in this proceeding, to be held on November 21, 2008. As mentioned in that notice, the focus of the conference is on natural gas demand and supply issues as they relate to the development of the domestic natural gas industry and the effect upon infrastructure. The Commission has invited industry representatives to provide perspectives and comments. The agenda for the conference is attached.

As noted in the October 7 Notice, the conference will be held at the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 in the Commission Meeting Room (2–C) from 9:30 a.m. until 12:30 p.m. (Eastern Standard Time). All interested parties are invited, and there is no registration required.

This conference will be transcribed. Transcripts of the conference will be immediately available from Ace Reporting Company (202–347–3700 or 1–800–336–6646) for a fee. A free Webcast of this event is available through *http://www.ferc.gov*. Anyone with Internet access who desires to view this event can do so by navigating to the Calendar of Events at *http://www.ferc.gov* and locating this event in the Calendar. The event will contain a link to its Webcast. The Capitol Connection provides technical support for the free Webcasts. It also offers access to this event via television in the Washington, DC area and via phone-bridge for a fee. If you have any questions, visit *http://www.CapitolConnection.org* and click on ''FERC'' or call (703) 993–3100.

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 866–208–3372 (voice) or 202–208–1659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

Questions about the conference should be directed to Raymond James by phone at 202–502–8588 or by e-mail at *raymond.james@ferc.gov*.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–27570 Filed 11–19–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8742–4]

EPA Science Advisory Board Staff Office; Notification of a Public Teleconference Meeting of the Chartered Science Advisory Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces two public teleconference meetings of the chartered SAB to: (1) Conduct its quality review of several draft SAB reports, and (2) to receive a briefing from EPA on biofuels.

DATES: The meeting dates are Tuesday, December 9, 2008, from 1 p.m. to 3 p.m. (Eastern Time) and Tuesday, December 16, 2008, from 11 a.m. to 12 p.m. (Eastern Time).

Location: The meeting will be conducted by telephone only.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing to obtain general information concerning this public teleconference meeting should contact Mr. Thomas Miller, Designated Federal Officer (DFO), EPA Science Advisory Board (1400F), 1200

Pennsylvania Avenue, NW., Washington, DC 20460; via telephone/voice mail (202) 343–9982; fax (202) 233–0643; or e-mail at *miller.tom@epa.gov*. General information concerning the EPA Science Advisory Board can be found on the SAB Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION: The SAB was established by 42 U.S.C. 4365 to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal advisory committee chartered under the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the EPA SAB will hold a public teleconference meeting to conduct several quality reviews and to receive a briefing on biofuels by EPA representatives.

Background: SAB Telephone Conference, Tuesday, December 9, 2008:

(a) SAB Quality Review of the Draft Report from the SAB Committee for the Valuation of Ecological Systems and Services (C–VPESS). The Chartered Science Advisory Board will conduct a quality review of the draft final SAB report from its Committee for Valuing the Protection of Ecological Systems and Services. The report is an original SAB study, initiated in 2003. The committee's charge was to assess EPA valuation needs; assess the state of the art and science of valuing protection of ecological systems and services; and identify key areas for improving knowledge, methodologies, practice, and research. The report takes a multi-disciplinary approach to ecological valuation issues. Additional information on this topic is available on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activities/Ecological%20Valuation?OpenDocument.*

(b) *EPA Biofuels Briefing:* On October 27, 2008, the Science Advisory Board conducted a seminar entitled ''Looking to the Future'' as part of an ongoing effort to consider EPA's long-range strategic research vision. A part of that meeting focused on the environmental implications of biofuels. During the SAB's December 9, 2008 telephone conference, the Board will receive a briefing from representatives of the EPA OAR Office of Transportation and Air Quality on the status of the agency's renewable fuels program rule development process. This information will provide additional background information to the SAB as it considers how it might further advise the EPA Administrator on the Agency's research program.

Background: SAB Telephone Conference, Tuesday, December 16, 2008:

(a) SAB Quality Review of the Draft SAB Panel Report on the EPA Particulate Matter (PM) Research Centers Program. The chartered Science Advisory Board will conduct a quality review of the draft SAB report from its Particulate Matter Research Centers Program Review Advisory Panel. In 1998, the Congress directed EPA to establish as many as five university-based PM research centers as part of the Agency's PM research program. The first PM Research Centers were funded from 1999 to 2005 with a total program budget of $8 million annually. EPA's PM Research Centers program was initially shaped by recommendations from the National Research Council. In 2002, EPA requested that the Science Advisory Board conduct an interim review of EPA's PM Research Centers program. This review was instrumental in providing additional guidance for the second phase of the program (2005–2010). Five current centers are funded for 2005–2010 with the total program budget at $40 million. EPA's National Center for Environmental Research (NCER), within the Office of Research and Development (ORD), requested that the SAB comment on the Agency's current PM Research Centers program and to advise EPA concerning the possible structures and strategic direction for the program from 2010 to 2015. The SAB formed the PM Research Centers Program Advisory Panel to conduct this review. The Panel met to review and discuss the program on October 1–2, 2008 and has now completed a draft report providing the results of its deliberations. Additional information on this review is available on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activities/2008%20PM%2Centers%20Program%;20Review?OpenDocument.*

(b) SAB Quality Review of the Draft SAB Contaminant Candidate List 3 Advisory. The Chartered Science Advisory Board will conduct a second quality review of the draft SAB Drinking Water Committee (DWC) report on EPA's Drinking Water Contaminant Candidate List 3. This report was the subject of a quality review at the SAB's October 28, 2008 meeting. At that meeting, the Chartered SAB asked for some revisions relative to the comments made by SAB members during that meeting (see these comments on the SAB Web site at the following URL *http://yosemite.epa.gov/sab/sabproduct.nsf/A3B59D3624B2B1DA852574EB006DD0C9/$File/;SAB+Comments+on+CCL+3+Oct+28+08+Meeting.pdf*) and that the report be returned to the SAB for completion of the quality review. The DWC review was conducted at the request of the EPA Office of Water. The 1996 Safe Drinking Water Act Amendments (SDWA) require EPA to (1) publish every five years a list of currently unregulated contaminants in drinking water that may pose risks and (2) make determinations on whether or not to regulate at least five contaminants from that list on a staggered five year cycle. The list must be published after consultation with the scientific community, including the SAB, after notice and opportunity for public comment, and after consideration of the occurrence database established under section 1445(g) of the SDWA. The unregulated contaminants considered for the list must include, but are not limited to, substances referred to in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), and substances registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Additional information on this review can be obtained on the EPA SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activities/CCL3.*

Availability of Meeting Materials: The agenda and other materials in support of this meeting will be placed on the SAB Web site at *http://www.epa.gov/sab* in advance of this meeting.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for the SAB to consider during this teleconference.

Oral Statements: In general, individuals or groups requesting time to make an oral presentation at a public SAB teleconference will be limited to three minutes, with no more than one-half hour for all speakers. At face-to-face meetings, presentations will be limited to five minutes, with no more than a total of one hour for all speakers. To be placed on the public speaker list, parties interested in the December 9, 2008 meeting should contact Mr. Thomas Miller, DFO, in writing (preferably by e-mail), by December 2, 2008 at the contact information provided above. Parties interested in the December 16, 2008 meeting should contact Mr. Thomas Miller, DFO, in writing (preferably by e-mail), by December 9,

2008 at the contact information provided above.

Written Statements: Written statements relevant to the December 9, 2008 meeting should be received in the SAB Staff Office by December 2, 2008, and written statements relevant to the December 16 meeting should be received in the SAB Staff Office by December 9, 2008 so that the information may be made available to the SAB for their consideration prior to these teleconference meetings. Written statements should be supplied to the DFO via e-mail to *miller.tom@epa.gov* (acceptable file format: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format).

Accessibility: For information on access or services for individuals with disabilities, please contact Mr. Thomas Miller at (202) 343–9982, or *miller.tom@epa.gov*. To request accommodation of a disability, please contact Mr. Miller, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: November 14, 2008.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. E8–27612 Filed 11–19–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

November 13, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. 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 January 20, 2009. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, (202) 395–5887, or via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to *Judith-B.Herman@fcc.gov*, Federal Communications Commission, or an e-mail to *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, and (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, contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0645.

Title: Section 17.4, Antenna Structure Registration.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit; not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 25,600 respondents; 25,600 responses.

Estimated Time Per Response: .2–1.2 hours.

Frequency of Response: On occasion reporting requirement, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for these information collections are contained in Sections 4 and 303; 47 U.S.C. 301 and 309.

Total Annual Burden: 40,329 hours.

Total Annual Cost: $3,200,000.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: This collection of information does not address information of a confidential nature. Respondents may request confidential treatment for information they believe should be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this information collection (IC) to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting an extension (no change in the reporting, recordkeeping and/or third party disclosure requirements). The estimated hourly and/or annual cost burdens have not changed since this IC was last submitted to the OMB in 2006).

Section 17.4, Antenna Structure Registration, which became effective July 1, 1996, requires the owner of any proposed or existing that requires notice of proposed construction to the Federal Aviation Administration (FAA) must register the structure with the Commission. This includes those structures used as part of stations licensed by the Commission for the transmission of radio energy, or to be used as part of a cable television head end system. If a Federal Government antenna structure is to be used by a Commission licensee, the structure must be registered with the Commission. Section 17.4 also contains other reporting, recordkeeping and third party notification requirements subject to the Paperwork Reduction Act (PRA) and OMB approval. The information is used by the Commission during investigations related to air safety or radio frequency interference. A registration number is issued to identify antenna structure owners in order to enforce the Congressionally-mandated provisions related to the owners.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–27662 Filed 11–19–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

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

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 15, 2008.

A. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. Carpenter Fund Manager GP LLC, Carpenter Fund Management Company LLC, Carpenter Community Bancfund L.P., Carpenter Community Bancfund–A L.P., Carpenter Community Bancfund–CA L.P., CCFW, Inc. (dba Carpenter & Company), and SCJ, Inc., all of Irvine, California, to acquire PB Holdings, Inc., Wilmington, Delaware, and thereby indirectly acquire at least 54 percent of Plaza Bank, Irvine, California. In addition, PB Holdings, Inc., Wilmington, Delaware, also has applied to become a bank holding company by acquiring at least 54 percent of the voting shares of Plaza Bank, Irvine, California.

Board of Governors of the Federal Reserve System, November 17, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–27584 Filed 11–19–08; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget (''OMB'') for review, as required by the Paperwork Reduction Act (''PRA''). The FTC is seeking public comments on its proposal to extend through March 31, 2012 the current PRA clearances for information collection requirements contained in four consumer financial regulations promulgated by the Federal Reserve Board and enforced by the Commission. Those clearances expire on March 31, 2009.

DATES: Comments must be received on or before January 20, 2009.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Regs BEMZ, PRA Comment, FTC File No. P084812'' to facilitate the organization of comments. Please note that comments will be placed on the public record of this proceeding—including on the publicly accessible FTC website, at (*http://www/ftc.gov/os/publiccomments.shtm*) — and therefore should not include any sensitive or confidential information. In particular, comments should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any ''[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential . . .,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://secure.commentworks.com/ftc-RegsBEMZ*) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink (*https://secure.commentworks.com/ftc-RegsBEMZ*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it.

A comment filed in paper form should include the ''Regs BEMZ, PRA Comment, FTC File No. P084812'' reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC

[1] FTC Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information requirements should be addressed to Carole Reynolds or James Chen, Attorneys, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, (202) 326-3230 or (202) 326-2659.

SUPPLEMENTARY INFORMATION: The four regulations covered by this notice are:

(1) Regulations promulgated under The Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq.* (''ECOA'') (''Regulation B'') (OMB Control Number: 3084-0087);

(2) Regulations promulgated under The Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.* (''EFTA'') (''Regulation E'') (OMB Control Number: 3084-0085);

(3) Regulations promulgated under The Consumer Leasing Act, 15 U.S.C. 1667 *et seq.*, (''CLA'') (''Regulation M'') (OMB Control Number: 3084-0086); and

(4) Regulations promulgated under The Truth-In-Lending Act, 15 U.S.C. 1601 *et seq.* (''TILA'') (''Regulation Z'') (OMB Control Number: 3084-0088).

Under the PRA, 44 U.S.C. 3501-3521, federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. ''Collection of information'' means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3), 5 CFR 1320.3(c). As required by the PRA, the FTC is providing this opportunity for public comment before requesting that OMB extend the existing paperwork clearance for the regulations noted herein. 44 U.S.C. 3506(c)(2)(A).

The FTC invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including 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.

Each of these four rules impose certain recordkeeping and disclosure requirements associated with providing credit or with other financial transactions. As detailed below, the FTC staff has calculated the PRA burden for each rule based on the compliance costs of entities over which the FTC has jurisdiction. All of these rules require covered entities to keep certain records. FTC staff believes that these entities would likely retain these records in the normal course of business even absent the recordkeeping requirements in the rules.[2] Covered entities, however, may incur some burden associated with ensuring that they do not prematurely dispose of relevant records (*i.e.*, during the period of time when they are required to retain records by the applicable rule).

Disclosure requirements involve both set-up and monitoring costs as well as certain transaction-specific costs. ''Set-up'' burden, incurred by new entrants only, includes identifying the applicable disclosure requirements, determining compliance obligations, and designing and developing compliance systems and procedures. ''Monitoring'' burden, incurred by all covered entities, includes reviewing changes to regulatory requirements, making necessary revisions to compliance systems and procedures, and monitoring the ongoing operation of systems and procedures to ensure continued compliance. ''Transaction-related'' burden refers to the effort associated with providing the various required disclosures in individual transactions. While this burden varies with the number of transactions, the figures shown for transaction-related burden in the tables that follow are estimated averages.

The actual range of compliance burden experienced by covered entities, and reflected in those averages, varies widely. Depending on the extent to which covered entities have developed computer-based systems and procedures for providing the required disclosures (and/or the extent to which entities utilize electronic transactions, communications, and/or electronic recordkeeping), and the efficacy of those systems and procedures, some entities may have little burden, while others may have a higher burden.[3]

Calculating the burden associated with the four regulations' disclosure requirements is very difficult because of the highly diverse group of affected entities. The ''respondents'' included in the following burden calculations consist of credit and lease advertisers, creditors, financial institutions, service providers, certain government agencies and others involved in delivering electronic fund transfers (''EFTs'') of government benefits, and lessors.[4] The burden estimates represent FTC staff's best assessment, based on its knowledge and expertise relating to the financial services industry. To derive these estimates, FTC staff considered the wide variations in covered entities': (1) size and location; (2) credit or lease products offered, extended, or advertised, and their particular terms; (3) types of EFTs used; (4) types and occurrences of adverse actions; (5) types of appraisal reports utilized; and (6) computer systems and electronic features of compliance operations.

The required disclosures do not impose PRA burden on some covered entities because the entities make those disclosures in the ordinary course of business. In addition, as noted above, some entities use computer-based and/or electronic means of providing the required disclosures, while others rely on methods requiring more manual effort.

The cost estimates detailed below relate solely to labor costs and include the time necessary to train employees how to comply with the regulations. The applicable PRA requirements impose minimal capital or other non-labor costs, as affected entities generally have the necessary equipment for other business purposes. Similarly, FTC staff estimates that compliance with these rules entails minimal printing and copying costs beyond that associated with documenting financial transactions in the ordinary course of business.

[2] PRA ''burden'' does not include effort expended in the ordinary course of business, regardless of any regulatory requirement. 5 CFR 1320.3(b)(2).

[3] For example, large companies may use computer-based and/or electronic means to provide required disclosures, including issuing some disclosures en masse, *e.g.*, notices of changes in terms. Smaller companies may have less automated compliance systems but may nonetheless rely on electronic mechanisms for disclosures and recordkeeping. Regardless of size, some entities may utilize compliance systems that are fully integrated into their general business operational system; as such, they may have minimal additional burden. Other entities may have incorporated fewer of these approaches into their systems and may have a higher burden.

[4] The Commission generally does not have jurisdiction over banks, thrifts, and federal credit unions under the applicable regulations.

1. Regulation B

The ECOA prohibits discrimination in the extension of credit. The Board of Governors of the Federal Reserve System (''FRB'') promulgated Regulation B, 12 CFR 202, to implement the ECOA. Regulation B establishes disclosure requirements to assist customers in understanding their rights under the ECOA and recordkeeping requirements to assist in detecting unlawful discrimination and other violations. The FTC enforces the ECOA as to all creditors except those (such as federally chartered or insured depository institutions) that are subject to the regulatory authority of another federal agency.

Estimated annual hours burden: 3,129,437 hours, rounded to the nearest thousand (1,153,500 recordkeeping hours + 1,975,937 disclosure hours)

Recordkeeping: FTC staff estimates that Regulation B's general recordkeeping requirements affect 1,000,000 credit firms within the Commission's jurisdiction, at an average annual burden of one hour per firm, for a total of 1,000,000 hours. Staff also estimates that the requirement that mortgage creditors monitor information about race/national origin, sex, age, and marital status imposes a maximum burden of one minute each[5] for approximately 9 million credit applications,[6] for a total of 150,000 hours. Staff also estimates that keeping records of self-testing pursuant to the regulation would affect 2,500 firms, with an average annual burden of one hour per firm, for a total of 2,500 hours, and that recordkeeping of any corrective action for self-testing would affect 250 firms in a given year, with an average annual burden of four hours per firm, for a total of 1,000 hours. The total estimated recordkeeping burden is 1,153,500 hours.

Disclosure: Regulation B requires that creditors (*i.e.*, entities that regularly participate in a credit decision, including setting the terms of the credit) provide notice whenever they take adverse action. It requires entities that extend various types of mortgage credit to provide a copy of the appraisal report to applicants or to notify them of their right to a copy of the report (and thereafter provide a copy of the report, upon the applicant's request). It also requires that, for accounts that spouses may use or for which they are contractually liable, creditors who report credit history must do so in a manner reflecting both spouses' participation. Further, it requires creditors that collect applicant characteristics for purposes of conducting a self-test to disclose to those applicants that providing the information is optional, that the creditor will not take the information into account in any aspect of the credit transaction, and, if applicable, that the information will be noted by visual observation or surname if the applicant chooses not to provide it.[7]

Regulation B applies to retailers, mortgage lenders, mortgage brokers, finance companies, utilities (for some requirements), and others. Below is FTC staff's best estimate of burden applicable to the wide spectrum of these entities within the FTC's jurisdiction.

REGULATION B: DISCLOSURES—BURDEN HOURS

	Setup/Monitoring[1]			Transaction-related[2]			
Disclosures	Respondents	Average Burden per Respondent (hours)	Total Setup/Monitoring Burden (hours)	Number of Transactions	Average Burden per Transaction (minutes)	Total Transactions Burden (hours)	Total Burden (hours)
Credit history reporting	250,000	.25	62,500	125,000,000	.25	520,833	583,333
Adverse action notices	1,000,000	.5	500,000	200,000,000	.25	833,333	1,333,333
Appraisal notices	20,000	.5	10,000	4,500,000	.25	18,750	28,750
Appraisal reports	20,000	.5	10,000	4,500,000	.25	18,750	28,750
Self-test disclosures	2,500	.5	1,250	125,000	.25	521	1,771
Total							1,975,937

[1] With respect to appraisal notices and appraisal reports, the above figures reflect a decrease in applicable mortgage entities. The figures assume that approximately half of those entities (.5 x 40,000, or 20,000 businesses) would not otherwise provide this information and thus would be affected. The figures also assume that all applicable entities would provide notices first and thereafter provide the reports upon request.

[2] The above figures reflect a decrease in mortgage transactions compared to prior FTC estimates. They assume that half of applicable mortgage transactions (.5 x 9,000,000, or 4,500,000) would not otherwise provide the appraisal notices and reports and thus would be affected.

Estimated annual cost burden: $83,456,633 rounded to the nearest thousand ($22,005,000 recordkeeping cost + $61,451,633 disclosure cost)

FTC staff calculated labor costs by applying appropriate hourly cost figures to the burden hours described above. The hourly rates used below ($41 for managerial or professional time, $30 for skilled technical time, and $16 for clerical time) are averages, based on the most currently available Bureau of Labor Statistics cost figures posted online.[8]

Recordkeeping: FTC staff estimates that the general recordkeeping responsibility of one hour per creditor would involve approximately 90 percent clerical time and 10 percent skilled technical time. Keeping records of race/national origin, sex, age, and marital status requires an estimated one minute of skilled technical time. Keeping records of the self-test responsibility and of any corrective actions requires an estimated one hour and four hours, respectively, of skilled technical time. As shown in the table below, the total recordkeeping cost is $22,005,000.

Disclosure: For each notice or information item listed, FTC staff estimates that the burden hours consist of 10 percent managerial time and 90 percent skilled technical time. As

[5] Regulation B contains model forms that creditors may use to gather and retain the required information.

[6] The decrease in credit applications relative to prior FTC estimates is based on industry data regarding the approximate number of mortgage purchase and refinance originations.

[7] The disclosure may be provided orally or in writing. Regulation B provides a model form to assist creditors in providing the disclosure.

[8] *http://www.bls.gov/ncs/ncswage2007.htm* (National Compensation Survey: Occupational Earnings in the United States 2007, US Department of Labor released August 2008, Bulletin 2704, Table 3 (''Full-time civilian workers,'' mean and median hourly wages).

shown below, the total disclosure cost is $61,451,633.

REGULATION B: RECORDKEEPING AND DISCLOSURES—COST

	Managerial		Skilled Technical		Clerical		
Required Task	Time (hours)	Cost ($41/hr.)	Time (hours)	Cost ($30/hr.)	Time (hours)	Cost ($16/hr.)	Total Cost ($)
General recordkeeping	0	$0	100,000	$3,000,000	900,000	$14,400,000	$17,400,000
Other recordkeeping	0	$0	150,000	$4,500,000	0	$0	$4,500,000
Recordkeeping of test	0	$0	2,500	$75,000	0	$0	$75,000
Recordkeeping of corrective action	0	$0	1,000	$30,000	0	$0	$30,000
Total Recordkeeping							$22,005,000
Credit history reporting	58,333	$2,391,653	525,000	$15,750,000	0	$0	$18,141,653
Adverse action notices	133,333	$5,466,653	1,200,000	$36,000,000	0	$0	$41,466,653
Appraisal notices	2,875	$117,875	25,875	$776,250	0	$0	$894,125
Appraisal reports	2,875	$117,875	25,875	$776,250	0	$0	$894,125
Self-test disclosure	177	$7,257	1,594	$47,820	0	$0	$55,077
Total Disclosures							$61,451,633
Total Recordkeeping and Disclosures							$83,456,633

2. Regulation E

The EFTA requires accurate disclosure of the costs, terms, and rights relating to EFT services provided to consumers. The FRB promulgated Regulation E, 12 CFR 205, to implement the EFTA. Regulation E establishes disclosure requirements to assist consumers and establishes recordkeeping requirements to assist in enforcing the EFTA. The FTC enforces the EFTA as to all entities providing EFT services, except those (such as federally chartered or insured depository institutions) that are subject to the regulatory authority of another federal agency.

Estimated annual hours burden: 3,731,342 hours (600,000 recordkeeping hours + approximately 3,131,342 disclosure hours)

Recordkeeping: FTC staff estimates that Regulation E's recordkeeping requirements affect 600,000 firms within the Commission's jurisdiction that offer EFT services to consumers, at an average annual burden of one hour per firm, for a total of 600,000 hours.

Disclosure: Regulation E applies to financial institutions (including certain retailers and various electronic commerce entities, such as other payees), service providers, various federal and state agencies offering EFTs, and others. Below is FTC staff's best estimate of burden applicable to this highly broad spectrum of covered entities.

REGULATION E: DISCLOSURES—BURDEN HOURS

	Setup/Monitoring			Transaction-related			
Disclosures[1]	Respondents	Average Burden per Respondent (hours)	Total Setup/ Monitoring Burden (hours)	Number of Transactions	Average Burden per Transaction (minutes)	Total Transactions Burden (hours)	Total Burden (hours)
Initial terms	100,000	.5	50,000	1,000,000	.02	333	50,333
Change in terms	25,000	.5	12,500	33,000,000	.02	11,000	23,500
Periodic statements	100,000	.5	50,000	1,200,000,000	.02	400,000	450,000
Error resolution	100,000	.5	50,000	1,000,000	5	83,333	133,333
Transaction receipts[2]	100,000	.5	50,000	5,000,000,000	.02	1,666,667	1,716,667
Preauthorized transfers	500,000	.5	250,000	1,000,000	.25	4,167	254,167
Service provider notices	100,000	.25	25,000	1,000,000	.25	4,167	29,167
Govt. benefit notices	10,000	.5	5,000	100,000,000	.25	416,667	421,667
ATM[3]	500	.25	125	250,000	.25	1,041	1,166
Electronic check conversion[4]	100,000	.5	50,000	3,500,000	.02	1,167	51,167
Payroll cards[5]	100	.5	50	2,500	3	125	175
Total							3,131,342

[1] This reflects an increase in entities offering EFT services to consumers.

[2] Regulation E now exempts EFTs of $15 or less from receipt requirements, which could decrease the burden of providing transaction receipts. However, use of the exemption could involve reprogramming costs. Due to the relatively recent change, the burden associated with transaction receipts has not been changed.

[3] Regulation E now permits ATM operators that do not charge fees for services in all circumstances to disclose on signs that a fee ''may'' (rather than ''will'') be charged. However, making this change would require replacing existing signage, which could increase disclosure burden. Due to the relatively recent change and its voluntary nature, the burden associated with ATM notice has not been revised.

[4] Regulation E now includes requirements for electronic check conversion.

[5] Regulation E now includes requirements for payroll cards.

Estimated annual cost burden: $107,825,124, rounded to the nearest thousand ($10,440,000 recordkeeping cost + $97,385,124 disclosure cost)

FTC staff calculated labor costs by applying appropriate hourly cost figures to the burden hours described above. The hourly rates used below ($41 for managerial or professional time, $30 for skilled technical time, and $16 for clerical time) are averages, based on current Bureau of Labor Statistics cost figures.[9]

Recordkeeping: For the 600,000 recordkeeping hours, FTC staff estimates that 10 percent of the burden hours require skilled technical time and 90 percent require clerical time. As shown below, the total recordkeeping cost is $10,440,000.

Disclosure: For each notice or information item listed, FTC staff estimates that 10 percent of the burden hours require managerial time and 90 percent require skilled technical time. As shown below, the total disclosure cost is $97,385,124.

REGULATION E: RECORDKEEPING AND DISCLOSURES—COST

	Managerial		Skilled Technical		Clerical		
Required Task	Time (hours)	Cost ($41/hr.)	Time (hours)	Cost ($30/hr.)	Time (hours)	Cost ($16/hr.)	Total Cost ($)
Recordkeeping	0	$0	60,000	$1,800,000	540,000	$8,640,000	$10,440,000
Disclosures:							
Initial terms	5,033	$206,353	45,300	$1,359,000	0	$0	$1,565,353
Change in terms	2,350	$96,350	21,150	$634,500	0	$0	$730,850
Periodic statements	45,000	$1,845,000	405,000	$12,150,000	0	$0	$13,995,000
Error resolution	13,333	$546,653	120,000	$3,600,000	0	$0	$4,146,653
Transaction receipts	171,667	$7,038,347	1,545,000	$46,350,000	0	$0	$53,388,347
Preauthorized transfers	25,417	$1,042,097	228,750	$6,826,500	0	$0	$7,904,597
Service provider notices	2,917	$119,597	26,250	$787,500	0	$0	$907,097
Govt. benefit notices	42,167	$1,728,874	379,500	$11,385,000	0	$0	$13,113,874
ATM notices	116	$4,756	1,050	$31,500	0	$0	$36,256
Electronic check conversion	5,117	$209,797	46,050	$1,381,500	0	$0	$1,591,297
Payroll cards	50	$2,050	125	$3,750	0	$0	$5,800
Total Disclosures							$97,385,124
Total Recordkeeping and Disclosures							$107,825,124

3. Regulation M

The CLA requires accurate disclosure of the costs and terms of leases to consumers. The FRB promulgated Regulation M, 12 CFR 213, to implement the CLA. Regulation M establishes disclosure requirements that assist consumers in comparison shopping and in understanding the terms of leases and recordkeeping requirements that assist enforcement of the CLA. The FTC enforces the CLA as to all lessors and advertisers except those that are subject to the regulatory authority of another federal agency (such as federally chartered or insured depository institutions).

Estimated annual hours burden: 225,000 hours, rounded to the nearest thousand (120,000 recordkeeping hours + 104,875 disclosure hours)

Recordkeeping: FTC staff estimates that Regulation M's recordkeeping requirements affect approximately 120,000 firms within the Commission's jurisdiction that lease products to consumers, at an average annual burden of one hour per firm, for a total of 120,000 hours.

Disclosure: Regulation M applies to automobile lessors (such as auto dealers, independent leasing companies, and manufacturers' captive finance companies), computer lessors (such as computer dealers and other retailers), furniture lessors, various electronic commerce lessors, diverse types of lease advertisers, and others. Below is FTC staff's best estimate of burden applicable to the wide spectrum of these entities within the FTC's jurisdiction.

REGULATION M: DISCLOSURES—BURDEN HOURS

	Setup/Monitoring			Transaction-related			
Disclosures	Respondents	Average Burden per Respondent (hours)	Total Setup/ Monitoring Burden (hours)	Number of Transactions	Average Burden per Transaction (minutes)	Total Transactions Burden (hours)	Total Burden (hours)
Auto Leases[1]	45,000	.75	33,750	2,000,000	.50	16,667	50,417
Other Leases[2]	75,000	.50	37,500	750,000	.25	3,125	40,625
Advertising	20,000	.50	10,500	800,000	.25	3,333	13,833
Total							104,875

[1] This category focuses on consumer vehicle leases. Vehicle leases are subject to more lease disclosure requirements (pertaining to computation of payment obligations) than other lease transactions. (Only consumer leases for more than four months are covered.) *See* 15 U.S.C. 1667(1); 12 CFR 213.2(e)(1). This reflects a decrease in auto leasing entities and transactions, relative to prior FTC estimates.

[2] This category focuses on all types of consumer leases other than vehicle leases. It includes leases for computers, other electronics, small appliances, furniture, and other transactions. (Only consumers leases for more than four months are covered.) *See* 15 U.S.C. 1667(1); 12 CFR 213.2(e)(1). This reflects a decrease in consumer leasing entities and transactions, relative to prior FTC estimates.

[9] *See* note 8.

Estimated annual cost burden: $5,349,618, rounded to the nearest thousand ($2,088,000 recordkeeping cost + $3,261,618 disclosure cost)

FTC staff calculated labor costs by applying appropriate hourly cost figures to the burden hours described above. The hourly rates used below ($41 for managerial or professional time, $30 for skilled technical time, and $16 for clerical time) are averages, based on current Bureau of Labor Statistics cost figures.[10]

Recordkeeping: For the 120,000 recordkeeping hours, FTC staff estimates that 10 percent of the burden hours require skilled technical time and 90 percent require clerical time. As shown in the table below, the total recordkeeping cost is $2,088,000.

Disclosure: For each notice or information item listed, FTC staff estimates that 10 percent of the burden hours require managerial time and 90 percent require skilled technical time. As shown in the table below, the total disclosure cost is $3,261,618.

REGULATION M: RECORDKEEPING AND DISCLOSURES—COST

	Managerial		Skilled Technical		Clerical		
Required Task	Time (hours)	Cost ($41/hr.)	Time (hours)	Cost ($30/hr.)	Time (hours)	Cost ($16/hr.)	Total Cost ($)
Recordkeeping	0	$0	12,000	$360,000	108,000	$1,728,000	$2,088,000
Disclosures							
Auto Leases	5,042	$206,722	45,375	$1,361,250	0	$0	$1,567,972
Other Leases	4,063	$166,583	36,562	$1,096,860	0	$0	$1,263,443
Advertising	1,383	$56,703	12,450	$373,500	0	$0	$430,203
Total Disclosures							$3,261,618
Total Recordkeeping and Disclosures							$5,349,618

4. Regulation Z

The TILA was enacted to foster comparison credit shopping and informed credit decision making by requiring creditors and others to provide accurate disclosure of the costs and terms of credit to consumers. The FRB promulgated Regulation Z, 12 CFR 226, to implement the TILA. Regulation Z establishes disclosure requirements to assist consumers and recordkeeping requirements to assist enforcement of the TILA. The FTC enforces the TILA as to all creditors and advertisers except those that are subject to the regulatory authority of another federal agency (such as federally chartered or insured depository institutions).

Estimated annual hours burden: 12,415,413 hours, rounded to the nearest thousand (1,000,000 recordkeeping hours + 11,415,413 disclosure hours)

Recordkeeping: FTC staff estimates that Regulation Z's recordkeeping requirements affect approximately 1,000,000 firms within the Commission's jurisdiction that offer credit, at an average annual burden of one hour per firm, for a total of 1,000,000 hours.

Disclosure: Regulation Z disclosure requirements pertain to open-end and closed-end credit. The Regulation applies to various types of entities, including mortgage companies; finance companies; auto dealerships; student loan companies; merchants who extend credit for goods or services, credit advertisers; and others. Below is FTC staff's best estimate of burden applicable to the wide spectrum of these entities within the FTC's jurisdiction.

REGULATION Z: DISCLOSURES—BURDEN HOURS

	Setup/Monitoring			Transaction-related			
Disclosures[1]	Respondents	Average Burden per Respondent (hours)	Total Setup/ Monitoring Burden (hours)	Number of Transactions	Average Burden per Transaction (minutes)	Total Transactions Burden (hours)	Total Burden (hours)
Open-end credit:							
Initial terms	90,000	.5	45,000	40,000,000	.25	166,666	211,666
Rescission notices	7,500	.5	3,750	400,000	.25	1,6665,416	
Change in terms	20,000	.5	10,000	125,000,000	.125	260,416	270,416
Periodic statements	90,000	.5	45,000	3,500,000,000	.0625	3,645,833	3,690,833
Error resolution	90,000	.5	45,000	8,000,000	5	666,666	711,666
Credit and charge card accounts	50,000	.5	25,000	25,000,000	.25	104,166	129,166
Home equity lines of credit	7,500	.5	3,750	3,500,000	.25	14,583	18,333
Advertising	200,000	.5	100,000	600,000	.5	5,000	105,000
Closed-end credit:							
Credit disclosures	700,000	.5	350,000	200,000,000	1.5	5,000,000	5,350,000
Rescission notices	75,000	.5	37,500	30,000,000	1	500,000	537,500
Variable rate mortgages	70,000	.5	35,000	2,000,000	1.5	50,000	85,000
High rate/high-fee mortgages	40,000	.5	20,000	500,000	1.5	12,500	32,500

[10] *See* note 8.

REGULATION Z: DISCLOSURES—BURDEN HOURS—Continued

	Setup/Monitoring			Transaction-related			
Disclosures[1]	Respondents	Average Burden per Respondent (hours)	Total Setup/ Monitoring Burden (hours)	Number of Transactions	Average Burden per Transaction (minutes)	Total Transactions Burden (hours)	Total Burden (hours)
Reverse mortgages	50,000	.5	25,000	175,000	12,917	27,917	
Advertising[2]	450,000	.5	225,000	900,000	115,000	240,000	
Total open-end credit							5,142,496
Total closed-end credit							6,272,917
Total credit							11,415,413

[1] Generally, open-end and closed-end entities and transactions have decreased, but reverse mortgages have increased, relative to prior FTC estimates.

[2] Advertising time for setup for open-end and closed-end mortgage transactions is estimated to increase based on new rules effective October 1, 2009, but the number of transactions have decreased, relative to prior FTC estimates.

Estimated annual cost burden: $372,419,363, rounded to the nearest thousand ($17,400,000 recordkeeping cost + $355,019,363 disclosure cost)

FTC staff calculated labor costs by applying appropriate hourly cost figures to the burden hours described above. The hourly rates used below ($41 for managerial or professional time, $30 for skilled technical time, and $16 for clerical time) are averages, based on current Bureau of Labor Statistics cost figures.[2]

Recordkeeping: For the 1,000,000 recordkeeping hours, FTC staff estimates that 10 percent of the burden hours require skilled technical time and 90 percent require clerical time. As shown in the table below, the total recordkeeping cost is $17,400,000.

Disclosure: For each notice or information item listed, FTC staff estimates that 10 percent of the burden hours require managerial time and 90 percent require skilled technical time. As shown in the table below, the total disclosure cost is $355,019,363.

REGULATION Z: RECORDKEEPING AND DISCLOSURES—COST

	Managerial		Skilled Technical		Clerical		
Required Task	Time (hours)	Cost ($41/hr.)	Time (hours)	Cost ($30/hr.)	Time (hours)	Cost ($16/hr.)	Total Cost ($)
Recordkeeping	0	$0	100,000	$3,000,000	900,000	$14,400,000	$17,400,000
Open-end credit Disclosures:							
Initial terms	21,167	$867,847	190,499	$5,714,970	0	$0	$6,582,817
Rescission notices	542	$22,222	4,874	$146,220	0	$0	$168,442
Change in terms	27,042	$1,108,722	243,374	$7,301,220	0	$0	$8,409,942
Periodic statements	369,083	$15,132,403	3,321,750	$99,652,500	0	$0	$114,784,903
Error resolution	71,167	$2,917,847	640,499	$19,214,970	0	$0	$22,132,817
Credit and charge card accounts	12,917	$529,597	116,249	$3,487,470	0	$0	$4,017,067
Home equity lines of credit	1,833	$75,153	16,500	$495,000	0	$0	$570,153
Advertising	10,500	$430,500	94,500	$2,835,000	0	$0	$3,265,500
Total open-end credit							$159,931,641
Closed-end credit Disclosures:							
Credit disclosures	535,000	$21,935,000	4,815,000	$144,450,000	0	$0	$166,385,000
Rescission notices	53,750	$2,203,750	483,750	$14,512,500	0	$0	$16,716,250
Variable rate mortgages	8,500	$348,500	76,500	$2,295,000	0	$0	$2,643,500
High-rate/high-fee mortgages	3,250	$133,250	29,250	$877,500	0	$0	$1,010,750
Reverse mortgages	2,792	$114,472	25,125	$753,750	0	$0	$868,222
Advertising	24,000	$984,000	216,000	$6,480,000	0	$0	$7,464,000
Total closed-end credit							$195,087,722
Total Disclosures							$355,019,363
Total Recordkeeping and Disclosures							$372,419,363

[2] *See* note 8.

William Blumenthal,

General Counsel.

[FR Doc. E8–27534 Filed 11–19–08: 8:45 am]

BILLING CODE 6750–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0263]

Agency Information Collection Request; 30-Day Public Comment Request

AGENCY: Office of the Secretary.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office on (202) 690–5683.

Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above e-mail address within 30 days.

Proposed Project: Protection of Human Subjects: Assurance Identification/IRB Certification/ Declaration of Exemption Form Extension—OMB No. 0990–0263—Office for Human Research Protections.

Abstract: The Federal Policy for the Protection of Human Subjects, known as the Common Rule, requires that before engaging in non-exempt human subjects research that is conducted or supported by a Common Rule department or agency, each institution must: (1) Hold an applicable assurance of compliance [Section 103(a)]; and (2) certify to the awarding department or agency that the application or proposal for research has been reviewed and approved by an IRB designated in the assurance [Sections 103(b) and (f)]. The Office for Human Research Protections is requesting a three-year extension of the Protection of Human Subjects: Assurance Identification/IRB Certification/ Declaration of Exemption Form. That form is designed to promote uniformity among departments and agencies, and to help ensure common means of ascertaining institutional review board certifications and other reporting requirements relating to the protection of human subjects in research. Respondents are institutions engaged in research involving human subjects where the research is supported by HHS. Institutional use of the form is also relied upon by other federal departments and agencies that have codified or follow the Federal Policy for the Protection of Human Subjects (Common Rule). There are an estimated total of 70,000 health or human research studies supported each year, meaning an average of 7 certifications per institution annually, requiring an estimated one-half hour per certification for a total burden of 35,000 hours. Data is collected as needed.

ESTIMATED ANNUALIZED BURDEN IN HOURS FOR IRB CERTIFICATION BURDEN

Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Protection of Human Subjects: Assurance Identification/IRB Certification/Declaration of Exemption	10,000	7	0.5	35,000

John Teeter,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. E8–27628 Filed 11–19–08; 8:45 am]

BILLING CODE 4150–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–08–0010]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

The National Birth Defects Prevention Study (NBDPS)—Revision—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Address the following criteria provided in 5 CFR 1320.5(a): CDC has been monitoring the occurrence of serious birth defects and genetic diseases in Atlanta since 1967 through the Metropolitan Atlanta Congenital Defects Program (MACDP). The MACDP is a population-based surveillance system for birth defects in the 5 counties of Metropolitan Atlanta, which is being requested for OMB clearance for three additional years. Its primary purpose is to describe the spatial and temporal patterns of birth defects occurrence and serves as an early warning system for new Teratogens. In 1997, the Birth Defects Risk Factor Surveillance (BDRFS) study, a case-control study of risk factors for selected birth defects, became the National Birth Defects Prevention Study (NBDPS). The major components of the study did not change.

The NBDPS is a case-control study of major birth defects that includes cases identified from existing birth defect surveillance registries in nine states,

including metropolitan Atlanta. Control infants are randomly selected from birth certificates or birth hospital records. Mothers of case and control infants are interviewed using a computer-assisted telephone interview. The interview is estimated to take one hour. A maximum of thirty-six hundred interviews are planned, 2,700 cases and 900 controls, resulting in a maximum interview burden of 3,600 hours for all Centers.

Parents are also asked to collect cheek cells from themselves and their infants for DNA testing. The collection of cheek cells by the mother, father, and infant is estimated to take about 10 minutes per person. Each person will be asked to rub 1 brush inside the left cheek and 1 brush inside the right cheek for a total of 2 brushes per person. Collection of the cheek cells takes approximately 1–2 minutes, but the estimate of burden is 10 minutes to account for reading and understanding the consent form and specimen collection instructions and mailing back the completed kits. The anticipated maximum burden for collection of the cheek cells is 1,800 hours.

Information gathered from both the interviews and the DNA specimens will be used to study independent genetic and environmental factors as well as gene-environment interactions for a broad range of carefully classified birth defects.

There are no costs to the respondents other than their time. The total estimated annualized burden is 5,400 hours.

ESTIMATED ANNUALIZED BURDEN TABLE

Respondents	Number of respondents	Number of responses per respondent	Avg. burden per response (In hours)
NBDPS case/control interview	3,600	1	1
Biologic Specimen Collection	10,800	1	10/60

Dated: November 13, 2008.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–27618 Filed 11–19–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–09–09AE]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Chagas Disease knowledge, attitude, practices (KAP) study of physicians—New—Coordinating Center for Infectious Disease (CCID), National Center for Zoonotic, Vector-borne, and Enteric Diseases (NCZVED), Division of Parasitic Diseases (DPD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Division of Parasitic Diseases is proposing a knowledge, attitudes, and practices (KAP) study to determine the level of physician awareness and understanding of Chagas disease. Chagas disease is a blood-borne parasitic disease, found only in the Americas, and spread through contact with the triatomine bug. Chagas disease can also be contracted through blood transfusion, organ transplantation, and from mother to child congenitally. This disease is not spread through person-to-person contact. Chagas disease can cause serious heart and stomach illness; for some patients, treatment with antiparasitic medications prevents these serious complications and may eliminate the infection. The hypothesis of this research study is that there will be a dramatic Chagas disease knowledge deficit among physicians. In the first 20 months of blood donor screening for Chagas disease, at least 624 positive blood donors were identified. Currently, only about 10% of blood donors with Chagas disease are receiving treatment medication. It is suspected that most physicians are not familiar with this disease and this may negatively impact patient care: (1) When positive blood donors see their healthcare provider, (2) when organs and tissues are transplanted unknowingly from infected donors, and (3) when infected mothers give birth to babies without screening for Chagas disease. This KAP study will survey physicians in areas where there may be more patients with Chagas disease. The survey will be sent to all physician members of several partner organizations. Results will be analyzed in order to develop physician education material. That material will then be sent to all members. Subsequently, a second follow-up survey, very similar to the initial one, will be sent in order to determine levels of knowledge change. The data collected by this study will allow DPD to understand, and consequently develop and appropriately target medical educational material to address, Chagas disease knowledge deficits of physicians.

There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Physicians	300	2	3/60	30

Dated: November 14, 2008.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–27619 Filed 11–19–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Human Genome Research Institute Special Emphasis Panel Site Visit (Stanford University).

Date: December 12, 2008.

Time: 8 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Suite 4076, Bethesda, MD 20892.

Contact Person: Keith McKenney, PhD, Scientific Review Officer, NHGRI, 5635 Fishers Lane, Suite 4076, Bethesda, MD 20814, 301–594–4280, *mckenneyk@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: November 12, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–27382 Filed 11–19–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, 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; Targeted Clinical Trials to Reduce the Risk of Antimicrobial Resistance.

Date: December 15, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: Crowne Plaza—Silver Spring, 8777 Georgia Avenue, Silver Spring, MD 20910.

Contact Person: Lynn Rust, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, 301–402–3938, *lr228v@nih.gov*.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Targeted Clinical Trials to Reduce the Risk of Antimicrobial Resistance.

Date: December 16, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: Crowne Plaza—Silver Spring, 8777 Georgia Avenue, Silver Spring, MD 20910.

Contact Person: Lynn Rust, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, 301–402–3938, *lr228v@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: November 13, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–27531 Filed 11–19–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of Biotechnology Activities, Office of Science Policy, Office of the Director; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the meeting of the National Science Advisory Board for Biosecurity (NSABB). Under authority 42 U.S.C. 217a, Section 222 of the Public Health Service Act, as amended, the Department of Health and Human Services established NSABB to provide advice, guidance and leadership regarding federal oversight of dual use research, defined as biological research with legitimate scientific purposes that could be misused to pose a biological threat to public health and/or national security.

The meeting will be open to the public, however pre-registration is strongly recommended due to space limitations. Persons planning to attend should register online at www.biosecurityboard.gov/meetings.asp or by calling Capital Consulting Corporation (Contact: Saundra Bromberg at 301–468–6004, ext. 406). Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should indicate these requirements upon registration.

Name of Committee: National Science Advisory Board for Biosecurity

Date: December 10, 2008

Open: 8:30 a.m. to 6 p.m.

Agenda: Presentations and discussions regarding: (1) Preliminary findings and recommendations on strategies to optimize programs of personnel reliability for individuals with access to select agents and toxins; (2) brief overview of Public

Consultation meeting in July 2008 on the proposed framework for the oversight of dual use research; (3) brief update on the activities of the Working Group on Outreach and Education; (4) brief update on Synthetic Genomics; (5) highlights from the November 2008 International Roundtable on Sustaining Progress in the Life Sciences: Strategies for Managing Dual Use Research of Concern; (6) public comments; and (7) other business of the Board.

Place: The Legacy Hotel & Meeting Centre, 1775 Rockville Pike, Rockville, MD 20852.

Contact Person: Ronna Hill, NSABB Program Assistant, 6705 Rockledge Drive, Bethesda, Maryland 20892, (301) 496–9838.

This meeting will also be webcast. The draft meeting agenda and other information about NSABB, including information about access to the Web cast and pre-registration, will be available at *http://www.biosecurityboard.gov/meetings.asp*. Please check the OBA Web site for updates. Times are approximate and subject to change.

Any member of the public interested in presenting oral comments at the meeting may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of an organization may submit a letter of intent, a brief description of the organization represented and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee. All written comments must be received by December 1, 2008 and should be sent via e-mail to *nsabb@od.nih.gov* with ''NSABB Public Comment'' as the subject line or by regular mail to 6705 Rockledge Drive, Suite 750, Bethesda, MD 20892, Attention Ronna Hill. The statement should include the name, address, telephone number and, when applicable, the business or professional affiliation of the interested person.

Dated: November 13, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–27532 Filed 11–19–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3279–EM]

California; Amendment No. 2 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of California (FEMA–3279–EM), dated October 23, 2007, and related determinations.

DATES: *Effective Date:* March 31, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective March 31, 2008.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–27574 Filed 11–19–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1800–DR]

Illinois; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Illinois (FEMA–1800–DR), dated October 3, 2008, and related determinations.

DATES: *Effective Date:* November 13, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Illinois is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of October 3, 2008.

Peoria County for Individual Assistance. The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–27571 Filed 11–19–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1766–DR]

Indiana; Amendment No. 19 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Indiana (FEMA–1766–DR), dated June 8, 2008, and related determinations.

EFFECTIVE DATE: November 13, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Regis Leo Phelan, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

This action terminates my appointment of Stephen M. DeBlasio, Sr. as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–27572 Filed 11–19–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1795–DR]

Indiana; Amendment No. 8 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Indiana (FEMA–1795–DR), dated September 23, 2008, and related determinations.

DATES: *Effective Date:* November 13, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Regis Leo Phelan, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

This action terminates my appointment of Stephen M. DeBlasio Sr. as Federal Coordinating Officer for this disaster.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–27573 Filed 11–19–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1807–DR]

Virgin Islands; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Territory of the U.S. Virgin Islands (FEMA–1807–DR), dated October 29, 2008, and related determinations.

EFFECTIVE DATE: November 10, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Territory of the U.S. Virgin Islands is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of October 29, 2008:

The island of St. John, for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–27560 Filed 11–19–08; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

New Agency Information Collection Activity Under OMB Review: On-Boarding Information for New Hire Candidates

AGENCY: Transportation Security Administration, DHS.

ACTION: 30-day Notice.

SUMMARY: This notice announces that the Transportation Security Administration (TSA) has forwarded the new Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act. The ICR describes the nature of the information collection and its expected burden. TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on July 18, 2008, 73 FR 41367. The collection involves collecting personal information from new hire candidates for their entrance on duty (EOD) as part of the hiring process using an electronic interface known as EODonline.

DATES: Send your comments by December 22, 2008. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Desk Officer, Department of Homeland Security/TSA, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Joanna Johnson, Office of Information Technology, TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220; telephone (571) 227–3651; facsimile (703) 603–0822.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation is available at *www.reginfo.gov*. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

Title: On-Boarding Information for New Hire Candidates.

Type of Request: New collection.

OMB Control Number: Not yet assigned.

Form(s): NA.

Affected Public: TSA New Hires.

Abstract: In an effort to streamline and add efficiency to the EOD process, TSA has transformed the paper-based process into an electronic one by implementing a system known as EODonline. Applicants who have accepted a position with TSA are able to log onto EODonline, where they answer questions designed to gather the necessary data to generate the standard EOD forms. Using EODonline allows employees to complete the EOD process more expeditiously and accurately. TSA will use the results of EODonline usage to measure efficiencies gained through implementation of the automated system both on the part of the new hire candidates (as applicable) and the agency.

Number of Respondents: 10,400.

Estimated Annual Burden Hours: An estimated 10,400 hours annually.

Issued in Arlington, Virginia, on November 14, 2008.

Ginger LeMay,

Paperwork Reduction Act Officer, Business Improvements and Communications, Office of Information Technology.

[FR Doc. E8–27513 Filed 11–19–08; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Approval From OMB of One New Public Collection of Information: Security Program for Hazardous Materials Motor Carriers & Shippers

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-Day Notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on a new information collection requirement abstracted below that we will submit to the Office of Management and Budget (OMB) for approval in compliance with the Paperwork Reduction Act. The collection involves the submission of security training program evaluation forms by hazardous materials (hazmat) motor carriers and shippers after participants have received the training.

DATES: Send your comments by January 20, 2009.

ADDRESSES: Comments may be mailed or delivered to Joanna Johnson, Communications Branch, Business Management Office, Operational Process and Technology, TSA–32, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220.

FOR FURTHER INFORMATION CONTACT: Joanna Johnson at the above address, or by telephone (571) 227–3651 or facsimile (571) 227–3588.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov*. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

TSA's Highway & Motor Carrier Division will be producing a voluntary security-related training course for the hazmat motor carrier and shipper industry. Participants will be able to choose to attend instructor-led training sessions that TSA will conduct at multiple sites in the United States, and TSA will advise the industry of the availability of the training through trade associations, conferences, and stakeholder meetings. Hazmat motor carriers and shippers that are registered with the U.S. Department of Transportation (DOT) will automatically receive the training via CD–ROM and DVD. Companies may also complete the training on-line at the TSA public Web site, *http://www.tsa.gov*. The Web site training is available to the public and does not require a log-in or password. After completion of the training program, participants will have the option to complete a course evaluation form to comment on the effectiveness of the training program. The participants who choose to complete the training evaluation form will submit the form via e-mail to a secure Web surveyor tool that is managed by TSA. Participants who attend the classroom training sessions will also be asked to complete an evaluation form on-site, which will later be entered into the Web surveyor tool by TSA personnel. TSA will use this data to measure the program's effectiveness at achieving its goal of heightened security awareness levels throughout the hazmat motor carrier and shipper industry.

Hazmat motor carriers and shippers that are registered with the DOT are eligible to receive the training; there are approximately seventy-five thousand (75,000) shippers registered.

Currently, DOT requires awareness and in-depth security training for hazmat employees of persons required to have a security plan in accordance with subpart I of 49 CFR part 172 concerning the security plan and its implementation. *See* 49 CFR

172.704(a)(4)(5).[1] The training CD–ROM and DVD will provide the necessary training curriculum and tools to be incorporated into the companies' annual security training program. The approximate number of hazmat employees who potentially could participate in the training program via instructor-led sessions, CD–ROM, DVD, or the TSA public Web site could approach approximately one hundred thousand (100,000) employees, depending on the level of participation. The training will be produced and delivered in a format that will allow companies that choose to complete the evaluation to have their employees take the training program individually or in a classroom setting and receive a certificate for completion of the training program. This will allow companies to keep a copy of the employee's training certificate in their personnel training files in accordance with 49 CFR 172.704. Since security training is already a Federal requirement for the hazmat motor carrier and shipper industry, the subject motor carrier or shipper companies should only incur small incremental costs associated with taking the voluntary training program produced by TSA.

Purpose of Data Collection

As prescribed by the President in Homeland Security Presidential Directive 7 (HSPD–7), the Department of Homeland Security (DHS) is tasked with protecting our nation's critical infrastructure and key resources (CI/KR). Through the National Infrastructure Protection Plan (NIPP), DHS gives guidance and direction as to how the Nation will secure its infrastructure. Furthermore, HSPD–7 and the NIPP assigned the responsibility for infrastructure security in the transportation sector to TSA. To this effect, the NIPP further tasks each sector to build security partnerships, set security goals, and measure their effectiveness. Through its voluntary Corporate Security Review (CSR) Program, TSA's Highway and Motor Carrier Division has conducted security reviews of numerous hazmat motor carriers and shippers in order to analyze various aspects of each company's security program. Through this review process, TSA has determined that improved security awareness and in-depth training for hazmat motor carrier and shipper company employees would enhance security. To increase the security awareness levels across the hazmat motor carrier and shipper industries, TSA plans to develop and distribute a security awareness/in-depth training program and will request voluntary feedback from hazmat motor carrier and shipper companies that elect to receive the training.

Hazmat motor carrier and shipper companies can take the training via CD–ROM and DVD, during classroom training sessions, or via the TSA public Web site. For those taking the classroom training sessions, TSA will hand out an evaluation form to collect feedback regarding the security training program. Participants can also complete the evaluation form on-line after completing the training. TSA will collect the forms and evaluate the results. TSA will use the survey results to guide TSA on future hazmat motor carrier and shipper transportation security initiatives. TSA plans to conduct the data collection over a two- to three-year period in order to allow for maximum distribution and use of the training program throughout the industry, and for participating companies to complete full training cycles.

Description of Data Collection

TSA will ask participating companies that voluntarily complete the Security Awareness Training program via the CD–ROM to log on to a TSA-managed secure Web site to provide feedback on the effectiveness of the training. Participants that complete the training program via the classroom sessions will be asked to complete an evaluation form on-site after the training is completed. TSA's Highway & Motor Carrier Division staff will manually input the data into the Web surveyor tool system.

As part of the evaluation form, TSA will collect information such as employee position, type of company, knowledge of material before and after the training, and overall training satisfaction. TSA will not collect the respondent's personal information as part of the course evaluation form. TSA will use this data to measure the program's effectiveness at achieving its goal of heightened security awareness levels throughout the hazmat motor carrier and shipper industry.

Use of Results

The primary use of this information is to allow TSA to assess the effectiveness of the training program and training CD–ROM within the hazmat motor carrier and shipper industries. The secondary purpose of this information is for TSA to obtain, based on individual company input, an indication of participation levels throughout the hazmat motor carrier and shipper industries. This data will be kept for at least one year or long enough to collect a significant sample size (percentage) of the hazmat motor carrier and shipper industries to be used in identifying additional training needs to enhance the industry's security posture.

Frequency

Most companies administer their security awareness training curriculum on an annual or bi-annual cycle. Typically, companies will generate quarterly or annual reports on employee training progress. At other companies, employees may receive training periodically as needed and submit feedback via the evaluation form between one and four times per year, which TSA equates to an average frequency for this collection of two times per year. Thus, company employees would provide TSA feedback approximately once every two years.

Out of the approximately 75,000 individual hazmat motor carrier and shipper companies, TSA estimates that approximately 75 percent of the companies that receive the CD–ROM training will incorporate it into their training plans. This number can be assumed due to the current DOT requirement (49 CFR 172.704) for certain hazmat motor carriers and shippers to conduct security awareness and in-depth training for their hazmat employees. TSA assumes that 50 percent of those who take the training will provide feedback on the training program. TSA estimates the average hour burden per response per shipper/carrier company employee will be approximately 20 minutes. TSA estimates the total annual hour burden will be dependent on the number of company employees that participate per motor carrier/shipper company. Therefore, TSA estimates that the maximum total annual hour burden will be approximately 16,667 hours per year for all motor carrier/shipper industry participants [50,000 employees × 20 minutes = 16,667 hours].

Issued in Arlington, Virginia, on November 13, 2008.

Kurt Guyer,

Acting Program Manager, Business Improvements and Communications, Office of Information Technology.

[FR Doc. E8–27526 Filed 11–19–08; 8:45 am]

BILLING CODE 9110–05–P

[1] This security training must include company security objectives, specific security procedures, employee responsibilities, actions to take in the event of a security breach, and the organizational security structure.

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form G–28, and Form G–28I, Revision of an Existing Information Collection Request; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review: Form G–28, Notice of Entry of Appearance as Attorney or Accredited Representative, and Form G–28I, Notice of Entry of Appearance of Foreign Attorney. OMB Control No. 1615–0105.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until January 20, 2009.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov*. When submitting comments by e-mail, please add the OMB Control Number 1615–0105 in the subject box.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of an existing information collection.

(2) *Title of the Form/Collection:* Notice of Entry of Appearance as Attorney or Accredited Representative, and Notice of Entry of Appearance of Foreign Attorney.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form G–28, and Form G–28I. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The data collected on Forms G–28 and G–28I are used by DHS to determine eligibility of the individual to appear as a representative.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 2,479,000 responses at 20 minutes (.333) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 825,507 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: *http://www.regulations.gov/search/index.jsp*.

We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529, telephone number 202–272–8377.

Dated: November 14, 2008.

Stephen Tarragon,

Deputy Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. E8–27515 Filed 11–19–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form N–25, Extension of an Existing Information Collection Request; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review: Form N–25, Request for Verification of Naturalization. OMB Control No. 1615–0049.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until January 20, 2009.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov*. When submitting comments by e-mail, please add the OMB Control Number 1615–0049 in the subject box.

During this 60-day period USCIS will be evaluating whether to revise the Form N–25. Should USCIS decide to revise this form it will advise the public when it publishes the 30-day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30 days to comment on any revisions to this form.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Request for Verification of Naturalization.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–25. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Not for Profit Institutions. This form will allow U.S. Citizenship and Immigration Services (USCIS) to obtain verification from the courts that a person claiming to be a naturalized citizen has, in fact, been naturalized.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1,000 responses at 15 minutes (.25) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 250 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: *http://www.regulations.gov/search/index.jsp.*

We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529, telephone number 202–272–8377.

Dated: November 14, 2008.

Stephen Tarragon,

Deputy Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. E8–27516 Filed 11–19–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO31000.L13100000.PB0000.24–1A]

Extension of Approval of Information Collection, OMB Control Number 1004–0034

AGENCY: Department of the Interior, Bureau of Land Management, Interior.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) is requesting the Office of Management and Budget (OMB) to extend an existing approval to collect information from those person who wish to transfer interest in oil and gas or geothermal leases by assignment or record title or transfer operating rights (sublease) in oil and gas or geothermal leases under the terms of mineral leasing laws. The BLM uses Form 3000–3, Assignment of Record Title Interest in a Lease for Oil and Gas or Geothermal Resources, and Form 3000–3a, Transfer of Operating Rights (sublease) in a Lease for Oil and Gas or Geothermal Resources, to collect this information. This information allows the BLM to transfer interest in oil or gas or geothermal leases by assignment of record title or transfer operating rights (sublease) in oil or gas or geothermal leases under the regulations at 43 CFR subparts 3106, 3135, and 3216.

DATES: You must submit your comments to the address below no later than January 20, 2009. Comments received or postmarked after this date may not be considered.

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

Mail: U.S. Department of the Interior, Director (630), Bureau of Land Management, Mail Stop 401 LS, 1849 C St., NW., (Attention: 1004–0034), Washington, DC 20240.

Personal or messenger delivery: 1620 L Street, NW., Room 401, Washington, DC 20036.

E-mail: information_collection@blm.gov (Attn.: 1004–0034)

All comments will be available for public review at the L Street address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, except on Federal holidays.

Before including your address, telephone number, e-mail address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT: You may contact Barbara Gamble, Division of Fluid Minerals, at 202–452–0338 (Commercial or FTS). Persons who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) on 1–800–877–8330, 24 hours a day, seven days a week, to leave a message for Ms. Gamble.

SUPPLEMENTARY INFORMATION: 5 CFR 1320.12(a) requires that we provide a 60-day notice in the **Federal Register** concerning a collection of information to solicit comments on:

(a) Whether the collection of information is necessary for the proper functioning of the agency, including whether the information will have practical utility;

(b) The accuracy of our estimates of the information collection burden, including the validity of the methodology and assumptions we use;

(c) Ways to enhance the quality, utility, and clarity of the information collected; and

(d) Ways to minimize the information collection burden on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

The Mineral Leasing Act of 1920 (MLA) (30 U.S.C. 181 *et seq.*) and the Geothermal Steam Act of 1970 (30 U.S.C. 1001–1025) authorize the Secretary of the Interior to issue leases for development of Federal oil and gas and geothermal resources. The Act of August 7, 1947 (Mineral Leasing Act for Acquired Lands) authorizes the Secretary to lease lands acquired by the United States (30 U.S.C. 341–359). The Department of the Interior Appropriations Act of 1981 (42 U.S.C. 6508) provides for the competitive leasing of lands for oil and gas in the National Petroleum Reserve—Alaska (NPRA). The Attorney General's Opinion of April 2, 1941 (40 Opinion of the Attorney General 41) provides the basis under which the Secretary issues certain leases for lands being drained of mineral resources. The Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 *et seq.*) provides the authority for leasing lands acquired from the General Services Administration.

Assignor/transferor submits Form 3000–3, Assignment of Record Title Interest in a Lease for Oil and Gas or Geothermal Resources, and Form 3000–3a, Transfer of Operating Rights (Sublease) in a Lease for Oil and Gas or Geothermal Resources, to transfer interest in oil and gas or geothermal leases by assignment of record title or transfer operating rights (sublease) in oil and gas or geothermal leases under the regulations in 43 CFR subparts 3106, 3135, and 3216. These regulations outline the procedures for assigning record title interest and transferring operating rights in a lease to explore for, develop, and produce oil and gas resources and geothermal resources.

The assignor/transferor provides the required information to comply with the regulations in order to process the assignments of record title interest or transfer of operating rights (sublease) in a lease for oil and gas or geothermal resources. The assignor/transferor submits the required information to BLM for approval under 30 U.S.C. 187a and the regulations at 43 CFR subparts 3106, 3135, and 3216.

BLM uses the information submitted by the assignor/transferor to identify the interest ownership that is assigned or transferred and the qualifications of the assignee-transferee. BLM determines whether the assignee-transferee is qualified to obtain the interest sought and ensures that the assignee/transferee does not exceed statutory acreage limitations.

Based on BLM's experience administering the activities described above, we estimate it takes 30 minutes per response to gather and provide the required information. The respondents include individuals, small businesses, and large corporations. The frequency of response is occasional. We estimate 60,000 responses per year and a total annual burden of 30,000 hours.

BLM will summarize all responses to this notice and include them in the request for OMB approval. All comments will become a matter of public record.

Dated: November 14, 2008.

Ted R. Hudson,

Acting Information Collection Clearance Officer, Bureau of Land Management.

[FR Doc. E8–27624 Filed 11–19–08; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO32000. L13100000.PC0000.24–1A]

Extension of Approved Information Collection, OMB Control Number 1004–0185

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) is requesting the Office of Management and Budget (OMB) to extend existing approvals to collect certain information from lessees, operators, record title holders, operating rights owners, and the general public on oil and gas and operations on Federal lands.

DATES: You must submit your comments to BLM at the address below on or before January 20, 2009. BLM will not necessarily consider any comments postmarked or received after the above date.

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

Mail: U.S. Department of the Interior, Director (630), Bureau of Land Management, Mail Stop 401 LS, 1849 C St., NW., (Attention: 1004–0185), Washington, DC 20240.

Personal or messenger delivery: 1620 L Street, NW., Room 401, Washington, DC 20036.

E-mail: information_collection@blm.gov (Attn.: 1004–0185).

Comments will be available for public review at the L Street address during regular business hours (7:45 a.m. to 4:15 p.m.) Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: You may contact Barbara Gamble, Division of Fluid Minerals, on (202) 452–0338 (Commercial or FTS). Persons who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) on 1–800–877–8330, 24 hours a day, seven days a week, to contact Ms. Gamble.

SUPPLEMENTARY INFORMATION: 5 CFR 1320.12(a) requires that we provide a 60-day notice in the **Federal Register** concerning a collection of information to solicit comments on:

(1) Whether the collection of information is necessary for the proper functioning of the agency, including whether the information will have practical utility;

(2) The accuracy of our estimates of the information collection burden, including the validity of the methodology and assumptions we use;

(3) Ways to enhance the quality, utility, and clarity of the information collected; and

(4) Ways to minimize the information collection burden on those who are required to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

The Mineral Leasing Act of 1920 (MLA), 30 U.S.C. 191 *et seq.*, gives the Secretary of the Interior responsibility for oil and gas leasing on approximately 570 million acres of public lands and national forests, and private lands where the mineral rights are reserved by the Federal government. The Act of May 21, 1930 (30 U.S.C. 301–306), authorizes the leasing of oil and gas deposits under railroads and other rights-of-way. The Act of August 7, 1947 (Mineral Leasing Act of Acquired Lands), authorizes the Secretary to lease lands acquired by the United States (30 U.S.C. 341–359). The regulations under 43 CFR part 3000 *et al.* authorize BLM to manage the oil and gas leasing and exploration activities. Without the information, BLM would not be able to analyze and approve oil and gas leasing and exploration activities.

BLM collects nonform information on oil and gas leasing and exploration activities when the lessee, record title holder, operating rights owner, or operator files any of the following information for BLM to adjudicate:

43 CFR	Information collection requirements	Reporting		Total hours
		Number of responses	hours per respondent	
3100.3–1	Notice of option holdings	30	1	30
3100.3–3	Option statement	50	1	50
3101.2–4(a)	Excess acreage petition	10	1	10
3101.2–6	Showings statement	10	1.5	15
31.1.3–1	Joinder evidence statement	50	1	50

43 CFR	Information collection requirements	Reporting		Total hours
		Number of responses	hours per respondent	
3103.4–1	Waiver, suspension, reduction of rental, etc	20	2	40
3105.2	Communitization or drilling agreement	150	2	300
3105.3	Operating, drilling, development contracts interest statement	50	2	100
3105.4	Joint operations; transportation of oil applications	20	1	20
3105.5	Subsurface storage application	50	1	50
3106.8–1	Heirs and devisee statement	40	1	40
3106.8–2	Change of name report	60	1	60
3106.8–3	Corporate merger notice	100	2	200
3107.8	Lease renewal application	30	1	30
3108.1	Relinquishments	150	0.5	75
3108.2	Reinstatement petition	500	0.5	250
3109.1	Leasing under rights-of-way application	20	1	20
3120.1–1(e)	Lands available for leasing	280	2.5	700
3120.1–3	Protests and appeals	90	1.5	135
3152.1	Oil and gas exploration in Alaska application	20	1	20
3152.6	Data collection	20	1	20
3152.7	Completion of operations report	20	1	20
Totals		1,770		2,235

BLM collects the information in the regulations that address oil and gas drainage and no form is required.

Type of drainage analysis	Number of analyses	Hours
Preliminary	1,000	2,000
Detailed	100	2,400
Additional	10	200
Total	1,110	4,600

Based upon our experience managing oil and gas activities, we estimate for the information collection 2,880 responses per year with an annual information burden of 6,835 hours.

BLM will summarize all responses to this notice and include them in the request for OMB approval. All comments will become a matter of public record.

Dated: November 13, 2008.

Ted Hudson,

Acting Information Collection Clearance Officer, Bureau of Land Management.

[FR Doc. E8–27630 Filed 11–19–08; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO320.LL120000.PC0000.24–1A]

Extension of Approved Information Collection, OMB Control Number 1004–0165

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) requests the Office of Management and Budget (OMB) to extend an existing approval to collect information from individuals submitting nominations for significant caves under the Federal Cave Resources Protection Act of 1988 and to request confidential cave information. BLM needs the information to determine which caves we will list as significant and decide whether to grant access to confidential cave information.

DATES: You must submit your comments to BLM at the address below on or before January 20, 2009. BLM will not necessarily consider any comments postmarked or received after the above date.

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

Mail: U.S. Department of the Interior, Director (630), Bureau of Land Management, Mail Stop 401 LS, 1849 C St., NW. (Attention: 1004–0165) Washington, DC 20240.

Personal or messenger delivery: 1620 L Street, NW., Room 401, Washington, DC 20036.

E-mail: information_collection@blm.gov (Attn.: 1004–0165)

Comments will be available for public review at the L Street address during regular business hours (7:45 a.m. to 4:15 p.m.) Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: You may contact James Goodbar, BLM Field Office, Carlsbad, New Mexico, on (505) 234–5929 (Commercial or FTS). Persons who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) on 1–800–877–8330, 24 hours a day, seven days a week, to contact Mr. Goodbar.

SUPPLEMENTARY INFORMATION: 5 CFR 1320.12(a) requires that we provide a 60-day notice in the **Federal Register** concerning a collection of information to solicit comments on:

(a) Whether the collection of information is necessary for the proper functioning of the agency, including whether the information will have practical utility;

(b) The accuracy of our estimates of the information collection burden, including the validity of the methodology and assumptions we use;

(c) Ways to enhance the quality, utility, and clarity of the information collected; and

(d) Ways to minimize the information collection burden on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

The Federal Cave Resources Protection Act of 1988, 102 Stat. 4546, 16 U.S.C. 4301, requires the identification, protection, and maintenance of significant caves on public lands the Department of the Interior, BLM manages. The implementing regulations are found at 43 CFR part 37—Cave Management. Federal agencies must consult with ''cavers'' and other interested parties and develop a list of significant caves. The regulations establish criteria for identifying significant caves and integrate cave management into existing planning and management processes to protect cave resource information. We use this information to prevent

vandalism and disturbance of significant caves. Other Federal or state agencies, bona fide education or research institutes, or individuals or organizations that assist land management agencies with cave management activities may request access to confidential cave information. BLM uses the Significant Cave Nomination Worksheet to collect some of the requested information on cave management activities.

Based on BLM's experience administering this program, we estimate the public reporting burden is 3 hours for each nomination and 30 minutes for each request for confidential cave information. BLM estimates that 50 cave nominations and 10 requests for confidential cave information will be filed annually, with a total annual burden of 155 hours. Respondents are cavers and other interested parties.

BLM will summarize all responses to this notice and include them in the request for OMB approval. All comments will become a matter of public record.

Dated: November 13, 2008.

Ted Hudson,

Acting Information Collection Clearance Officer, Bureau of Land Management.

[FR Doc. E8–27653 Filed 11–19–08; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Quarterly Status Report of Water Service, Repayment, and Other Water-Related Contract Negotiations

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: Notice is hereby given of contractual actions that have been proposed to the Bureau of Reclamation and are new, modified, discontinued, or completed since the last publication of this notice on August 12, 2008. This notice is one of a variety of means used to inform the public about proposed contractual actions for capital recovery and management of project resources and facilities consistent with section 9(f) of the Reclamation Project Act of 1939. Additional announcements of individual contract actions may be published in the **Federal Register** and in newspapers of general circulation in the areas determined by Reclamation to be affected by the proposed action.

ADDRESSES: The identity of the approving officer and other information pertaining to a specific contract proposal may be obtained by calling or writing the appropriate regional office at the address and telephone number given for each region in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Michelle Kelly, Water and Environmental Resources Office, Bureau of Reclamation, PO Box 25007, Denver, Colorado 80225–0007; telephone 303–445–2888.

SUPPLEMENTARY INFORMATION: Consistent with section 9(f) of the Reclamation Project Act of 1939 and the rules and regulations published in 52 FR 11954, April 13, 1987 (43 CFR 426.22), Reclamation will publish notice of proposed or amendatory contract actions for any contract for the delivery of project water for authorized uses in newspapers of general circulation in the affected area at least 60 days prior to contract execution. Announcements may be in the form of news releases, legal notices, official letters, memorandums, or other forms of written material. Meetings, workshops, and/or hearings may also be used, as appropriate, to provide local publicity. The public participation procedures do not apply to proposed contracts for the sale of surplus or interim irrigation water for a term of 1 year or less. Either of the contracting parties may invite the public to observe contract proceedings. All public participation procedures will be coordinated with those involved in complying with the National Environmental Policy Act. Pursuant to the ''Final Revised Public Participation Procedures'' for water resource-related contract negotiations, published in 47 FR 7763, February 22, 1982, a tabulation is provided of all proposed contractual actions in each of the five Reclamation regions. When contract negotiations are completed, and prior to execution, each proposed contract form must be approved by the Secretary of the Interior, or pursuant to delegated or redelegated authority, the Commissioner of Reclamation or one of the regional directors. In some instances, congressional review and approval of a report, water rate, or other terms and conditions of the contract may be involved.

Public participation in and receipt of comments on contract proposals will be facilitated by adherence to the following procedures:

1. Only persons authorized to act on behalf of the contracting entities may negotiate the terms and conditions of a specific contract proposal.

2. Advance notice of meetings or hearings will be furnished to those parties that have made a timely written request for such notice to the appropriate regional or project office of Reclamation.

3. Written correspondence regarding proposed contracts may be made available to the general public pursuant to the terms and procedures of the Freedom of Information Act, as amended.

4. Written comments on a proposed contract or contract action must be submitted to the appropriate regional officials at the locations and within the time limits set forth in the advance public notices.

5. All written comments received and testimony presented at any public hearings will be reviewed and summarized by the appropriate regional office for use by the contract approving authority.

6. Copies of specific proposed contracts may be obtained from the appropriate regional director or his designated public contact as they become available for review and comment.

7. In the event modifications are made in the form of a proposed contract, the appropriate regional director shall determine whether republication of the notice and/or extension of the comment period is necessary.

Factors considered in making such a determination shall include, but are not limited to (i) the significance of the modification, and (ii) the degree of public interest which has been expressed over the course of the negotiations. At a minimum, the regional director shall furnish revised contracts to all parties who requested the contract in response to the initial public notice.

Definitions of Abbreviations Used in this Document

BCP—Boulder Canyon Project
Reclamation—Bureau of Reclamation
CAP—Central Arizona Project
CVP—Central Valley Project
CRSP—Colorado River Storage Project
CFS—Cubic foot (feet) per second
FR—Federal Register
IDD—Irrigation and Drainage District
ID—Irrigation District
M&I—Municipal and Industrial
NMISC—New Mexico Interstate Stream Commission
O&M—Operation and Maintenance
P–SMBP—Pick-Sloan Missouri Basin Program
PPR—Present Perfected Right
RRA—Reclamation Reform Act of 1982
SOD—Safety of Dams
SRPA—Small Reclamation Projects Act of 1956
USACE—U.S. Army Corps of Engineers
WD—Water District

Pacific Northwest Region: Bureau of Reclamation, 1150 North Curtis Road, Suite 100, Boise, Idaho 83706–1234, telephone 208–378–5344.

New Contract Actions

14. Idaho Water Resource Board, Palisades Project, Idaho: Assignment of repayment contract for 5,000 acre-feet of storage space in Palisades Reservoir from the F.M.C. Corporation to provide water to help mitigate the effects of ground water withdrawal and drought on the Eastern Snake River Plain Aquifer.

15. State of Washington, Columbia Basin Project, Washington: Long-term contract for up to 5,000 acre-feet of water for M&I purposes.

Mid-Pacific Region: Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825–1898, telephone 916–978–5250.

New Contract Action

36. California State Department of Water Resources: Reclamation is working with the Department to develop a 2009 Drought Water Bank to facilitate water transfers from willing sellers to willing buyers to assist with the anticipated drought in 2009.

Modified Contract Action

35. Cawelo WD, CVP, California: Long-term Warren Act contract for conveying up to 20,000 acre-feet of nonproject water (exchanged banked groundwater) via the Friant-Kern Canal for M&I purposes.

Lower Colorado Region: Bureau of Reclamation, PO Box 61470 (Nevada Highway and Park Street), Boulder City, Nevada 89006–1470, telephone 702–293–8192.

New Contract Actions

26. Basic Water Company, BCP, Nevada: Approve the assignment and transfer of 400 acre-feet per year of Colorado River water from Basic's contract to the Southern Nevada Water Authority's contract.

27. Basic Water Company, BCP, Nevada: Amend Basic's contract to conform to the assignment and transfer of 400 acre-feet per year of Colorado River water from Basic's contract to the Southern Nevada Water Authority's contract.

28. Southern Nevada Water Authority, BCP, Nevada: Amend contract to conform to the assignment and transfer of 400 acre-feet per year of Colorado River water from Basic Water Company's contract to Southern Nevada Water Authority's contract.

29. Metropolitan WD of Southern California, San Diego County Water Authority, Otay WD; California: Amendment to extend by 5 years to November 9, 2013, an agreement for temporary emergency delivery of a portion of the Mexican Treaty Waters of the Colorado River to the International Boundary in the vicinity of Tijuana, Baja California, Mexico, and for the operation of facilities in the United States.

30. Hillcrest Water Company, BCP, Arizona: Amend contract to exclude lands occupied by Springs del Sol Domestic Water Improvement District.

Modified Contract Actions

17. Mohave County Water Authority, Springs del Sol Domestic Water Improvement District, La Paz County; BCP; Arizona: Approval of assignment and transfers of 300 acre-feet of Mohave County's fourth-priority water entitlement from Mohave County to Springs del Sol (50 acre-feet) and La Paz County (250 acre-feet).

19. Hopi Tribe, Springs del Sol Domestic Water Improvement District, La Paz County; BCP; Arizona: Approval of assignment and transfers of 300 acre-feet of fourth-priority water entitlement from the Hopi Tribe to Springs del Sol (50 acre-feet) and La Paz County (250 acre-feet).

23. La Paz County, BCP; Arizona: Enter into a new contract for 100 acre-feet per year of fourth-priority water and Amendment No. 1 to add 400 acre-feet that is being assigned to La Paz County by the Mohave County Water Authority (250 acre-feet) and by the Hopi Tribe (250 acre-feet).

Discontinued Contract Actions

12. Basic Management, Inc., BCP, Nevada: Amend contract to add additional service areas where part of the contractor's entitlement can be used.

21. Ehrenberg Improvement Association on behalf of B&F Investment, BCP, Arizona: Amend contract to increase Ehrenberg's fourth-priority water entitlement by 100 acre-feet per year being assigned to B&F from the Mohave County Water Authority (50 acre-feet) and from the Hopi Tribe (50 acre-feet).

Completed Contract Actions

17. Mohave County Water Authority, Springs del Sol Domestic Water Improvement District, La Paz County; BCP; Arizona: Approval of assignment and transfers of 300 acre-feet of Mohave County's fourth-priority water entitlement from Mohave County to Springs del Sol (50 acre-feet) and La Paz County (250 acre-feet). Contracts executed on June 9, 2008, and June 10, 2008.

18. Mohave County Water Authority, BCP, Arizona: Amend contract to decrease the Authority's fourth-priority water entitlement by 300 acre-feet per year (La Paz County Option). Contracts executed on June 9, 2008, and June 10, 2008.

19. Hopi Tribe, Springs del Sol Domestic Water Improvement District, La Paz County; BCP; Arizona: Approval of assignment and transfers of 300 acre-feet of fourth-priority water entitlement from the Hopi Tribe to Springs del Sol (50 acre-feet) and La Paz County (250 acre-feet). Contracts executed on June 9, 2008, and June 10, 2008.

20. Hopi Tribe, BCP, Arizona: Amend contract to decrease the Hopi Tribe's fourth-priority water entitlement by 300 acre-feet per year (La Paz County Option). Contracts executed on June 9, 2008, and June 10, 2008.

22. Springs del Sol Domestic Water Improvement District (Springs del Sol), BCP, Arizona: Enter into a new contract with Springs del Sol for 100 acre-feet per year of fourth-priority water being assigned to Springs del Sol from the Mohave County Water Authority (50 acre-feet) and the Hopi Tribe (50 acre-feet). Contract executed on June 9, 2008.

23. La Paz County, BCP, Arizona: Enter into a new contract for 100 acre-feet per year of fourth-priority water and Amendment No. 1 to add 400 acre-feet that is being assigned to La Paz County by the Mohave County Water Authority (250 acre-feet) and by the Hopi Tribe (250 acre-feet). Contract and amendment executed on June 10, 2008.

24. Cibola Valley IDD, BCP, Arizona: Amend contract to decrease the district's fourth-priority water entitlement by 2,700 acre-feet per year that is being assigned from the district to Arizona Recreational Facilities, LLC. Contract executed on September 4, 2008.

25. Arizona Recreational Facilities, LLC, BCP; Arizona: Enter into a new contract with Arizona Recreational Facilities for 2,700 acre-feet per year of fourth-priority Colorado River water that is being assigned to them from the Cibola Valley IDD. Contract executed on September 4, 2008.

Upper Colorado Region: Bureau of Reclamation, 125 South State Street, Room 6107, Salt Lake City, Utah 84138–1102, telephone 801–524–3864.

New Contract Actions

1.(i) Michael R. Pelletier, Aspinall Storage Unit, CRSP: Mr. Pelletier has requested a 40-year water service contract for 1 acre-foot of M&I water out of the Blue Mesa Reservoir which requires Mr. Pelletier to present a Plan

of Augmentation to the Division 4 Water Court.

34. Bridger Valley Water Conservancy District, Lyman Project, Wyoming: The district has requested that their Meeks Cabin repayment contract be amended from two 25 year contacts to one 40 year contract.

35. Glen, Michael D., and Tambra Spencer; Mancos Project; Colorado: The parties have requested a new carriage contract to replace existing contract No. 02–WC–40–8290. Existing carriage contract is for 1 cfs of nonproject water to be carried through Mancos Project facilities. The new contract will add 2 cfs to the existing quantity for a total of 3 cfs.

Discontinued Contract Actions

31. Strawberry High Line Canal Company, Strawberry Valley Project, Utah: The company has requested a contract for carriage of nonproject water in project canals.

32. Jordan Valley Water Conservancy District, Metropolitan WD of Salt Lake and Sandy, and others; Provo River Project; Utah: The entities have requested contracts for storage of nonproject water in Deer Creek Reservoir.

Completed Contract Actions

18. The Grand Valley Water Users Association, Reclamation, and U.S. Fish and Wildlife Service: Construction and O&M of a fish passage and fish screen facilities at the Grand Valley Diversion Dam and Government Highline Canal Facilities to facilitate recovery of endangered fish species in the Colorado River Basin (October 30, 2000, 114 Stat. 1602, Pub. L. 106–392). Contract was executed June 3, 2008.

22. Warren-Vosburg Ditch Company, Animas-La Plata Project, Colorado and New Mexico: Contract for payment of O&M costs associated with the Warren-Vosburg ditch. Contract was executed March 26, 2008.

Great Plains Region: Bureau of Reclamation, PO Box 36900, Federal Building, 316 North 26th Street, Billings, Montana 59101, telephone 406–247–7752.

New Contract Actions

43. Helena Sand & Gravel; Helena Valley Unit, P–SMBP; Montana: Request for a long-term water service contract for M&I purposes for up to 1,000 acre-feet of water per year.

44. City of Cheyenne, Kendrick Project, Wyoming: The City of Cheyenne has requested an amendment to its water storage contract to increase the storage entitlement to 15,700 acre-feet of storage space in Seminoe Reservoir.

45. Central Nebraska Public Power and ID; Glendo Unit, P–SMBP; Nebraska: Request to amend current water service contract.

Modified Contract Actions

8. Savage ID, P–SMBP, Montana: The district is currently seeking title transfer. The contract is subject to renewal pending outcome of the title transfer process. The existing interim contract expired in May 2008. A 5-year interim contract was offered to district on June 28, 2008.

14. Northern Integrated Supply Project, Colorado-Big Thompson Project, Colorado: Consideration of a new long-term contract with approximately 15 regional water suppliers and the Northern Colorado Water Conservancy District for the Northern Integrated Supply Project.

28. Glendo Unit, P–SMBP, Nebraska: Contract renewal for long-term water service contracts with Bridgeport, Enterprise, and Mitchell IDs.

Completed Contract Actions

5. Highland-Hanover ID; Hanover-Bluff Unit, P–SMBP; Wyoming: Execute long-term water service contract. Contract was executed June 13, 2008.

6. Upper Bluff ID; Hanover-Bluff Unit, P–SMBP; Wyoming: Execute long-term water service contract. Contract was executed June 13, 2008.

38. Treeline Springs, LLC., Canyon Ferry Unit, Montana: Request for water service contract for up to 620 acre-feet of water per year for replacement of water for senior water rights. Contract was executed June 19, 2008.

Dated: October 22, 2008.

Roseann Gonzales,

Director, Policy and Program Services, Denver Office.

[FR Doc. E8–27614 Filed 11–19–08; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–451 and 731–TA–1126–1127 (Final)]

Certain Lightweight Thermal Paper from China and Germany; Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to sections 705(b) and 735(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b) and 1673d(b)) (the Act), that an industry in the United States is threatened with material injury by reason of imports from China of certain lightweight thermal paper, which may be classified in subheadings 4811.90.80, 4811.90.90, 3703.10.60, 4811.59.20, 4820.10.20, and 4823.40.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce (Commerce) to be sold in the United States at less than fair value (LTFV) and to be subsidized by the Government of China. The Commission further determines, pursuant to section 735(b) of the Act, that an industry in the United States is threatened with material injury by reason of imports from Germany of certain lightweight thermal paper that have been found by Commerce to be sold in the United States at LTFV.[2] In addition, the Commission determines that it would not have found material injury but for the suspension of liquidation.

Background

The Commission instituted these investigations effective September 19, 2007, following receipt of a petition filed with the Commission and Commerce by Appleton Papers, Inc., Appleton, WI. The final phase of these investigations was scheduled by the Commission following notification of preliminary determinations by Commerce that imports of certain lightweight thermal paper from China and Germany were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)) and that imports of certain lightweight thermal paper from China were being subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of June 16, 2008 (73 FR 34038). The hearing was held in Washington, DC, on October 2, 2008, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on November 17, 2008. The views of the Commission are contained in USITC

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Chairman Shara L. Aranoff, Vice Chairman Daniel R. Pearson, and Commissioner Deanna Tanner Okun dissenting with regard to imports from Germany.

Publication 4043 (November 2008), entitled *Certain Lightweight Thermal Paper from China and Germany: Investigation Nos. 701–TA–451 and 731–TA–1126–1127 (Final).*

By order of the Commission.

Issued: November 17, 2008.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. E8–27626 Filed 11–19–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–753, 754, and 756 (Second Review)]

Cut-To-Length Carbon Steel Plate From China, Russia, and Ukraine

AGENCY: United States International Trade Commission.

ACTION: Notice of Commission determinations to conduct full five-year reviews concerning the antidumping duty order on cut-to-length carbon steel plate from China and the suspended investigations on cut-to-length carbon steel plate from Russia and Ukraine.

SUMMARY: The Commission hereby gives notice that it will proceed with full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) to determine whether revocation of the antidumping duty order on cut-to-length carbon steel plate from China and/or the termination of the suspended investigations on cut-to-length carbon steel plate from Russia and Ukraine would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the reviews will be established and announced at a later date. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* November 4, 2008.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION: On November 4, 2008, the Commission determined that it should proceed to full reviews in the subject five-year reviews pursuant to section 751(c)(5) of the Act. The Commission found that the domestic interested party group response to its notice of institution (73 FR 45071, August 1, 2008) was adequate and that the respondent interested party group responses with respect to Russia and Ukraine were adequate and decided to conduct full reviews with respect to the suspended investigations concerning cut-to-length carbon steel plate from Russia and Ukraine. The Commission found that the respondent interested party group response with respect to China was inadequate. However, the Commission determined to conduct a full review concerning the antidumping duty order on cut-to-length carbon steel plate from China to promote administrative efficiency in light of its decision to conduct full reviews with respect to the suspended investigations concerning cut-to-length carbon steel plate from Russia and Ukraine. A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's Web site.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: November 17, 2008.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. E8–27591 Filed 11–19–08; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0012]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Application for Registration (DEA Form 225); Application for Registration Renewal (DEA Form 225a); Affidavit for Chain Renewal (DEA Form 225b)

The Department of Justice (DOJ), Drug Enforcement Administration (DEA) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** at 73 FR 53278 on September 15, 2008, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 22, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Information Collection 1117–0012

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Registration (DEA Form 225);

Application for Registration Renewal (DEA Form 225a);

Affidavit for Chain Renewal (DEA Form 225B).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:*

Form Number: DEA Form 225, 225a, and 225B;

Office of Diversion Control, Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: Not-for-Profit Institutions; State, Local or Tribal Government.

Abstract: The Controlled Substances Act requires all persons who manufacture, distribute, import, export, conduct research or dispense controlled substances to register with DEA. Registration provides a closed system of distribution to control the flow of controlled substances through the distribution chain.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 725 persons complete DEA Form 225 on paper, at 30 minutes per form, for an annual burden of 362.5 hours. It is estimated that 1,397 persons complete DEA Form 225 electronically, at 10 minutes per form, for an annual burden of 232.8 hours. It is estimated that 5,481 persons complete DEA Form 225a on paper, at 30 minutes per form, for an annual burden of 2,740.5 hours. It is estimated that 5,948 persons complete DEA Form 225a electronically, at 10 minutes per form, for an annual burden of 991.3 hours. It is estimated that 4 persons complete DEA Form 225B on paper, at 1 hour per form, for an annual burden of 4 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* It is estimated that this collection will create a burden of 4,331.1 annual burden hours.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: November 14, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. E8–27638 Filed 11–19–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0014]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Application for Registration (DEA Form 224); Application for Registration Renewal (DEA Form 224a); Affidavit for Chain Renewal (DEA Form 224B).

The Department of Justice (DOJ), Drug Enforcement Administration (DEA) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** at 73 FR 53279 on September 15, 2008, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 22, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Information Collection 1117–0014:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Registration (DEA Form 224);

Application for Registration Renewal (DEA Form 224a);

Affidavit for Chain Renewal (DEA Form 224B).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:*

Form Number: DEA Form 224, 224a and 224B;

Office of Diversion Control, Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: Not-for-Profit Institutions; State, Local or Tribal Government.

Abstract: All firms and individuals who distribute or dispense controlled substances must register with the DEA under the Controlled Substances Act. Registration is needed for control measures over legal handlers of controlled substances and is used to monitor their activities.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 12,094 persons complete DEA Form 224 on paper, at 12 minutes per form, for an annual burden of 2,418.8 hours. It is estimated that 59,283 persons complete DEA Form 224 electronically, at 8 minutes per form, for an annual burden of 7,904.4 hours. It is estimated that 159,678 persons complete DEA Form 224a on paper, at 12 minutes per form, for an annual burden of 31,935.6 hours. It is estimated that 209,535 persons complete DEA Form 224a electronically, at 4 minutes per form, for an annual

burden of 13,969 hours. It is estimated that 16 persons complete DEA Form 224b, at 5 hours per form, for an annual burden of 80 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* It is estimated that this collection will create a burden of 56,307.8 annual burden hours.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: November 14, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. E8–27640 Filed 11–19–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0015]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review, Application for Registration (DEA Form 363) and Application for Registration Renewal (DEA Form 363a).

The Department of Justice (DOJ), Drug Enforcement Administration (DEA) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** at 73 FR 53280 on September 15, 2008, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 22, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview Information Collection 1117–0015:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Registration (DEA Form 363) and Application for Registration Renewal (DEA Form 363a)

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:*

Form Number: DEA Form 363 and 363a; Office of Diversion Control, Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: Not-for-profit institutions; State, Local, or Tribal Government.

Abstract: Practitioners who dispense narcotic drugs to individuals for maintenance or detoxification treatment must register with the DEA under the Narcotic Addiction Treatment Act of 1974. Registration is needed for control measures and is used to prevent diversion.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 33 persons complete DEA Form 363 on paper, at 30 minutes per form, for an annual burden of 16.5 hours. It is estimated that 96 persons complete DEA Form 363 electronically, at 8 minutes per form, for an annual burden of 12.8 hours. It is estimated that 614 persons complete DEA Form 363a on paper, at 30 minutes per form, for an annual burden of 307 hours. It is estimated that 537 persons complete DEA Form 363a electronically, at 8 minutes per form, for an annual burden of 71.6 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* It is estimated that this collection will create a burden of 407.9 annual burden hours.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: November 14, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. E8–27641 Filed 11–19–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

[OMB Number 1125–0002]

Agency Information Collection Activities: Proposed collection; comments requested:

ACTION: 30-Day Notice of Information Collection Under Review: Notice of Appeal from a Decision of an Immigration Judge.

The Department of Justice (DOJ), Executive Office for Immigration Review (EOIR) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 73, Number 179, page 53281 on September 15, 2008, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 22, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20530. Additionally, comments may also be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—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.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Notice of Appeal from a Decision of an Immigration Judge.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form EOIR 26, Executive Office for Immigration Review, United States Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* A party (either the U.S. Immigration and Customs Enforcement of the Department of Homeland Security or the respondent/applicant) who appeals a decision of an Immigration Judge to the Board of Immigration Appeals (Board). *Other:* None. Abstract: A party affected by a decision of an Immigration Judge may appeal that decision to the Board, provided the Board has jurisdiction pursuant to 8 CFR 1003.1(b). An appeal from an Immigration Judge's decision is taken by completing the Form EOIR–26 and submitting it to the Board.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 23,417 respondents will complete the form annually with an average of thirty minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 11,708.5 total burden hours associated with this collection annually.

If additional information is required, contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: November 14, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E8–27645 Filed 11–19–08; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–0142]

Office for Victims of Crime; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Extension of a currently approved collection; Victims of Crime Act, Crime Victim Assistance Grant Program Performance Report.

The Department of Justice (DOJ), Office of Justice Programs (OJP), Office for Victims of Crime (OVC) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 73, Number 180, page 53444 on September 16, 2008, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 22, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Victims of Crime Act, Crime Victim Assistance Grant Program, Subgrant Award Report.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is 1121–0142. Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice is sponsoring the collection.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* State government. Other: None. The VOCA, Crime Victim Assistance Grant Program, Subgrant Award Report is a required submission by state grantees, within 90 days of their awarding a subgrant for the provision of crime victim services. VOCA and the Program Guidelines require each state victim assistance office to report to OVC on the impact of the Federal funds, to

certify compliance with the eligibility requirements of VOCA, and to provide a summary of proposed activities. This information will be aggregated and serve as supporting documentation for the Director's biennial report to the President and to the Congress on the effectiveness of the activities supported by these grants. This request is for an extension of a currently approved reporting instrument, with no revisions.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* The number of VOCA-funded victim assistance programs varies widely from State to State. A review of information currently available to this Office on the number of active victim assistanceprograms in 15 states selected for variance in size and population revealed that a State would be responsible for entering subgrant data for as many as 436 programs (California) to as few as 12 programs (District of Columbia).

The estimated time to enter a record via the Grants Management System is three minutes (.05 hour). Therefore, the estimated clerical time can range from 36 minutes to 22 hours, based on the number of records that are entered. It would take 295 hours to enter 5,900 responses electronically [5,900 × .05 hour].

(6) *An estimate of the total public burden (in hours) associated with the collection:* The current estimated burden is 295 (5,900 responses × .05 hour per response = 295 hours). There is no increase in the annual recordkeeping and reporting burden.

If additional information is required contact: Lynn Bryant, Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: November 17, 2008.

Lynn Bryant,

Department Clearance Officer, PRA U.S. Department of Justice.

[FR Doc. E8–27634 Filed 11–19–08; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

November 17, 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 Departmental Management (DM), 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: International Labor Affairs Bureau.

Type of Review: New collection (Request for a new OMB Control Number).

Title of Collection: Data Collection for OCFT Program Evaluation.

OMB Control Number: 1290–0NEW.

Affected Public: Federal Government, Individuals or Households, Businesses or other for-profits, Not-for-profit institutions.

Total Estimated Number of Respondents: 490.

Total Estimated Annual Burden Hours: 520.

Description: This collection will provide critical information to the Office of Child Labor, Forced Labor and Human Trafficking (OCFT) on the impact of its technical cooperation program to combat exploitive child labor. For additional information, see related notice published at 73 FR 19529 on April 10, 2008.

Darrin A. King,

Departmental Clearance Officer.

[FR Doc. E8–27592 Filed 11–19–08; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application Nos. and Proposed Exemptions; Heico Holding Inc. Pension Plan, D–11428; D–11450, Brewster Dairy, Inc. 401(k) Profit Sharing Plan (the Plan); and Starrett Corporation Pension Plan (the Plan), D–11473, et al.]

Notice of Proposed Exemptions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of Proposed Exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Employee

Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. __, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: ''*moffitt.betty@dol.gov*'', or by FAX to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Heico Holding Inc. Pension Plan (the Plan), Located in Downers Grove, Illinois [Exemption Application Number: D–11428]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570 Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a)(1)(A) and (D), and section 406(b)(1) and (b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), and (E) of the Code, shall not apply to the proposed sale by the Plan of a non-marketable limited partnership interest (the Interest) in Trident Equity Fund, II, L.P. (the Partnership) to Heico Holding Inc. (the Applicant), a party in interest with respect to the Plan, provided that the following conditions are satisfied:

(a) The sale is a one-time transaction for cash;

(b) The Plan pays no commissions, fees or other expenses in connection with the sale;

(c) The terms and conditions of the sale are at least as favorable as those obtainable in an arm's length transaction with an unrelated third party;

(d) As a result of the sale, the Plan receives the greater of: (i) $1,050,000; (ii) The value of the Interest as determined by the General Partner of the Partnership and reported on the most recent quarterly account statements of the Partnership available at the time of the sale; (iii) The fair market value of the Interest as determined on the date of the sale by a qualified, independent appraiser; or (iv) The total amount of the Plan's contributions to the Partnership made on or after January 21, 2005 (i.e., the Plan's investment cost basis in the Interest); and

(e) Upon Plan termination, it is determined that the Plan is overfunded.

Summary of Facts and Representations

1. The Plan is a defined benefit pension plan sponsored by Heico Holding Inc. (the Applicant), which is headquartered at 2626 Warrenville Road, Downers Grove, Illinois. The Applicant is a company that specializes in purchasing interests in distressed and under-performing businesses from a variety of industries (including heavy equipment, telecommunications, plastics, food production, and commercial construction) with the purpose of improving their financial condition. As of December 31, 2006, the Plan had a combined total of approximately 2,848 participants and beneficiaries, and total net assets of approximately $84,664,677. The Applicant represents that the Plan was overfunded by approximately $2,000,000 as of June 1, 2007. The administrator of the Plan is Daniel M. Schramm (Schramm), and an Investment Committee (the Committee) comprised of five members (Mr. Schramm, Michael E. Heisley, E.A. Roskovensky, Stanley H. Meadows, and Larry G. Wolski) possesses discretionary authority under the Plan to select and manage the Plan's investments.

2. The Applicant represents that one of the current assets of the Plan is a partnership interest (the Interest), which was acquired on January 21, 2005 in accordance with the terms of both a subscription agreement (Deed of Adherence) and a partnership agreement (Partnership Agreement) between the Plan and Trident Equity Fund, II, L.P. (the Partnership). The Applicant states that the Partnership is domiciled in the Cayman Islands. The Applicant further represents that the limited partnership interests offered to investors by the Partnership are not publicly traded. According to the Applicant, the investment objective of the Partnership is to generate high absolute returns by investing the limited partners' capital in a portfolio consisting primarily of private and listed investments in small and medium sized companies in the United Kingdom and to distribute realized gains to the limited partners. Specifically, the intended underlying investments of the Partnership are concentrated on leveraged buyouts, expansion capital, consolidation, public-to-private and pre-IPO investments in a range of non-technology sectors in the United Kingdom. The Applicant further represents that the General Partner of the Partnership, North Atlantic Value, Ltd., of Hamilton, Bermuda, does not provide investment advice to the Plan or otherwise act as a fiduciary with respect to the Plan, and that the General Partner and the Partnership itself are independent of both the Plan and the Applicant.

3. The Applicant represents that pension plan assets from the United States do not comprise 20% or more of the assets of the Partnership, and that the underlying assets of the Partnership do not constitute plan assets within the meaning of 29 CFR 2510.3–101. The Applicant states that, pursuant to Section 1.5 of the Partnership Agreement, the ordinary term of the Plan's investment as a limited partner in the Partnership is ten (10) years from January 21, 2005. The Applicant also

represents that the Plan's investment in the Partnership as of December 31, 2007 amounted to approximately 1.2% of the Plan's total assets.

4. The Applicant represents that the Plan became a limited partner of the Partnership as of January 21, 2005, the effective date of the Partnership Agreement. The Applicant states that the terms and conditions of the Plan's entry into the Partnership were the same as those required of other limited partners.[1]

The Applicant represents that, pursuant to the terms of the Partnership Agreement, the Plan made three separate installments of capital contributions totaling $447,427.51 to the Partnership after January 21, 2005: (1) On May 16, 2005, the Plan contributed $185,530 to the Partnership; (2) On November 5, 2005, the Plan contributed $173,915.01 to the Partnership; and (3) On December 21, 2005, the Plan contributed $87,982.50 to the Partnership. The Applicant states that no further capital contributions were made by the Plan to the Partnership after December 21, 2005, and that no distributions were made by the Partnership to the Plan.

5. The Applicant represents that, prior to June 1, 2007, the benefits under the plan were ''frozen'', with different freeze dates applying to different groups of employees. According to the Applicant, the effective date of the termination of the Plan is June 1, 2007. In connection with the termination, the Applicant represents that the Company has submitted information relating to the termination to the Pension Benefit Guaranty Corporation (PBGC), and has also sought a favorable determination letter from the Internal Revenue Service (IRS). After the IRS and PBGC approvals are received and all assets of the Plan have been liquidated, the Applicant states, final distribution of pension benefits to participants and beneficiaries will ensue.

The Applicant has contracted to purchase a group annuity contract with Transamerica Life Insurance Company (Transamerica) of Los Angeles, California to assume the liability for benefit payments to participants; The effective date of this contract was May 2, 2007. To fund the purchase of the group annuity contract, to pay associated administrative expenses, and to allow the winding up of the Plan and trust, the Applicant represents that all of the remaining assets of the Plan (including the Interest) must be converted to cash; such a liquidation would necessarily entail a transfer of the Interest from the Plan.

6. The Applicant represents that, pursuant to Section 14.2.1 of the Partnership Agreement, a limited partner cannot assign or transfer its Interest in the Partnership without the prior written consent of the General Partner of the Partnership.

The Applicant states that, pursuant to section 14.2.1 of the Partnership Agreement, the General Partner possesses sole and absolute discretion regarding transfers of Interests by limited partners. The Applicant represents that this same provision of the Partnership Agreement allows a transfer of a limited partner's interest in the Partnership only to the General Partner or to an associate of the transferring limited partner. The Applicant represents that the General Partner considers Heico Holding Inc., the sponsor of the Plan, as an associate to whom a transfer of the Plan's Interest in the Partnership may be made under the foregoing provision of the Partnership Agreement. The Applicant also maintains that a sale of the Interest to the General Partner, rather than to Heico Holding Inc., could only occur at a price that would represent a significant discount. The Applicant represents that Mr. Schramm has been informed by the General Partner that it will only permit the Plan to sell its Interest in the Partnership to Heico Holding Inc.

7. The Applicant represents that the General Partner has stated that there is no requirement that the transfer from one limited partner to another be at fair market value.[2] The Applicant also represents that the General Partner has confirmed that the proportionate share of an investor's interests in the Partnership as shown in the unaudited financial statements furnished quarterly to limited partners is, in the opinion of the General Partner, an accurate representation of the value of the Interest as of the dates of the financial statements. The Applicant further states that this value is used by the General Partner for all transactions relating to the value and the Interest for purchases, sales and calculation of the investment management fee, and was applied consistently to all limited partners. The Applicant also represents that, according to the Plan's most recent statement of account prepared by Northern Trust Company (Northern Trust) of Chicago, Illinois, the Plan's custodial trustee, the value of the Plan's Interest in the Partnership as of December 31, 2007 was $715,146.93. The same statement from Northern Trust also indicated that, as of December 31, 2007, the Plan's cumulative return on the Interest since the inception of its investment in the Partnership was $267,719.42.

8. In July of 2008, the Committee retained Comstock Valuation Advisors, Inc. (Comstock Advisors) of Wheaton, Illinois, to determine the fair market value of the Interest. On August 15, 2008, Comstock Advisors, on behalf of the Plan, prepared an appraisal report concerning the value of the Interest for the Committee. Comstock Advisors represents that it is a national valuation firm that specializes in customized business appraisals, including the valuation of limited partnership interests for which no readily-ascertainable price is available. In the July 26, 2008 engagement letter accompanying its appraisal report, Comstock Advisors represents that it is independent of, and unrelated to, the Applicant, and acknowledges that the appraisal report was prepared as part of the Applicant's exemption application. Comstock Advisors also represents in the engagement letter that it derives less than 1% of its annual income from the Applicant. The administrator of the Plan, Mr. Dan Schramm, represents that all of the fees and costs associated with appraising the value of the Interest shall be borne by the Applicant rather than the Plan.

A supplement to the appraisal report further states that the Comstock Advisors managing director who personally conducted the appraisal of the Interest, Mr. James E. Ahern, has been employed full-time as a valuation professional since 1986. The supplement states that Mr. Ahern has prior experience in valuing the securities of investment vehicles such as limited liability companies and limited partnerships, as well as experience in valuing certain investment interests

[1] The Applicant further represents that Heico Holding Inc., the Plan sponsor, also holds an interest in Trident Equity Fund, II, L.P. In this connection, section 404 of the Act requires, among other things, that a plan fiduciary act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making decisions on behalf of a plan. Accordingly, the Department is not expressing an opinion herein as to whether any investment decisions or other actions taken by the Committee regarding the acquisition and subsequent holding of the Interest in the Partnership by the Plan would be consistent with, or in violation of, its fiduciary obligations under Part 4 of Title I of the Act.

[2] Under section 5.3(c) of the Partnership Agreement, the General Partner is authorized generally to take any action the General Partner considers appropriate for the protection of the assets of the Partnership. Section 8.5.6 of the Partnership Agreement also provides that, in the event the Partnership purchases the Interest of any limited partner, the valuation of such Interest shall be made by the General Partner in good faith in consultation with the auditors of the Partnership, Ernst & Young.

lacking readily ascertainable market values that are held by employee benefit plans. The supplement also represents that Mr. Ahern is an accredited senior appraiser with the American Society of Appraisers.

9. In its engagement letter, Comstock Advisors advised that the fair market measurement utilized in the appraisal would assume an exit price in an orderly, hypothetical transaction by market participants in the Interest's principal or most advantageous market. In this connection, Comstock Advisors stated that, because the Partnership's equity interests are not publicly traded, it would utilize the applicable fair value measurement described in Statement No. 157 issued by the Financial Accounting Standards Board (FASB) concerning the valuation of an asset for which (i) there is little, if any, market activity as of the valuation date, (ii) there are no independent, observable pricing data inputs available, and (iii) there are restrictions placed by management on its sale or use.

In an appraisal report issued on August 15, 2008, Comstock Advisors determined that the Interest had a fair market value of $1,050,000 as of December 31, 2007, representing approximately 1.42% of the outstanding partnership interests of the Partnership. In arriving at this valuation, Comstock Advisors did not use the income valuation approach because the future income of the Partnership could not be reasonably estimated. The market approach to valuation (which examines actual sales of similar assets to estimate value) also was not used because, according to the appraiser, there are no publicly traded companies comparable to the Partnership. Comstock Advisors determined that the net asset valuation of the Interest (which was discounted for the lack of marketability and lack of investor control associated with the Interest) was the appropriate valuation methodology, given the Partnership's character as an investment holding company. A net asset valuation reflects the amount that can be realized if the company's assets are sold at their individual fair market values. Because Comstock Advisors noted that the Partnership has generated very high returns, it applied a 10% discount factor to the adjusted net asset value of the Interest, which produced a higher value for the Interest than the value reported as of December 31, 2007 by Northern Trust.

10. The Applicant requests an administrative exemption from the Department to purchase the Interest from the Plan. The Applicant states that the proposed sale of the Interest by the Plan to the Applicant would be a one-time transaction for cash, and that no commissions or other expenses would be charged to the Plan in connection with the sale. The Applicant represents that the proposed transaction is administratively feasible because, under the Partnership Agreement, the sale of the Interest from the Plan to the Applicant is the only permissible transfer that can be accomplished without a significant discounting of the value of the Interest. The Applicant also represents that the proposed transaction is in the interests of the Plan and its participants and beneficiaries because, in the absence of the proposed sale, the necessary liquidation of the Plan's remaining assets incident to the termination of the Plan will be delayed. The Applicant further represents that the proposed transaction is protective of the interests of the Plan's participants and beneficiaries because the Plan will receive an amount greater than the Plan's cumulative capital contributions to the Partnership. If the Department grants the proposed exemption, an updated appraisal of the Interest will be performed as of the date of the sale by a qualified, independent appraiser.

11. In summary, it is represented that the proposed transaction will satisfy the statutory requirements for an exemption under section 408(a) of the Act because: (a) The sale is a one-time transaction for cash; (b) The Plan pays no commissions, fees or other expenses in connection with the sale; (c) The terms and conditions of the sale are at least as favorable as those obtainable in an arm's length transaction with an unrelated third party; (d) As a result of the sale, the Plan receives the greater of: (i) $1,050,000; (ii) The value of the Interest as determined by the General Partner of the Partnership and reported on the most recent quarterly account statements of the Partnership available at the time of the sale; (iii) The fair market value of the Interest as determined on the date of the sale by a qualified, independent appraiser; or (iv) The total amount of the Plan's contributions to the Partnership made on or after January 21, 2005 (i.e., the Plan's investment cost basis in the Interest); and (e) Upon Plan termination, it is determined that the Plan is overfunded.

Notice to Interested Persons: A copy of this notice of the proposed exemption (the Notice) shall be given to all interested persons in the manner agreed upon by the Applicant and the Department within fifteen (15) days of the date of its publication in the **Federal Register**. The Department must receive all written comments and requests for a hearing no later than forty-five (45) days after publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Judge of the Department, telephone (202) 693–8339. (This is not a toll-free number).

Brewster Dairy, Inc. 401(k) Profit Sharing Plan (the Plan)

Located in Brewster, Ohio

[Application No. D–11450]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a)(1)(A) and (D), 406(b)(1) and (b)(2) of the Act, and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A), (D) and (E) of the Code, shall not apply to the sale (the Sale) by the Plan of 2.5 limited partnership units (the Units) in the Heartland California Clayton Limited Partnership (the Partnership) to Brewster Dairy, Inc. (Brewster), the Plan's sponsor and a party in interest with respect to the Plan, for the greater of: (1) $57,000; (2) the net proceeds for the Units in the event the Partnership sells its real estate (the Property) to a third party; or (3) the net proceeds from foreclosure for the Units in the event the Property is foreclosed to pay back real estate taxes, provided the following conditions are satisfied:

(a) The Sale of the Units is a one-time transaction for cash;

(b) The Plan pays no commissions, fees or other expenses in connection with the Sale;

(c) The terms of the transaction are at least as favorable to the Plan as those the Plan could obtain in a similar transaction with an unrelated party;

(d) The fair market value of the Units on the date of the Sale is determined by a qualified independent appraiser;

(e) The Plan fiduciaries will determine whether it is in the best interest of the Plan to go forward with the Sale, will review and approve the methodology used in the appraisal that is being relied upon, and will ensure that the methodology is applied by a qualified, independent appraiser in determining the fair market value of the Units as of the date of the Sale; and

(f) The proceeds from the Sale of the Units to Brewster will be allocated only to the participants who are defined in the Consent Order and Judgment (the COJ, File No. 5:98CV744, July 1, 1999)

entered by the United States District Court for the Northern District of Ohio Eastern Division (the Court).

Summary of Facts and Representations

1. The Brewster Dairy, Inc. 401(k) Profit Sharing Plan (the Plan) is an individual account plan established by Brewster Dairy, Inc. (Brewster) on April 1, 1965. As of June 30, 2007, the Plan had 259 participants, and had total assets of $15,013,748. Brewster, headquartered in Brewster, Ohio, is the largest manufacturer of all natural Swiss cheese in the United States.

2. In December 1990, the Plan purchased 2.5 limited partnership units (the Units) in the Heartland California Clayton Limited Partnership (the Partnership), a predevelopment real estate limited partnership originally consisting of 139 acres of land (the Property). The Plan made an initial capital contribution of $243,952 to the Partnership in 1990, and made additional contributions during the years through 1996. In all, the Plan made payments to the Partnership totaling approximately $749,000, which would represent less than 5% of the Plan's current assets. The applicant represents that the Plan has not paid any of the costs related to the Units since they were acquired. The costs of appraisals, reports, etc. have all been paid by Brewster.

3. In 1997, the Department, in a routine audit of the Plan, determined that the purchase of the 2.5 Units of the Partnership was a violation of the fiduciary responsibility provisions of the Act. The Department filed suit in this matter on May 29, 1998. The parties agreed to settle the case, and a Consent Order and Judgment (the COJ) was entered by the Court on July 1, 1999. On December 4, 1999, Brewster complied with the COJ and allocated the agreed amount, $333,333, to the individual accounts of such persons (other than defendants Fritz Leeman, Walter Leeman and Tom Riegler) [3] who were Plan participants on March 31, 1999 and held a portion of the Plan's investment in the Units as an asset in their individual accounts.

4. The applicant represents that due to zoning restrictions and the discovery of landslides on the Property, the value of the Units has dropped significantly since the Plan purchase date.[4] Timothy McDaniel, CPA and ASA, an accountant experienced in business valuations and a co-director of Rea Strategic Solutions, stated on June 23, 2008 that the Units had a fair market value of $57,000. Mr. McDaniel based his valuation of the Units on an appraisal of the fair market value of the Property performed by Ms. Marian Huntoon, SRA, a California Certified General Appraiser in Berkeley, California. Ms. Huntoon determined that the Property had a fair market value of $780,000 as of May 10, 2008. The applicant represents that the Plan fiduciaries will determine whether it is in the best interest of the Plan to go forward with the Sale, will review and approve the methodology used in the appraisal that is being relied upon, and will ensure that the methodology is applied by a qualified, independent appraiser in determining the fair market value of the Units as of the date of the Sale.

5. By letter dated August 25, 2008, the Partnership notified the fiduciaries of the Plan that due to delinquent real estate taxes, the Partnership anticipated receiving a foreclosure notice in December 2008. The Partnership further notified the Plan that an unrelated adjacent property owner, Clayton Estates, LLC has contacted the Partnership and offered to purchase the Property for $65,000. In its August 25, 2008 letter, the Partnership sought approval from the Plan to negotiate and close on a sale of the Property at a price not less than $65,000.

6. The applicant has requested a prohibited transaction exemption for the Sale of the Units by the Plan to Brewster, in a cash Sale, for a price not less than $57,000, the appraised value of the Units as determined by Mr. McDaniel. The applicant represents that in the event the Partnership sells its real estate to a third party, if the net proceeds for the Units exceeds $57,000, that will be the Sale price for the subject transaction. Similarly, the applicant represents that in the event the Property is foreclosed to pay back real estate taxes, if the net proceeds from that foreclosure for the Units exceeds $57,000, that will be the Sale price for the subject transaction. In the calculation of net proceeds, the Plan will be treated the same as all other limited partners in the Partnership.

7. The applicant represents that when Brewster complied with the COJ in 1999 and allocated the agreed amount, $333,333, to the individual accounts of such persons (other than defendants Fritz Leeman, Walter Leeman and Tom Riegler) who were Plan participants on March 31, 1999 and held a portion of the Plan's investment in the Units as an asset in their individual accounts, Brewster also filed with the Court a schedule showing how the allocation was calculated. A separate trust was established to hold the Units and the trustees have kept track of those participants who received an allocation. In fact, a majority of those participants are still employed by Brewster. The applicant represents that if the exemption proposed herein is granted, the proceeds of the Sale will be allocated on a pro rata basis in accordance with the terms of the COJ, to the same participants and in the same manner as was the 1999 payment. The three Plan fiduciaries will not receive any allocation. If for some reason Brewster is unable to locate a participant or a deceased participant's beneficiary, Brewster would use one of the Federal Government Locator services. If, after a reasonable amount of time, Brewster is still unable to locate a participant or beneficiaries, Brewster would then reallocate the missing participant's allocation to the other participants set forth above, using each participant's percentage ownership calculated excluding the missing participant's percentage.

8. The applicant represents that the transaction would be in the best interests of the Plan because the Plan would be relieved of an illiquid asset that is difficult and expensive to value. After the Sale, the annual valuation would no longer be required, and the cash proceeds resulting from the Sale will be added to the appropriate participant accounts per the COJ. After the Sale, the Plan would be relieved of keeping track of such participants, which is both time-consuming and expensive. The fiduciary responsibility of monitoring the Units and the Partnership would also be removed.

9. In summary, the applicant represents that the subject transaction satisfies the criteria contained in section 408(a) of the Act because: (a) The Sale of the Units is a one-time transaction for cash; (b) The Plan will pay no commissions, fees or other expenses in connection with the Sale; (c) The terms of the transaction will be at least as favorable to the Plan as those the Plan could obtain in a similar transaction with an unrelated party; (d) The fair market value of the Units on the date of the Sale will be determined by a qualified independent appraiser who is unrelated to Brewster and the Plan's current fiduciaries; (e) The Plan fiduciaries will determine whether it is in the best interest of the Plan to go forward with the Sale, will review and approve the methodology used in the appraisal that is being relied upon, and will ensure that the methodology is applied by a qualified, independent

[3] These three individuals were the Plan fiduciaries responsible for the acquisition of the Units by the Plan.

[4] The Department in this proposed exemption is not opining on the prudence of the Plan's continued holding of the Units after the date of the COJ.

appraiser in determining the fair market value of the Units as of the date of the Sale; (f) The Sale price for the Units will be the greater of: (1) $57,000; (2) the net proceeds for the Units in the event the Partnership sells its real estate to a third party; or (3) the net proceeds from foreclosure for the Units in the event the Property is foreclosed to pay back real estate taxes; and (g) The proceeds from the Sale will be allocated only to the Plan participants who are defined in the COJ.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department, telephone (202) 693–8546. (This is not a toll-free number.)

Starrett Corporation Pension Plan (the Plan), Located in New York, NY [Exemption Application Number: D–11473]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570 Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), through (E) of the Code, shall not apply to the proposed cash sale (the Sale) by the Plan to the Starrett Corporation (the Applicant), a party in interest with respect to the Plan, of a $25,000 face amount 7.797% secured senior note (the Security) issued by the Osprey Trust (the Trust), an Enron related entity, provided that the following conditions are satisfied:

(a) The Sale is a one-time transaction for cash;

(b) The Plan pays no commissions, fees or other expenses in connection with the Sale;

(c) The terms and conditions of the Sale are at least as favorable as those obtainable in an arm's length transaction with an unrelated third party;

(d) The value of the Security is determined by Interactive Data Systems, a qualified, unrelated entity; and

(e) The Plan is a defined benefit plan which has been terminated and all benefits have been paid out to Plan participants and beneficiaries.

Summary of Facts and Representations

1. The Plan is a defined benefit pension plan sponsored by the Applicant, which is headquartered at 70 East 55th Street New York, NY 10022–3222. The Applicant represents that the Plan was terminated in 2006, and that all benefits have been paid to participants and beneficiaries; therefore the Plan currently has no remaining participants or beneficiaries. The Plan holds residual assets totaling $17,348.25. These residual assets are comprised of two components: (1) Cash equivalents totaling $12,098.25; and (2) the Security, whose value as of April 11, 2008, was stated as $5,250.00 by the Plan's broker-dealer, UBS Financial Services, Inc., (UBS).

2. The Applicant is a construction manager or general contractor of buildings, mainly in the metropolitan New York City area. Its services also include initial planning and development; property acquisition, financing, and management; consulting; and related services. Through its subsidiary, Levitt Corporation, the company constructs single-family homes and garden apartments in the United States and Puerto Rico. Through its HRH subsidiary, the company supplies construction services and acts as a manager for major construction projects.

3. The Plan acquired the Security on September 28, 2000, for $25,000 pursuant to an Eligible Rule 144A Offering.[5] The Applicant proposes that the Plan sell the Security, which matured on January 15, 2003, to the Applicant for a one time payment of $5,250 in cash. The Plan will pay no commissions, fees or other expenses in connection with the Sale. The Security has been in default for a number of years in connection with the Enron bankruptcy. The cash price to be paid will be the value of the Security as set forth on a monthly statement issued to the Plan by UBS. UBS determined the value of the Security based on information from an independent pricing service, Interactive Data Systems Inc.

4. The Applicant represents that UBS has stated that the Security is not traded, and the Applicant further represents that efforts to sell the Security to an unrelated third party have been unsuccessful. The Applicant represents that none of the Plan's residual assets will revert to the Applicant, and that subsequent to the Sale these assets will be used to pay the Plan's unrelated service providers amounts due in connection with the winding down and termination of the Plan.

In summary, it is represented that the proposed transaction will satisfy the statutory requirements for an exemption under section 408(a) of the Act because: (a) The Sale is a one-time transaction for cash; (b) The Plan pays no commissions, fees or other expenses in connection with the Sale; (c) The terms and conditions of the Sale are at least as favorable as those obtainable in an arm's length transaction with an unrelated third party; (d) The value of the Security was determined by Interactive Data Systems, a qualified and unrelated party; and (e) The Plan is a defined benefit plan which has been terminated and all benefits have been paid out to Plan participants and beneficiaries.

Notice to Interested Persons: The Applicant represents that the Plan has been terminated and that all participants and beneficiaries have been paid their benefits in full. Thus, the only practical means of notifying terminated plan participants is by publication of the proposed exemption in the **Federal Register**. Therefore, the Department must receive all written comments and requests for a hearing no later than forty-five (45) days after publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. Brian Buyniski of the Department, telephone (202) 693–8545. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does

[5] SEC Rule 10f–3(a)(4), 17 CFR 270.10f–3(a)(4), states that the term ''Eligible Rule 144A Offering'' means an offering of securities that meets the following conditions:

(i) The securities are offered or sold in transactions exempt from registration under section 4(2) of the Securities Act of 1933 [15 U.S.C. 77d(d)], rule 144A thereunder [§ 230.144A of this chapter], or rules 501–508 thereunder [§§ 230.501–230–508 of this chapter];

(ii) The securities are sold to persons that the seller and any person acting on behalf of the seller reasonably believe to include qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter; and

(iii) The seller and any person acting on behalf of the seller reasonably believe that the securities are eligible for resale to other qualified institutional buyers pursuant to § 230.144A of this chapter.

it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 12th day of November 2008.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. E8–27616 Filed 11–19–08; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

Prohibited Transaction Exemptions 2008–13 Through 2008–14; Grant of Individual Exemptions Involving: Banc One Investment Advisors Corporation and J.P. Morgan Investment Management Inc. (JPMIM) and Their Affiliates (collectively JPMorgan), PTE 2008–13; and Fidelity Brokerage Services, D–11424, LLC (FBS), PTE 2008–14

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

Banc One Investment Advisors Corporation (BOIA) and J.P. Morgan Investment Management Inc. (JPMIM) and their Affiliates (collectively, JPMorgan). Located in New York, New York. [Prohibited Transaction Exemption 2008–13; Application No. D–11263]

Exemption

Section I—Retroactive Exemption for the Acquisition, Holding, and Disposition of JPMorgan Chase & Co. Stock

The restrictions of sections 406(a)(1)(D), 406(b)(1) and 406(b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(D) and (E) of the Code, shall not apply, as of January 14, 2004, until November 20, 2008, to the acquisition, holding, and disposition of the common stock of JPMorgan Chase & Co. (the JPM Stock) by Index and Model-Driven Funds managed by JPMorgan, provided that the following conditions and the general conditions in Section III are satisfied:

(a) The acquisition or disposition of the JPM Stock is for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Index or Model-Driven Fund is based.

(b) The acquisition or disposition of the JPM Stock does not involve any agreement, arrangement, or understanding regarding the design or operation of the Fund acquiring the JPM Stock which is intended to benefit JPMorgan or any party in which JPMorgan may have an interest.

(c) All aggregate daily purchases of JPM Stock by the Funds do not exceed, on any particular day, the greater of:

(1) Fifteen (15) percent of the aggregate average daily trading volume for the JPM Stock occurring on the applicable exchange and automated trading system (as described in paragraph (d) below) for the previous five business days, or

(2) Fifteen (15) percent of the trading volume for the JPM Stock occurring on the applicable exchange and automated trading system on the date of the transaction, both as determined by the best available information for the trades occurring on that date or dates.

(d) All purchases and sales of JPM Stock are either (i) Entered into on a principal basis in a direct, arm's length transaction with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of JPMorgan and is either registered under the Securities Exchange Act of 1934 (the 1934 Act), and thereby subject to regulation by the Securities and Exchange Commission (SEC), (ii) effected on an automated trading system (as defined in Section IV(i) below) operated by a broker-dealer independent of JPMorgan that is subject to regulation by the SEC, or an automated trading system operated by a recognized U.S.

securities exchange (as defined in Section IV(j) below), which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) effected on a recognized securities exchange (as defined in Section IV(j) below), so long as the broker is acting on an agency basis.

(e) No transactions by a Fund involve purchases from, or sales to, JPMorgan (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund (unless the transaction by the Fund with such party in interest would otherwise be subject to an exemption); however, this condition would not apply to purchases or sales on an exchange or through an automated trading system (described in paragraph (d) of this Section) on a blind basis where the identity of the counterparty is not known.

(f) No more than five (5) percent of the total amount of JPM Stock that is issued and outstanding at any time is held in the aggregate by Index and Model-Driven Funds managed by JPMorgan.

(g) JPM Stock constitutes no more than three (3) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based.

(h) A plan fiduciary which is independent of JPMorgan authorizes the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds JPM Stock, pursuant to the procedures described herein.

(i) A fiduciary independent of JPMorgan directs the voting of the JPM Stock held by an Index or Model-Driven Fund on any matter in which shareholders of JPM Stock are required or permitted to vote.

Section II—Prospective Exemption for the Acquisition, Holding, and Disposition of JPMorgan Chase & Co. Stock

The restrictions of sections 406(a)(1)(D), 406(b)(1) and 406(b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(D) and (E) of the Code, shall not apply, as of November 20, 2008 to the acquisition, holding, and disposition of JPM Stock by Index and Model-Driven Funds managed by JPMorgan, provided that the following conditions and the general conditions in Section III are satisfied:

(a) The acquisition or disposition of JPM Stock is for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Index or Model-Driven Fund is based.

(b) The acquisition or disposition of JPM Stock does not involve any agreement, arrangement or understanding regarding the design or operation of the Fund acquiring the JPM Stock which is intended to benefit JPMorgan or any party in which JPMorgan may have an interest.

(c) All purchases of JPM Stock pursuant to a Buy-up (as defined in Section IV(d)) occur in the following manner:

(1) Purchases on a single trading day are from, or through, only one broker or dealer;

(2) Based on the best available information, purchases are not the opening transaction for the trading day;

(3) Purchases are not effected in the last half hour before the scheduled close of the trading day;

(4) Purchases are at a price that is not higher than the lowest current independent offer quotation, determined on the basis of reasonable inquiry from brokers that are not affiliates of JPMorgan (as defined in section IV(g));

(5) Aggregate daily purchases of JPM Stock by the Funds do not exceed, on any particular day, the greater of: (i) Fifteen (15) percent of the aggregate average daily trading volume for the security occurring on the applicable exchange and automated trading system for the previous five business days, or (ii) fifteen (15) percent of the trading volume for the security occurring on the applicable exchange and automated trading system on the date of the transaction, as determined by the best available information for the trades occurring on that date;

(6) All purchases and sales of JPM Stock occur either (i) On a recognized securities exchange (as defined in Section IV(j) below), (ii) through an automated trading system (as defined in Section IV(i) below) operated by a broker-dealer independent of JPMorgan that is registered under the 1934 Act, and thereby subject to regulation by the SEC, which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) through an automated trading system (as defined in Section IV(i) below) that is operated by a recognized securities exchange (as defined in Section IV(j) below), pursuant to the applicable securities laws, and provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; and

(7) If the necessary number of shares of JPM Stock cannot be acquired within 10 business days from the date of the event that causes the particular Fund to require JPM Stock, JPMorgan appoints a fiduciary that is independent of JPMorgan to design acquisition procedures and monitor JPMorgan's compliance with such procedures, in accordance with Representation 7 in the Summary of Facts and Representations in the Notice of Proposed Exemption (the Notice).[1]

(d) For transactions subsequent to a Buy-up, all aggregate daily purchases of JPM Stock by the Funds do not exceed, on any particular day, the greater of:

(1) Fifteen (15) percent of the aggregate average daily trading volume for the JPM Stock occurring on the applicable exchange and automated trading system for the previous five (5) business days, or

(2) Fifteen (15) percent of the trading volume for JPM Stock occurring on the applicable exchange and automated trading system on the date of the transaction, as determined by the best available information for the trades that occurred on such date.

(e) All transactions in JPM Stock not otherwise described in paragraph (c) above are either: (i) Entered into on a principal basis in a direct, arms-length transaction with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of JPMorgan and is registered under the 1934 Act, and thereby subject to regulation by the SEC, (ii) effected on an automated trading system (as defined in Section IV(i) below) operated by a broker-dealer independent of JPMorgan that is subject to regulation by the SEC, or an automated trading system operated by a recognized securities exchange (as defined in Section IV(j) below), which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) effected through a recognized securities exchange (as defined in Section IV(j) below), so long as the broker is acting on an agency basis.

(f) No transactions by a Fund involve purchases from, or sales to, JPMorgan (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets in the Fund (unless the transaction by the Fund with such party in interest would otherwise be subject to an exemption);

[1] See 73 FR 39168, 39172 (July 8, 2008).

however, this condition would not apply to purchases or sales on an exchange or through an automated trading system (described in paragraphs (c) and (e) of this Section) on a blind basis where the identity of the counterparty is not known.

(g) No more than five (5) percent of the total amount of JPM Stock that is issued and outstanding at any time is held in the aggregate by Index and Model-Driven Funds managed by JPMorgan.

(h) JPM Stock constitutes no more than five (5) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based.

(i) A plan fiduciary independent of JPMorgan authorizes the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds JPM Stock, pursuant to the procedures described herein.

(j) A fiduciary independent of JPMorgan directs the voting of the JPM Stock held by an Index or Model-Driven Fund on any matter in which shareholders of JPM Stock are required or permitted to vote.

Section III—General Conditions

(a) JPMorgan maintains or causes to be maintained, for a period of six years from the date of the transaction, the records necessary to enable the persons described in paragraph (b) of this Section to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be considered to have occurred if, solely due to circumstances beyond the control of JPMorgan, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest other than JPMorgan shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (b) below.

(b)(1) Except as provided in paragraph (b)(2) and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (a) of this Section are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service or the Securities and Exchange Commission,

(B) Any fiduciary of a plan participating in an Index or Model-Driven Fund who has authority to acquire or dispose of the interests of the plan, or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer to any plan participating in an Index or Model-Driven Fund or any duly authorized employee or representative of such employer, and

(D) Any participant or beneficiary of any plan participating in an Index or Model-Driven Fund, or a representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (B) through (D) of this paragraph (b) shall be authorized to examine trade secrets of JPMorgan or commercial or financial information that is considered confidential.

Section IV—Definitions

(a) The term ''Index Fund'' means any investment fund, account, or portfolio sponsored, maintained, trusteed, or managed by JPMorgan, in which one or more investors invest, and—

(1) That is designed to track the rate of return, risk profile, and other characteristics of an independently maintained securities Index, as described in Section IV(c) below, by either (i) replicating the same combination of securities that comprise such Index, or (ii) sampling the securities that comprise such Index based on objective criteria and data;

(2) For which JPMorgan does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) That contains ''plan assets'' subject to the Act; and,

(4) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund which is intended to benefit JPMorgan or any party in which JPMorgan may have an interest.

(b) The term ''Model-Driven Fund'' means any investment fund, account, or portfolio sponsored, maintained, trusteed, or managed by JPMorgan, in which one or more investors invest, and—

(1) That is composed of securities, the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria using independent third party data, not within the control of JPMorgan, to transform an independently maintained Index, as described in Section IV(c) below;

(2) That contains ''plan assets'' subject to the Act; and

(3) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund or the utilization of any specific objective criteria that is intended to benefit JPMorgan or any party in which JPMorgan may have an interest.

(c) The term ''Index'' means a securities index that represents the investment performance of a specific segment of the public market for equity or debt securities in the United States and/or foreign countries, but only if—

(1) The organization creating and maintaining the index is—

(A) Engaged in the business of providing financial information, evaluation, advice or securities brokerage services to institutional clients,

(B) A publisher of financial news or information, or

(C) A public stock exchange or association of securities dealers; and,

(2) The index is created and maintained by an organization independent of JPMorgan; and,

(3) The index is a generally accepted standardized index of securities that is not specifically tailored for the use of JPMorgan.

(d) The term ''Buy-up'' means an initial acquisition of JPM Stock by an Index or Model-Driven Fund which is necessary to bring the Fund's holdings of such stock either to its capitalization-weighted or other specified composition in the relevant index, as determined by the independent organization maintaining such index, or to its correct weighting as determined by the model which has been used to transform the index.

(e) The term ''JPMorgan'' refers to Bank One Investment Advisors Corporation (BOIA) and J.P. Morgan Investment Management Inc. (JPMIM), and their respective Affiliates, as defined in paragraph (f) below.

(f) The term ''Affiliate'' means, with respect to BOIA or JPMIM, an entity which, directly or indirectly, through one or more intermediaries, is controlling, controlled by, or under common control with BOIA or JPMIM;

(g) An ''affiliate'' of a person includes:

(1) Any person, directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with the person;

(2) Any officer, director, employee or relative of such person, or partner of any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(h) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(i) The term ''automated trading system'' means an electronic trading system that functions in a manner

intended to simulate a securities exchange by electronically matching orders on an agency basis from multiple buyers and sellers, such as an ''alternative trading system'' within the meaning of the SEC's Reg. ATS [17 CFR 242.300], as such definition may be amended from time to time, or an ''automated quotation system'' as described in Section 3(a)(51)(A)(ii) of the 1934 Act [15 U.S.C. 78c(a)(51)(A)(ii)].

(j) The term ''recognized securities exchange'' means a U.S. securities exchange that is registered as a ''national securities exchange'' under Section 6 of the 1934 Act (15 U.S.C. 78f), as such definition may be amended from time to time, which performs with respect to securities the functions commonly performed by a stock exchange within the meaning of definitions under the applicable securities laws (e.g., 17 CFR 240.3b–16).

(k) The term ''Fund'' means an Index Fund (as described in Section IV(a)) or a Model-Driven Fund (as described in IV(b)).

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice, published on July 8, 2008, at 73 FR 39168.

The Department received no written comments with respect to the Notice. The Department notes that the Notice incorrectly stated that, as of December 31, 2005, JPMIM managed $1.19 trillion in assets for defined benefit and defined contribution plans, endowments and foundations, and other institutional clients, mutual funds, and high net worth individuals. In fact, the applicable date for that information was December 31, 2007.

FOR FURTHER INFORMATION CONTACT: Ms. Karen Lloyd of the Department, telephone (202) 693–8554. (This is not a toll-free number.)

Fidelity Brokerage Services, LLC (FBS) and its affiliates (together with FBS, Fidelity); Located Boston, Massachusetts.

[Prohibited Transaction Exemption No. 2008–14; Application No. D–11424]

Section I: Covered Transactions

Effective November 20, 2008, the restrictions of sections 406(a)(1)(D) and 406(b) of ERISA, and the sanctions resulting from the application of section 4975 of the Code, including the loss of exemption of an individual retirement account or annuity pursuant to section 408(e)(2)(A) of the Code, of a Coverdell education savings account pursuant to section 530(d) of the Code, of an Archer medical savings account pursuant to section 220(e)(2) of the Code, or of a health savings account pursuant to section 223(e)(2) of the Code, by reason of section 4975(c)(1)(D), (E), and (F) of the Code, shall not apply to the receipt of an Applicable Benefit by an individual for whose benefit a Covered Plan is established or maintained, or by his or her Family Members, with respect to a Tiered Product, pursuant to an arrangement offered by Fidelity under which the Account Value of the Covered Plan is taken into account for purposes of determining eligibility to receive such Applicable Benefit, provided that each condition of Section II of this exemption is satisfied.

Section II: Conditions

(a) The Covered Plan whose Account Value is taken into account for purposes of determining eligibility to receive the Applicable Benefit under the arrangement is established and maintained for the exclusive benefit of the participant covered under the Covered Plan, his or her spouse, or their beneficiaries.

(b) The Applicable Benefit with respect to the Tiered Product must be of the type that Fidelity itself could offer consistent with all applicable federal and state banking laws and all applicable federal and state laws regulating broker-dealers.

(c) The Applicable Benefit with respect to the Tiered Product must be provided by Fidelity or its affiliate in the ordinary course of its business as a bank or broker-dealer to customers of Fidelity who qualify for such arrangement, but who do not maintain Covered Plans with Fidelity or its affiliate.

(d) For purposes of determining eligibility to receive the Applicable Benefit, the Account Value required by Fidelity for the Covered Plan is as favorable as any such requirement based on the value of any type of account and other financial relationships an individual and his or her Family Members have with Fidelity that is used by Fidelity to determine eligibility to receive the Applicable Benefit.

(e) The rate of interest paid with respect to any assets of the Covered Plan invested in a Tiered Interest Product is reasonable.

(f) The combined total of all fees for the provision of services to the Covered Plan is not in excess of reasonable compensation within the meaning of section 4975(d)(2) of the Code and section 408(b)(2) of ERISA.

(g) The investment performance of the Covered Plan's investment(s) is no less favorable than the investment performance of an identical investment(s) that could have been made at the same time by a customer of Fidelity who is not eligible for (or who does not receive) any Applicable Benefit.

(h) The Applicable Benefits offered with respect to any Tiered Product under the arrangement to a Covered Plan customer must be the same as is offered by Fidelity with respect to such Tiered Product to non-Covered Plan customers of Fidelity having the same aggregate Account Value.

(i) If the Covered Plan is established at a broker-dealer or bank that is unrelated to Fidelity, the assets of the Covered Plan must be custodied with Fidelity and at the time the Covered Plan is established, disclosures must be made to the owner of the Covered Plan specifying that under the arrangement, services are being provided by Fidelity to the Covered Plan.

III. Definitions

(a) The term ''Fidelity'' means Fidelity Brokerage Services LLC (FBS) or any of its affiliates. An ''affiliate'' of Fidelity Brokerage Services LLC includes any person directly or indirectly controlling, controlled by, or under common control with FBS. The term control means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(b) The term ''Covered Plan'' means a plan sponsored by Fidelity or a plan with respect to which Fidelity maintains custody of its assets, and is an Individual Retirement Plan or other savings account described in section III(c), or a Keogh Plan described in section III(d).

(c) The term ''Individual Retirement Plan'' means an individual retirement account (''IRA'') described in Code section 408(a), an individual retirement annuity described in Code section 408(b), a Coverdell education savings account described in section 530 of the Code, an Archer MSA described in section 220(d) of the Code, or a health savings account described in section 223(d) of the Code. For purposes of this exemption, the term Individual Retirement Plan shall not include an Individual Retirement Plan which is an employee benefit plan covered by Title I of ERISA, except for a Simplified Employee Pension (SEP) described in section 408(k) of the Code or a Simple Retirement Account described in section 408(p) of the Code which provides participants with the unrestricted authority to transfer their balances to IRAs or Simple Retirement Accounts sponsored by different financial institutions.

(d) The term ''Keogh Plan'' means a pension, profit-sharing or stock bonus plan qualified under Code section 401(a) and exempt from taxation under Code section 501(a) under which some or all of the participants are employees described in section 401(c) of the Code. For purposes of this exemption, the term Keogh Plan shall not include a Keogh Plan which is an employee benefit plan covered by Title I of ERISA.

(e) The term ''Account Value'' means the dollar value of investments in cash or securities held in the account for which market quotations are readily available. For purposes of this exemption, the term ''cash'' shall include (without limitation) savings accounts that are federally-insured and deposits as that term is defined in section 29 CFR 2550.408b–4(c)(3). The term ''Account Value'' shall not include investments in securities that are offered by Fidelity exclusively to Covered Plans.

(f) The term ''Tiered Product'' means an arrangement that is a ''Tiered Interest Product'' or a ''Tiered Loan Product.''

(g) The term ''Tiered Interest Product'' means a bank deposit, an arrangement for payment of interest on free cash held in a brokerage account, or any other arrangement under which assets in an individual's account that is eligible for the arrangement (including Covered Plans) are invested, and with respect to which interest is paid at a specified rate based on the aggregate amount of the accounts and other financial relationships an individual and his or her Family Member have with Fidelity that are eligible to be taken into account for purposes of the arrangement, including the Account Value of the Covered Plans.

(h) The term ''Tiered Loan Product'' means any arrangement for the extension of credit to an individual, with respect to which the interest and/or Loan Expenses required to be paid are reduced to a specified rate or an amount based on the aggregate amount of the accounts and other financial relationships that an individual and his or her Family Member have with Fidelity that are eligible to be taken into account for purposes of the arrangement, including the Account Value of the Covered Plans.

(i) The term ''Loan Expenses'' means application fees, points, attorneys'' fees, appraisal fees, title insurance, and any other fees or costs that an individual is required to pay in connection with the origination or maintenance of an extension of credit pursuant to a Tiered Loan Product.

(j) The term ''Applicable Benefit'' means: (i) In the case of a Tiered Interest Product, an increase in the interest paid on an account established or maintained by an individual or any of his or her Family Members (including, in either case, through a Covered Plan); and (ii) in the case of a Tiered Loan Product, a reduction in the interest and/or Loan Expenses that an individual or any of his or her Family Members is required to pay.

(k) The term ''Family Members'' means beneficiaries of an individual for whose benefit the Covered Plan is established or maintained who would be members of the family as that term is defined in Code Section 4975(e)(6), or a brother, a sister, or spouse of a brother or sister.

DATES: *Effective Date:* This exemption is effective November 20, 2008.

Written Comments

The proposed exemption gave interested persons an opportunity to comment and to request a hearing. In this regard, all interested persons were invited to submit written comments and/or requests for a hearing on the pending exemption on or before October 20, 2008. During the comment period, the Department received one written comment letter and no requests for a public hearing. The comment was submitted by the applicant, and a discussion of the comment is provided below.

Exemption Heading

The applicant requested the Department change the heading of the exemption to read ''Fidelity Brokerage Services LLC (FBS) and its affiliates (together with FBS, Fidelity.) The Department has made the requested change.

Eligibility

In its application, Fidelity discussed that an individual's eligibility to receive Tiered Products would be calculated based on the aggregate amount of accounts and other financial relationships that the individual and his or her Family Members have with Fidelity. In this regard, Sections II(d), III(g) and III(h) of the proposal relate to eligibility requirements and definitions of the products offered under Fidelity's program. Section II(d) of the proposal states:

''For purposes of determining eligibility to receive the Applicable Benefit, the Account Value required by Fidelity for the Covered Plan is as favorable as any such requirement based on the value of any type of account used by Fidelity to determine eligibility to receive the Applicable Benefit.''

Section III(g) of the proposal states:

''The term ''Tiered Interest Product'' means a bank deposit, an arrangement for payment of interest on free cash held in a brokerage account, or any other arrangement under which assets in an individual's account that is eligible for the arrangement (including Covered Plans) are invested, and with respect to which interest is paid at a specified rate based on the aggregate amount of the accounts maintained with Fidelity by an individual and by his or her Family Members that are eligible to be taken into account for purposes of the arrangement, including the Account Value of the Covered Plans.''

Lastly, Section III(h) of the proposal states:

''The term ''Tiered Loan Product'' means any arrangement for the extension of credit to an individual, with respect to which the interest and/or Loan Expenses required to be paid are reduced to a specified rate or amount based on the aggregate amount of the accounts and other financial relationships of the individual (and his or her Family Members) eligible to be taken into account for purposes of the arrangement, including the Account Value of the Covered Plans.''

The applicant asks the Department to insert the words ''and other financial relationships'' in Section II(d) and Section III(g). The Department has made the requested change making all three sections consistent.

General Clarification:

The Department makes the following clarifications in response to the applicant's comments: (1) Fidelity has approximately $1.7 trillion assets under administration, and (2) the word ''as'' should be inserted immediately after the word ''favorable'' in the fifth line of subparagraph 10(d) of the Summary of Facts and Representations of the notice of proposed exemption.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption that was published in the **Federal Register** on September 3, 2008 at 73 FR 51521.

FOR FURTHER INFORMATION CONTACT: Allison Padams-Lavigne, U.S. Department of Labor, telephone (202) 693–8564. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404

of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 12th day of November 2008.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. E8–27615 Filed 11–19–08; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency has submitted to OMB for approval the information collection described in this notice. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted to OMB at the address below on or before December 22, 2008 to be assured of consideration.

ADDRESSES: Send comments to Mr. Nicholas A. Fraser, Desk Officer for NARA, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5167; or electronically mailed to *Nicholas_A._Fraser@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301–837–1694 or fax number 301–713–7409.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. NARA published a notice of proposed collection for this information collection on September 11, 2008 (73 FR 52890). No comments were received. NARA has submitted the described information collection to OMB for approval.

In response to this notice, comments and suggestions should address one or more of the following points: (a) Whether the proposed information collection is necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of information technology; and (e) whether small businesses are affected by this collection. In this notice, NARA is soliciting comments concerning the following information collection:

Title: Use of NARA Official Seals.

OMB number: 3095–0052.

Agency form number: N/A.

Type of review: Regular.

Affected public: Business or other for-profit, not-for-profit institutions, Federal government.

Estimated number of respondents: 10.

Estimated time per response: 20 minutes.

Frequency of response: On occasion.

Estimated total annual burden hours: 3 hours.

Abstract: The authority for this information collection is contained in 36 CFR 1200.8. NARA's three official seals are the National Archives and Records Administration seal; the National Archives seal; and the National Archives Trust Fund Board seal. The official seals are used to authenticate various copies of official records in our custody and for other official NARA business. Occasionally, when criteria are met, we will permit the public and other Federal agencies to use our official seals. A written request must be submitted to use the official seals, which we approve or deny using specific criteria.

Dated: November 14, 2008.

Martha Morphy,

Assistant Archivist for Information Services.

[FR Doc. E8–27684 Filed 11–19–08; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency proposes to renew the information collections described in this notice, which are used in the National Historical Publications and Records Commission (NHPRC) grant program. The public is invited to comment on the proposed information collections pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be received on or before January 20, 2009 to be assured of consideration.

ADDRESSES: Comments should be sent to: Paperwork Reduction Act Comments (NHP), Room 4400, National Archives and Records Administration, 8601 Adelphi Rd, College Park, MD 20740–6001; or faxed to 301–713–7409; or electronically mailed to *tamee.fechhelm@nara.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collections and supporting statements should be directed to Tamee Fechhelm at telephone number 301–837–1694, or fax number 301–713–7409.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) Whether the proposed information collections are necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collections; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of information technology; and (e) whether small businesses are affected by this collection. The comments that are

submitted will be summarized and included in the NARA request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this notice, NARA is soliciting comments concerning the following information collections:

1. *Title:* Application for Attendance at the Institute for the Editing of Historical Documents.

OMB number: 3095–0012.

Agency form number: None.

Type of review: Regular.

Affected public: Individuals, often already working on documentary editing projects, who wish to apply to attend the annual one-week Institute for the Editing of Historical Documents, an intensive seminar in all aspects of modern documentary editing techniques taught by visiting editors and specialists.

Estimated number of respondents: 25.

Estimated time per response: 1.5 hours.

Frequency of response: On occasion, no more than annually (when respondent wishes to apply for attendance at the Institute).

Estimated total annual burden hours: 37.5 hours.

Abstract: The application is used by the NHPRC staff to establish the applicant's qualifications and to permit selection of those individuals best qualified to attend the Institute jointly sponsored by the NHPRC, the Wisconsin Historical Society, and the University of Wisconsin. Selected applicants forms are forwarded to the resident advisors of the Institute, who use them to determine what areas of instruction would be most useful to the applicants.

You can also use NARA's Web site at *http://www.archives.gov/nhprc/forms/editing-application.pdf* to review and fill-in the application.

2. *Title:* National Historical Publications and Records Commission Grant Program.

OMB number: 3095–0013.

Agency form number: None.

Type of review: Regular.

Affected public: Nonprofit organizations and institutions, state and local government agencies, Federally acknowledged or state-recognized Native American tribes or groups, and individuals who apply for NHPRC grants for support of historical documentary editions, archival preservation and planning projects, and other records projects.

Estimated number of respondents: 148 per year submit applications; approximately 100 grantees among the applicant respondents also submit semiannual narrative performance reports.

Estimated time per response: 54 hours per application; 2 hours per narrative report.

Frequency of response: On occasion for the application; semiannually for the narrative report. Currently, the NHPRC considers grant applications 2 times per year; respondents usually submit no more than one application per year.

Estimated total annual burden hours: 8,392 hours.

Abstract: The NHPRC posts grant announcements to their Web site and to Grants.gov (*http://www.grants.gov*), where the information will be specific to the grant opportunity named. The basic information collection remains the same. The grant proposal is used by the NHPRC staff, reviewers, and the Commission to determine if the applicant and proposed project are eligible for an NHPRC grant, and whether the proposed project is methodologically sound and suitable for support. The narrative report is used by the NHPRC staff to monitor the performance of grants.

You can also use NARA's Web site at *http://www.archives.gov/nhprc/apply/index.html* to review application instructions.

Dated: November 14, 2008.

Martha Morphy,

Assistant Archivist for Information Services.

[FR Doc. E8–27685 Filed 11–19–08; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2008–0607]

Commonwealth of Virginia: NRC Staff Assessment of a Proposed Agreement Between the Nuclear Regulatory Commission and the Commonwealth of Virginia

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of a proposed Agreement with the Commonwealth of Virginia.

SUMMARY: By letter dated June 12, 2008, Governor Timothy M. Kaine of Virginia requested that the U.S. Nuclear Regulatory Commission (NRC or Commission) enter into an Agreement with the Commonwealth of Virginia (Commonwealth or Virginia) as authorized by Section 274 of the Atomic Energy Act of 1954, as amended (Act).

Under the proposed Agreement, the Commission would relinquish, and the Commonwealth would assume, portions of the Commission's regulatory authority exercised within the Commonwealth. As required by the Act, the NRC is publishing the proposed Agreement for public comment. The NRC is also publishing the summary of an assessment by the NRC staff of the Commonwealth's regulatory program. Comments are requested on the proposed Agreement, especially its effect on public health and safety. Comments are also requested on the NRC staff assessment, the adequacy of the Commonwealth's program, and the Commonwealth's program staff, as discussed in this notice.

The proposed Agreement would release (exempt) persons who possess or use certain radioactive materials in the Commonwealth from portions of the Commission's regulatory authority. The Act requires that the NRC publish those exemptions. Notice is hereby given that the pertinent exemptions have been previously published in the **Federal Register** and are codified in the Commission's regulations as 10 CFR part 150.

DATES: The comment period expires December 22, 2008. Comments received after this date will be considered if it is practical to do so, but the Commission cannot assure consideration of comments received after the expiration date.

ADDRESSES: Written comments may be submitted to Mr. Michael T. Lesar, Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, Washington, DC 20555–0001. Members of the public are invited and encouraged to submit comments electronically to *http://www.regulations.gov.* Search on Docket ID: [NRC–2008–0607] and follow the instructions for submitting comments.

The NRC maintains an Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) reference staff at (800) 397–4209, or (301) 415–4737, or by e-mail to *pdr.resource@nrc.gov.*

Copies of comments received by NRC may be examined at the NRC Public Document Room, 11555 Rockville Pike, Public File Area O–1–F21, Rockville, Maryland. Copies of the request for an Agreement by the Governor of Virginia including all information and

documentation submitted in support of the request, and copies of the full text of the NRC Draft Staff Assessment are also available for public inspection in the NRC's Public Document Room—ADAMS Accession Numbers: ML081720184, ML081760524, ML081760523, ML081760623, ML081760624, ML082470314, and ML082520075.

FOR FURTHER INFORMATION CONTACT: Ms. Monica L. Orendi, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Telephone (301) 415–3938 or e-mail to *monica.orendi@nrc.gov.*

SUPPLEMENTARY INFORMATION: Since Section 274 of the Act was added in 1959, the Commission has entered into Agreements with 35 States. The Agreement States currently regulate approximately 18,000 Agreement material licenses, while the NRC regulates approximately 4,000 licenses. Under the proposed Agreement, approximately 400 NRC licenses will transfer to the Commonwealth. The NRC periodically reviews the performance of the Agreement States to assure compliance with the provisions of Section 274.

Section 274e requires that the terms of the proposed Agreement be published in the **Federal Register** for public comment once each week for four consecutive weeks. This notice is being published in fulfillment of the requirement.

I. Background

(a) Section 274b of the Act provides the mechanism for a State to assume regulatory authority, from the NRC, over certain radioactive materials [1] and activities that involve use of the materials.

In a letter dated June 12, 2008, Governor Kaine certified that the Commonwealth of Virginia has a program for the control of radiation hazards that is adequate to protect public health and safety within Virginia for the materials and activities specified in the proposed Agreement, and that the Commonwealth desires to assume regulatory responsibility for these materials and activities. Included with the letter was the text of the proposed Agreement, which is shown in Appendix A to this notice.

The radioactive materials and activities (which together are usually referred to as the ''categories of materials'') that the Commonwealth requests authority over are:

(1) The possession and use of byproduct materials as defined in section 11e.(1) of the Act;

(2) The possession and use of byproduct materials as defined in section 11e.(3) of the Act;

(3) The possession and use of byproduct materials as defined in section 11e.(4) of the Act;

(4) The possession and use of source materials; and

(5) The possession and use of special nuclear materials in quantities not sufficient to form a critical mass.

The materials and activities the Commonwealth is not requesting authority over are:

(1) The regulation of extraction or concentration of source material from source material ore and the management and disposal of the resulting byproduct material;

(2) The regulation of land disposal of byproduct material or special nuclear material waste received from other persons; and

(3) The evaluation of radiation safety information on sealed sources or devices containing byproduct, source, or special nuclear materials and the registration of the sealed sources or devices for distribution.

(b) The proposed Agreement contains articles that:

(1) Specify the materials and activities over which authority is transferred;

(2) Specify the activities over which the Commission will retain regulatory authority;

(3) Continue the authority of the Commission to safeguard nuclear materials and restricted data;

(4) Commit the Commonwealth and NRC to exchange information as necessary to maintain coordinated and compatible programs;

(5) Provide for the reciprocal recognition of licenses;

(6) Provide for the suspension or termination of the Agreement; and

(7) Specify the effective date of the proposed Agreement.

The Commission reserves the option to modify the terms of the proposed Agreement in response to comments, to correct errors, and to make editorial changes. The final text of the Agreement, with the effective date, will be published after the Agreement is approved by the Commission and signed by the NRC Chairman and the Governor of Virginia.

(c) The regulatory program is authorized by law under the Code of Virginia (32.1–227–32.1–238). Section 32.1–235 provides the Governor with the authority to enter into an Agreement with the Commission. Virginia law contains provisions for the orderly transfer of regulatory authority over affected licensees from the NRC to the Commonwealth. After the effective date of the Agreement, licenses issued by NRC would continue in effect as Commonwealth licenses until the licenses expire or are replaced by Commonwealth issued licenses. NRC licenses transferred to the Commonwealth which contain requirements for decommissioning and express intent to terminate the license when decommissioning has been completed under a Commission approved decommissioning plan will continue as Commonwealth licenses and will be terminated by the Commonwealth when the Commission approved decommissioning plan has been completed.

The Commonwealth currently regulates the users of naturally-occurring and accelerator-produced radioactive materials. The Energy Policy Act of 2005 (EPAct) expanded the Commission's regulatory authority over byproduct materials as defined in Sections 11e.(3) and 11e.(4) of the Act, to include certain naturally-occurring and accelerator-produced radioactive materials. On August 31, 2005, the Commission issued a time-limited waiver (70 FR 51581) of the EPAct requirements. Under the proposed Agreement, the Commonwealth would assume regulatory authority for these radioactive materials. Therefore, if the proposed Agreement is approved, the Commission would terminate the time-limited waiver in the Commonwealth coincident with the effective date of the Agreement. Also, a notification of waiver termination would be provided in the **Federal Register** for the final Agreement.

(d) The NRC draft staff assessment finds that the Commonwealth's Division of Radiological Health, an organizational unit of the Virginia Department of Health (VDH), is adequate to protect public health and safety and is compatible with the NRC program for the regulation of Agreement materials.

II. Summary of the NRC Staff Assessment of the Commonwealth's Program for the Control of Agreement Materials

The NRC staff has examined the Commonwealth's request for an Agreement with respect to the ability of

[1] The radioactive materials, sometimes referred to as ''Agreement materials,'' are: (a) Byproduct materials as defined in Section 11e.(1) of the Act; (b) byproduct materials as defined in Section 11e.(3) of the Act; (c) byproduct materials as defined in Section 11e.(4) of the Act; (d) source materials as defined in Section 11z. of the Act; and (e) special nuclear materials as defined in Section 11aa. of the Act, restricted to quantities not sufficient to form a critical mass.

the radiation control program to regulate Agreement materials. The examination was based on the Commission's policy statement ''Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement,'' (46 FR 7540; January 23, 1981, as amended by Policy Statements published at 46 FR 36969; July 16, 1981 and at 48 FR 33376; July 21, 1983), and the Office of Federal and State Materials and Environmental Management Programs (FSME) Procedure SA–700, ''Processing an Agreement.''

(a) Organization and Personnel. The Agreement materials program will be located within the existing Division of Radiological Health (DRH) of the VDH. The DRH will be responsible for all regulatory activities related to the proposed Agreement.

The educational requirements for the DRH staff members are specified in the Commonwealth's personnel position descriptions, and meet the NRC criteria with respect to formal education or combined education and experience requirements. All current staff members hold at least bachelor's degrees in physical or life sciences, or have a combination of education and experience at least equivalent to a bachelor's degree. All have had additional training and work experience in radiation protection. Supervisory level staff has at least seven years working experience in radiation protection.

The DRH performed and the NRC staff reviewed an analysis of the expected workload under the proposed Agreement. Based on the NRC staff review of the DRH's staff analysis, the DRH has an adequate number of staff to regulate radioactive materials under the terms of the Agreement. The DRH will employ a staff with at least the equivalent of 6.0 full-time professional/technical and administrative employees for the Agreement materials program.

The Commonwealth has indicated that the DRH has an adequate number of trained and qualified staff in place. The Commonwealth has developed qualification procedures for license reviewers and inspectors which are similar to the NRC's procedures. The technical staff are working with NRC license reviewers in the NRC Region I Office and accompanying NRC staff on inspections of NRC licensees in Virginia. DRH staff is also actively supplementing their experience through direct meetings, discussions, and facility walk-downs with NRC licensees in the Commonwealth, and through self-study, in-house training, and formal training.

Overall, the NRC staff believes that the DRH technical staff identified by the Commonwealth to participate in the Agreement materials program has sufficient knowledge and experience in radiation protection, the use of radioactive materials, the standards for the evaluation of applications for licensing, and the techniques of inspecting licensed users of agreement materials.

(b) Legislation and Regulations. In conjunction with the rulemaking authority vested in the Virginia Board of Health by Section 32.1–229 of the Code of Virginia, the DRH has the requisite authority to promulgate regulations for protection against radiation. The law provides DRH the authority to issue licenses and orders, conduct inspections, and to enforce compliance with regulations, license conditions, and orders. Licensees are required to provide access to inspectors.

The NRC staff verified that the Commonwealth adopted the relevant NRC regulations in 10 CFR Parts 19, 20, 30, 31, 32, 33, 34, 35, 36, 39, 40, 61, 70, 71, and 150 into Virginia Administrative Code Title 12, Section 5–481. The NRC staff also approved two license conditions to implement Increased Controls and Fingerprinting and Criminal History Records Check requirements for risk-significant radioactive materials for certain Commonwealth licensees under the proposed Agreement. These license conditions will replace the Orders that NRC issued (EA–05–090 and EA–07–305) to these licensees that will transfer to the Commonwealth. As a result of the restructuring of Virginia Regulations, the Commonwealth deleted financial assurance requirements equivalent to 10 CFR 40.36. The Commonwealth is proceeding with the necessary revisions to their regulations to ensure compatibility, and these revisions will be effective by January 1, 2009. Therefore, on the proposed effective date of the Agreement, the Commonwealth will have adopted an adequate and compatible set of radiation protection regulations that apply to byproduct, source, and special nuclear materials in quantities not sufficient to form a critical mass. The NRC staff also verified that the Commonwealth will not attempt to enforce regulatory matters reserved to the Commission.

(c) Storage and Disposal. The Commonwealth has adopted NRC compatible requirements for the handling and storage of radioactive material. The Commonwealth will not seek authority to regulate the land disposal of radioactive material as waste. The Commonwealth waste disposal requirements cover the preparation, classification, and manifesting of radioactive waste generated by Commonwealth licensees for transfer for disposal to an authorized waste disposal site or broker.

(d) Transportation of Radioactive Material. Virginia has adopted compatible regulations to the NRC regulations in 10 CFR Part 71. Part 71 contains the requirements licensees must follow when preparing packages containing radioactive material for transport. Part 71 also contains requirements related to the licensing of packaging for use in transporting radioactive materials. Virginia will not attempt to enforce portions of the regulations related to activities, such as approving packaging designs, which are reserved to NRC.

(e) Recordkeeping and Incident Reporting. The Commonwealth has adopted compatible regulations to the sections of the NRC regulations which specify requirements for licensees to keep records, and to report incidents or accidents involving materials.

(f) Evaluation of License Applications. The Commonwealth has adopted compatible regulations to the NRC regulations that specify the requirements a person must meet to get a license to possess or use radioactive materials. The Commonwealth has also developed a licensing procedures manual, along with the accompanying regulatory guides, which are adapted from similar NRC documents and contain guidance for the program staff when evaluating license applications.

(g) Inspections and Enforcement. The Commonwealth has adopted a schedule providing for the inspection of licensees as frequently as, or more frequently than, the inspection schedule used by the NRC. The program has adopted procedures for the conduct of inspections, reporting of inspection findings, and reporting inspection results to the licensees. The Commonwealth has also adopted procedures for the enforcement of regulatory requirements.

(h) Regulatory Administration. The Commonwealth is bound by requirements specified in Commonwealth law for rulemaking, issuing licenses, and taking enforcement actions. The program has also adopted administrative procedures to assure fair and impartial treatment of license applicants. Commonwealth law prescribes standards of ethical conduct for Commonwealth employees.

(i) Cooperation with Other Agencies. Commonwealth law deems the holder of an NRC license on the effective date of the proposed Agreement to possess a

like license issued by the Commonwealth. The law provides that these former NRC licenses will expire either 90 days after receipt from the radiation control program of a notice of expiration of such license or on the date of expiration specified in the NRC license, whichever is later. In the case of NRC licenses that are terminated under restricted conditions required by 10 CFR 20.1403 prior to the effective date of the proposed Agreement, the Commonwealth deems the termination to be final despite any other provisions of Commonwealth law or rule. For NRC licenses that, on the effective date of the proposed Agreement, contain a license condition indicating intent to terminate the license upon completion of a Commission approved decommissioning plan, the transferred license will be terminated by the Commonwealth under the plan so long as the licensee conforms to the approved plan.

The Commonwealth also provides for ''timely renewal.'' This provision affords the continuance of licenses for which an application for renewal has been filed more than 30 days prior to the date of expiration of the license. NRC licenses transferred while in timely renewal are included under the continuation provision. The Code of Virginia provides exemptions from the Commonwealth's requirements for licensing of sources of radiation for NRC and U.S. Department of Energy contractors or subcontractors. The proposed Agreement commits the Commonwealth to use its best efforts to cooperate with the NRC and the other Agreement States in the formulation of standards and regulatory programs for the protection against hazards of radiation, and to assure that the Commonwealth's program will continue to be compatible with the Commission's program for the regulation of Agreement materials. The proposed Agreement stipulates the desirability of reciprocal recognition of licenses, and commits the Commission and the Commonwealth to use their best efforts to accord such reciprocity.

III. Staff Conclusion

Section 274d of the Act provides that the Commission shall enter into an agreement under Section 274b with any State if:

(a) The Governor of the State certifies that the State has a program for the control of radiation hazards adequate to protect public health and safety with respect to the agreement materials within the State, and that the State desires to assume regulatory responsibility for the agreement materials; and

(b) The Commission finds that the State program is in accordance with the requirements of section 274o, and in all other respects compatible with the Commission's program for the regulation of materials, and that the State program is adequate to protect public health and safety with respect to the materials covered by the proposed Agreement.

The NRC staff has reviewed the proposed Agreement, the certification by the Commonwealth of Virginia in the application for an Agreement submitted by Governor Kaine on June 12, 2008, and the supporting information provided by the staff of the DRH of the Virginia Department of Health, and concludes that the Commonwealth of Virginia satisfies the criteria in the Commission's policy statement ''Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement,'' and therefore, meets the requirements of Section 274 of the Act. The proposed Commonwealth of Virginia program to regulate Agreement materials, as comprised of statutes, regulations, and procedures, is compatible with the program of the Commission and is adequate to protect public health and safety with respect to the materials covered by the proposed Agreement.

Dated at Rockville, Maryland, this 14th day of November, 2008.

For the Nuclear Regulatory Commission.

Terrence Reis,

Acting Director, Division of Materials Safety and State Agreements, Office of Federal and State Materials and Environmental Management Programs.

Appendix A—An Agreement Between the United States Nuclear Regulatory Commission and the Commonwealth of Virginia for the Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the Commonwealth Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended

Whereas, The United States Nuclear Regulatory Commission (the Commission) is authorized under Section 274 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.* (the Act), to enter into agreements with the Governor of any State/Commonwealth providing for discontinuance of the regulatory authority of the Commission within the Commonwealth under Chapters 6, 7, and 8, and Section 161 of the Act with respect to byproduct materials as defined in Sections 11e.(1), (3), and (4) of the Act, source materials, and special nuclear materials in quantities not sufficient to form a critical mass; and,

WHEREAS, The Governor of the Commonwealth of Virginia is authorized under the Code of Virginia Section 32.1–235, to enter into this Agreement with the Commission; and,

WHEREAS, The Governor of the Commonwealth of Virginia certified on June 12, 2008, that the Commonwealth of Virginia (the Commonwealth) has a program for the control of radiation hazards adequate to protect public health and safety with respect to the materials within the Commonwealth covered by this Agreement, and that the Commonwealth desires to assume regulatory responsibility for such materials; and,

WHEREAS, The Commission found on [date] that the program of the Commonwealth for the regulation of the materials covered by this Agreement is compatible with the Commission's program for the regulation of such materials and is adequate to protect public health and safety; and,

WHEREAS, The Commonwealth and the Commission recognize the desirability and importance of cooperation between the Commission and the Commonwealth in the formulation of standards for protection against hazards of radiation and in assuring that Commonwealth and Commission programs for protection against hazards of radiation will be coordinated and compatible; and,

WHEREAS, The Commission and the Commonwealth recognize the desirability of the reciprocal recognition of licenses, and of the granting of limited exemptions from licensing of those materials subject to this Agreement; and,

WHEREAS, This Agreement is entered into pursuant to the provisions of the Act;

NOW, THEREFORE, It is hereby agreed between the Commission and the Governor of the Commonwealth acting on behalf of the Commonwealth as follows:

ARTICLE I

Subject to the exceptions provided in Articles II, IV, and V, the Commission shall discontinue, as of the effective date of this Agreement, the regulatory authority of the Commission in the Commonwealth under Chapters 6, 7, and 8, and Section 161 of the Act with respect to the following materials:

1. Byproduct materials as defined in Section 11e.(1) of the Act;

2. Byproduct materials as defined in Section 11e.(3) of the Act;

3. Byproduct materials as defined in Section 11e.(4) of the Act;

4. Source materials; and

5. Special nuclear materials in quantities not sufficient to form a critical mass.

ARTICLE II

This Agreement does not provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to:

1. The regulation of the construction and operation of any production or utilization facility or any uranium enrichment facility;

2. The regulation of the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

3. The regulation of the disposal into the ocean or sea of byproduct, source, or special

nuclear materials waste as defined in the regulations or orders of the Commission;

4. The regulation of the disposal of such other byproduct, source, or special nuclear materials waste as the Commission from time to time determines by regulation or order should, because of the hazards or potential hazards thereof, not be disposed without a license from the Commission;

5. The evaluation of radiation safety information on sealed sources or devices containing byproduct, source, or special nuclear materials and the registration of the sealed sources or devices for distribution, as provided for in regulations or orders of the Commission;

6. The regulation of byproduct material as defined in Section 11e.(2) of the Act;

7. The regulation of the land disposal of byproduct, source, or special nuclear material waste received from other persons.

ARTICLE III

With the exception of those activities identified in Article II.1 through 4, this Agreement may be amended, upon application by the Commonwealth and approval by the Commission, to include one or more of the additional activities specified in Article II, whereby the Commonwealth may then exert regulatory authority and responsibility with respect to those activities.

ARTICLE IV

Notwithstanding this Agreement, the Commission may from time to time by rule, regulation, or order, require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license or an exemption from licensing issued by the Commission.

ARTICLE V

This Agreement shall not affect the authority of the Commission under Subsection 161b or 161i of the Act to issue rules, regulations, or orders to protect the common defense and security, to protect restricted data, or to guard against the loss or diversion of special nuclear material.

ARTICLE VI

The Commission will cooperate with the Commonwealth and other Agreement States in the formulation of standards and regulatory programs of the Commonwealth and the Commission for protection against hazards of radiation and to assure that Commission and Commonwealth programs for protection against hazards of radiation will be coordinated and compatible.

The Commonwealth agrees to cooperate with the Commission and other Agreement States in the formulation of standards and regulatory programs of the Commonwealth and the Commission for protection against hazards of radiation and to assure that the Commonwealth's program will continue to be compatible with the program of the Commission for the regulation of materials covered by this Agreement.

The Commonwealth and the Commission agree to keep each other informed of proposed changes in their respective rules and regulations, and to provide each other the opportunity for early and substantive contribution to the proposed changes.

The Commonwealth and the Commission agree to keep each other informed of events, accidents, and licensee performance that may have generic implication or otherwise be of regulatory interest.

ARTICLE VII

The Commission and the Commonwealth agree that it is desirable to provide reciprocal recognition of licenses for the materials listed in Article I licensed by the other party or by any other Agreement State.

Accordingly, the Commission and the Commonwealth agree to develop appropriate rules, regulations, and procedures by which such reciprocity will be accorded.

ARTICLE VIII

The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the Commonwealth, or upon request of the Governor of the Commonwealth, may terminate or suspend all or part of this agreement and reassert the licensing and regulatory authority vested in it under the Act if the Commission finds that (1) such termination or suspension is required to protect public health and safety, or (2) the Commonwealth has not complied with one or more of the requirements of Section 274 of the Act.

The Commission may also, pursuant to Section 274j of the Act, temporarily suspend all or part of this agreement if, in the judgment of the Commission, an emergency situation exists requiring immediate action to protect public health and safety and the Commonwealth has failed to take necessary steps. The Commission shall periodically review actions taken by the Commonwealth under this Agreement to ensure compliance with Section 274 of the Act which requires a Commonwealth program to be adequate to protect public health and safety with respect to the materials covered by this Agreement and to be compatible with the Commission's program.

ARTICLE IX

This Agreement shall become effective on [date], and shall remain in effect unless and until such time as it is terminated pursuant to Article VIII.

Done at [Richmond, Virginia] this [date] day of [month], [year].

For the United States Nuclear Regulatory Commission.

Dale E. Klein,
Chairman.

For the Commonwealth of Virginia.

Timothy M. Kaine,
Governor.

[FR Doc. E8–27582 Filed 11–19–08; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Meeting of the Industry Trade Advisory Committee on Small and Minority Business (ITAC–11)

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of a partially opened meeting.

SUMMARY: The Industry Trade Advisory Committee on Small and Minority Business (ITAC–11) will hold a meeting on Monday, December 8, 2008, from 9 a.m. to 3 p.m. The meeting will be closed to the public from 9 a.m. to 12:30 p.m. and opened to the public from 1 p.m. to 3 p.m.

DATES: The meeting is scheduled for December 8, 2008, unless otherwise notified.

ADDRESSES: The meeting will be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Laura Hellstern, DFO for ITAC–11 at (202) 482–3222, Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION: During the opened portion of the meeting the following agenda items will be considered.

- Process for adding or deleting products from GSP eligibility from a country.
- U.S. Customs and Border Protection: Technical Corrections Relating to the Rules of Origin for Goods Imported Under the NAFTA and for Textile and Apparel Products: NPRM.
- Small Business Administration Update.

Colleen J. Litkenhaus,

Assistant U.S. Trade Representative for Intergovernmental Affairs and Public Liaison.

[FR Doc. E8–27652 Filed 11–19–08; 8:45 am]

BILLING CODE 3190–W9–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. WTO/DS381]

WTO Dispute Settlement Proceeding Regarding United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (''USTR'') is

providing notice that on October 24, 2008, Mexico requested consultations with the United States under the *Marrakesh Agreement Establishing the World Trade Organization* (''WTO Agreement'') concerning U.S. limitations on the use of a dolphin-safe label for tuna and tuna products. That request may be found at *http://www.wto.org* contained in a document designated as WT/DS381/1. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before December 23, 2008 to be assured of timely consideration by USTR.

ADDRESSES: Comments should be submitted (i) electronically to *http://www.regulations.gov,* docket number USTR–2008–0038, or (ii) by fax, to Sandy McKinzy at (202) 395–3640. For documents sent by fax, USTR requests that the submitter provide a confirmation copy to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Priti Seksaria Agrawal, Associate General Counsel, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508, (202) 395–9439.

SUPPLEMENTARY INFORMATION: USTR is providing notice that consultations have been requested pursuant to the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (''DSU''). If such consultations should fail to resolve the matter and a dispute settlement panel is established pursuant to the DSU, such panel, which would hold its meetings in Geneva, Switzerland, would be expected to issue a report on its findings and recommendations within nine months after it is established.

Major Issues Raised by Mexico

On October 24, 2008, Mexico requested consultations regarding U.S. limitations on the use of a dolphin-safe label for tuna and tuna products. Mexico challenges three U.S. measures: (1) The Dolphin Protection Consumer Information Act (19 U.S.C. 1385); (2) certain dolphin-safe labeling regulations (50 CFR 216.91–92); and (3) the Ninth Circuit decision in *Earth Island* v. *Hogarth,* 494 F.3d. 757 (9th Cir. 2007), and alleges that these measures have the effect of prohibiting Mexican tuna and tuna products from being labeled dolphin-safe. Specifically, Mexico alleges that its tuna and tuna products are accorded less favorable treatment than like products of national origin and like products originating in other countries and are not immediately and unconditionally accorded any advantage, favor, privilege, or immunity granted to like products in other countries. Mexico further alleges that the U.S. measures create unnecessary obstacles to trade and are not based on an existing international standard. Finally, Mexico alleges that the U.S. procedures for assessing conformity with the dolphin-safe labeling requirement create unnecessary obstacles to trade and do not grant access to Mexican suppliers under conditions that are no less favorable than those accorded to suppliers of like products of national origin or originating in any other country under comparable circumstances. Mexico alleges that the U.S. measures appear to be inconsistent with the *General Agreement on Tariffs and Trade 1994,* Articles I and III, and the *Agreement on Technical Barriers to Trade,* Articles 2, 5, 6, and 8.

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Persons may submit their comments either (i) electronically to *http://www.regulations.gov* docket number USTR–2008–0038, or (ii) by fax, to Sandy McKinzy at (202) 395–3640. For documents sent by fax, USTR requests that the submitter provide a confirmation copy to *http://www.regulations.gov.*

To submit comments via *http://www.regulations.gov,* enter docket number USTR–2008–0038 on the home page and click ''go''. The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' on the left side of the search-results page, and click on the link entitled ''Send a Comment or Submission.'' (For further information on using the *http://www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on ''How to Use This Site'' on the left side of the home page.)

The *http://www.regulations.gov* site provides the option of providing comments by filling in a ''General Comments'' field, or by attaching a document. It is expected that most comments will be provided in an attached document. If a document is attached, it is sufficient to type ''See attached'' in the ''General Comments'' field.

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such and the submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of the cover page and each succeeding page. Any comment containing business confidential information must be accompanied by a non-confidential summary of the confidential information. The non-confidential summary will be placed in the docket and open to public inspection.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitter believes that information or advice may qualify as such, the submitter—

(1) Must clearly so designate the information or advice;

(2) Must clearly mark the material as ''SUBMITTED IN CONFIDENCE'' at the top and bottom of the cover page and each succeeding page; and

(3) Must provide a non-confidential summary of the information or advice. The non-confidential summary will be placed in the docket and open to public inspection.

USTR will maintain a docket on this dispute settlement proceeding, accessible to the public. The public file will include non-confidential comments received by USTR from the public with respect to the dispute; if a dispute settlement panel is convened or in the event of an appeal from such a panel, the U.S. submissions, any non-confidential submissions, or non-confidential summaries of submissions, received from other participants in the dispute; the report of the panel; and, if applicable, the report of the Appellate Body.

Comments will be placed in the docket and open to public inspection pursuant to 15 CFR 2006.13, except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15 or information determined by USTR to be confidential in accordance with 19 U.S.C. 2155(g)(2). Comments may be viewed on the *http://www.regulations.gov* Web site by entering docket number USTR–2008–

0038 in the search field on the home page.

Daniel Brinza,

Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. E8–27658 Filed 11–19–08; 8:45 am]

BILLING CODE 3190–W9–P

OFFICE OF PERSONNEL MANAGEMENT

SES Performance Review Board

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: Notice is hereby given of the appointment of members of the OPM Performance Review Board.

FOR FURTHER INFORMATION CONTACT: Janet Smith, Center for Human Capital Management Services, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415, (202) 606–4473.

SUPPLEMENTARY INFORMATION: Section 4314(c)(1) through (5) of Title 5, U.S.C., requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more SES performance review boards. The board reviews and evaluates the initial appraisal of a senior executive's performance by the supervisor, and considers recommendations to the appointing authority regarding the performance of the senior executive.

Office of Personnel Management.

Michael W. Hager,

Acting Director.

The following have been designated as members of the Performance Review Board of the U.S. Office of Personnel Management:

Howard Weizmann, Deputy Director—Chair.
Patricia Hollis, Chief of Staff and Director of External Affairs.
Mark Reger, Chief Financial Officer.
Kay Ely, Associate Director, Human Resources Products and Services Division.
Nancy Kichak, Associate Director, Strategic Human Resources Policy Division.
Kevin Mahoney, Associate Director, Human Capital Leadership and Merit System Accountability Division.
Kathy Dillaman, Associate Director, Federal Investigative Services Division.
Ronald Flom, Associate Director, Management Services Division and Chief Human Capital Officer.
John Maher, General Counsel.
James F. McDermott, Director of Human Resources and Chief Human Capital Officer.
Nuclear Regulatory Commission.
Mark Reinhold, Deputy Associate Director for Human Capital Management Services—Executive Secretariat.

[FR Doc. E8–27533 Filed 11–19–08; 8:45 am]

BILLING CODE 6325–38–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2009–8; Order No. 132]

Competitive Products Price Changes

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently filed Postal Service notice of changes to rates of general applicability for competitive products and related classification changes. The price changes are scheduled to become effective January 18, 2009.

DATES: Comments are due December 1, 2008.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov*.

SUPPLEMENTARY INFORMATION: On November 13, 2008, the Postal Service filed notice with the Commission concerning changes in rates of general applicability for competitive products.[1] The Filing also includes related mail classification changes. As required by the Commission's rules, 39 CFR 3015.2(b), the Filing includes an explanation and justification for the changes, the effective date, and a schedule of the changed rates. The price changes are scheduled to become effective January 18, 2009.

Attached to the Filing is the Governors' Decision evaluating the new prices and classification changes in accordance with 39 U.S.C. 3632–33 and 39 CFR 3015.2.

The Governors' Decision includes two Attachments. Attachment A provides an analysis of the competitive products' price and classification changes intended to demonstrate that the changes comply with section 3633(a) of title 39 and the Commission's rules.[2] 39 CFR 3015.7(c).

Attachment B to the Governors' Decision sets forth the price changes and related product description changes to be incorporated into the draft Mail Classification Schedule. Selected highlights of the price and classification changes follow.

Express Mail. Overall, Express Mail prices increase by approximately 5.7 percent, with average retail prices increasing by approximately 6 percent. Changes to the price structure include supplanting the current Commercial Volume Incentives category with a Commercial Plus category that provides lower prices, rather than rebates, for customers meeting specified volume levels. Customers paying through the use of qualifying metered systems will be eligible for the lower prices currently available to customers paying postage online and through authorized payment methods.

Priority Mail. Priority Mail prices increase by 3.9 percent overall, with average retail prices increasing by about 4.7 percent. Changes to the price structure include the creation of a Commercial Plus category, similar to the one for Express Mail, to provide lower prices for customers mailing specified volumes. A small flat-rate box is also added as a new Priority Mail option. Pricing incentives currently available to customers paying postage online or through authorized payment methods are extended to customers paying through the use of qualifying metered systems.

Parcel Select. Parcel Select service increases, on average, by 5.9 percent. Prices are designed to encourage dropshipping at destination delivery units (DDUs), and accordingly, increase more for destination bulk mail center (BMC) entry than for destination sectional center facility entry and DDU entry.

Parcel Return. Parcel Return service increases, on average, by 5.3 percent. Return BMC prices will increase by 7.1 percent with no increase for return delivery unit prices.

Global Express Guaranteed. Global Express Guaranteed service increases, on average, by 11.2 percent. Price

[1] *See* Notice of the United States Postal Service of Changes in Rates of General Applicability for Competitive Products Established in Governors' Decision No. 08–19, November 13, 2008 (Filing). The Filing is available on the Commission's Web site, *http://www.prc.gov*, under Daily Listings for November 13, 2008. Pursuant to 39 U.S.C. 3632(b)(2), the Postal Service is obligated to publish the Governors' Decision and record of proceedings in the **Federal Register** at least 30 days before the effective date of the new rates or classes.

[2] Page 4 of Attachment A to the Governors' Decision was filed publisly in redacted form. The unredacted version of page 4 was filed under seal in the nonpublic index.

increases vary by country group and weight increment. Qualified customers paying through information-based indicia postage meters will be eligible for the lower prices currently available to customers paying online or through an authorized PC postage vender.

Express Mail International. Express Mail International service increases, on average, by 8.5 percent. Price increases vary by country group and weight increment. Qualified customers paying through information-based indicia postage meters will be eligible for the lower prices currently available to customers paying online or through an authorized PC postage vender. The country group structure is also expanded from 9 to 10 country groups.

Priority Mail International. Priority Mail International prices increase on average by 8.5 percent. Different increases apply depending on the weight and country group. Qualified customers paying through information-based indicia postage meters will be eligible for the lower prices currently available to customers paying online or through an authorized PC postage vender. A small flat-rate box is also added as a new Priority Mail International option. The country group structure is also expanded from 9 to 10 country groups.

M-bags. International Direct Sacks—M-bags (Airmail M-bags) increase by approximately 8 percent.

Details of these changes may be found in Attachment B to the Filing.

The establishment of rates of general applicability for competitive products and the associated mail classification changes effects a change in the Mail Classification Schedule. As such, pursuant to subpart E of part 3020 of its rules, 39 CFR 3020.90 *et seq.*, the Commission provides notice of the Postal Service's Filing. Interested persons may express views and offer comments on whether the planned changes are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015 and 39 CFR 3020 subpart B. Comments are due no later than December 1, 2008.

Pursuant to 39 U.S.C. 505, Emmett Rand Costich is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in the above-captioned docket.

It is Ordered:

1. The Commission establishes Docket No. CP2009–8 to provide interested persons an opportunity to express views and offer comments on whether the planned changes are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015 and 39 CFR part 3020 subpart B.

2. Comments on the Filing are due no later than December 1, 2008.

3. The Commission appoints Emmett Rand Costich as Public Representative to represent the interests of the general public in this proceeding.

4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Steven W. Williams,

Secretary.

[FR Doc. E8–27655 Filed 11–19–08; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copy Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form N–54C, SEC File No. 270–184, OMB Control No. 3235–0236.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (the ''Act''), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Form N–54C (17 CFR 274.54) under the Investment Company Act of 1940 (15 U.S.C. 80a) is a notification to the Commission that a company withdraws its election to be regulated as a business development company. Such a company only has to file a Form N–54C once.

It is estimated that approximately 12 respondents per year file with the Commission a Form N–54C. Form N–54C requires approximately 1 burden hour per response resulting from creating and filing the information required by the Form. The total burden hours for Form N–54C would be 12 hours per year in the aggregate. The estimated annual burden of 12 hours represents a decrease of 6 hours over the prior estimate of 18 hours. The decrease in burden hours is attributable to a decrease in the number of respondents from 18 to 12.

The estimate of average burden hours for Form N–54C is made solely for the purposes of the Act and is not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (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 respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: November 13, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27580 Filed 11–19–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copy Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213

Extension:

Form N–6F, SEC File No. 270–185, OMB Control No. 3235–0238.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

The title for the collection of information is ''Form N–6F (17 CFR 274.15), Notice of Intent to be Subject to Sections 55 through 65 of the Investment Company Act of 1940.'' The purpose of Form N–6F is to allow business development companies to

take advantage of the less burdensome regulatory provisions available to such companies under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (''1940 Act'').

Certain companies may have to make a filing with the Commission before they are ready to elect to be regulated as a business development company.[1] A company that is excluded from the definition of ''investment company'' by Section 3(c)(1) of the 1940 Act because it has fewer than one hundred shareholders and is not making a public offering of its securities may lose such an exclusion solely because it proposes to make a public offering of securities as a business development company. Such a company, under certain conditions, would not lose its exclusion if it notifies the Commission on Form N–6F of its intent to make an election to be regulated as a business development company. The company only has to file a Form N–6F once.

It is estimated that 6 respondents per year file with the Commission a Form N–6F. Form N–6F requires approximately 0.5 burden hours per response resulting from creating and filing the information required by the Form. The total burden hours for Form N–6F would be 3 hours per year in the aggregate. The estimated annual burden of 3 hours represents an increase from the prior estimate of 1 hour. This increase in burden hours is attributable to an increase in the total number of respondents from 2 to 6.

The estimate of average burden hours for Form N–6F is made solely for the purposes of the Paperwork Reduction Act and is not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms.

Written comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: November 13, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27581 Filed 11–19–08; 8:45 am]

BILLING CODE 8011–01–P

[1] A company might not be prepared to elect to be subject to Sections 55 through 65 of the 1940 Act because its capital structure or management compensation plan is not yet in compliance with the requirements of those sections.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58941; File No. SR–BSE–2008–50]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Enable the Listing and Trading of Options on Index-linked Securities

November 13, 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 November 7, 2008, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Boston Stock Exchange, Inc. (the ''Exchange'' or ''BSE'') proposes to amend Section 3 (Criteria for Underlying Securities) and Section 4 (Withdrawal of Approval of Underlying Securities) of Chapter IV of the Rules of the Boston Options Exchange Group, LLC (''BOX'') to enable the listing and trading on BOX of options on index-linked securities. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room, and also on the Exchange's Internet Web site at *http://nasdaqtrader.com/Trader.aspx?id=Boston_Stock_Exchange*.

[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).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization 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. BSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This proposed rule change is based on proposals by NYSE Arca, Inc. (''NYSE Arca'') and the Chicago Board Options Exchange, Incorporated (''CBOE'').[5]

The purpose of the proposed rule change is to revise Sections 3 and 4 of Chapter IV of the BOX Rules to enable the listing and trading of options on: Equity index-linked securities (''Equity Index-Linked Securities''); commodity-linked securities (''Commodity-Linked Securities''); currency-linked securities (''Currency-Linked Securities''); fixed income index-linked securities (''Fixed Income Index-Linked Securities''); futures-linked securities (''Futures-Linked Securities''); and multifactor index-linked securities (''Multifactor Index-Linked Securities''); collectively known as ''Index-Linked Securities'' that are principally traded on a national securities exchange and are defined as an ''NMS stock'' (as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934 (the ''Act'')).

Index-Linked Securities are designed for investors who desire to participate in a specific market segment by providing exposure to one or more identifiable underlying securities, commodities, currencies, derivative instruments or market indexes of the foregoing (''Underlying Index'' or ''Underlying Indexes''). Index-Linked Securities are the non-convertible debt of an issuer

[5] *See* Exchange Act Release Nos. 58203 (July 22, 2008), 73 FR 43812 (July 28, 2008) (SR–NYSEArca–2008–57) and 58204 (July 22, 2008), 73 FR 43807 (July 28, 2008) (SR–CBOE–2008–64).

that have a term of at least one (1) year but not greater than thirty (30) years. Despite the fact that Index-Linked Securities are linked to an underlying index, each trades as a single, exchange-listed security. Accordingly, rules pertaining to the listing and trading of standard equity options will apply to options on Index-Linked Securities. The Exchange does not propose any changes to rules pertaining to Index Options.

Listing Criteria

The Exchange will consider listing and trading options on Index-Linked Securities provided that the Index-Linked Securities meet the criteria for underlying securities set forth in Section 3 of Chapter IV of the BOX Rules.

The Exchange proposes that Index-Linked Securities deemed appropriate for options trading represent ownership of a security that provides for the payment at maturity, as described below:

• *Equity Index-Linked Securities* are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying index or indexes of equity securities (''Equity Reference Asset'');

• *Commodity-Linked Securities* are securities that provide for the payment at maturity of a cash amount based on the performance of one or more physical commodities or commodity futures, options or other commodity derivatives or Commodity-Based Trust Shares [6] or a basket or index of any of the foregoing (''Commodity Reference Asset'');

• *Currency-Linked Securities* are securities that provide for the payment at maturity of a cash amount based on the performance of one or more currencies, or options or currency futures or other currency derivatives or Currency Trust Shares [7] or a basket or index of any of the foregoing (''Currency Reference Asset'');

• *Fixed Income Index-Linked Securities* are securities that provide for the payment at maturity of a cash amount based on the performance of one or more notes, bonds, debentures or evidence of indebtedness that include, but are not limited to, U.S. Department of Treasury securities (''Treasury Securities''), government-sponsored entity securities (''GSE Securities''), municipal securities, trust preferred securities, supranational debt and debt of a foreign country or a subdivision thereof or a basket or index of any of the foregoing (''Fixed Income Reference Asset'');

• *Futures-Linked Securities* are securities that provide for the payment at maturity of a cash amount based on the performance of an index of (a) futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or options or other derivatives on any of the foregoing; or (b) interest rate futures or options or derivatives on the foregoing in this subparagraph (b) (''Futures Reference Asset''); and

• *Multifactor Index-Linked Securities* are securities that provide for the payment at maturity of a cash amount based on the performance of any combination of two or more Equity Reference Assets, Commodity Reference Assets, Currency Reference Assets, Fixed Income Reference Assets or Futures Reference Assets (''Multifactor Reference Asset'').

For the purposes of proposed Section 3(k) of Chapter IV of the BOX Rules, Equity Reference Assets, Commodity Reference Assets, Currency Reference Assets, Fixed Income Reference Assets, Futures Reference Assets and Multifactor Reference Assets, will be collectively referred to as ''Reference Assets.''

Index-Linked Securities must meet the criteria and guidelines for underlying securities set forth in Section 3(b) of Chapter IV of the BOX Rules, or the Index-Linked Securities must be redeemable at the option of the holder at least on a weekly basis through the issuer at a price related to the applicable underlying Reference Asset. In addition, the issuing company is obligated to issue or repurchase the securities in aggregation units for cash or cash equivalents satisfactory to the issuer of Index-Linked Securities which underlie the option as described in the Index-Linked Securities prospectus.

Continued Listing Requirements

Options on Index-Linked Securities will be subject to all Exchange rules governing the trading of equity options. The current continuing or maintenance listing standards for options traded on BOX will continue to apply.

The Exchange proposes to establish Section 4(k) of Chapter IV of the BOX Rules which will include criteria related to the continued listing of options on Index-Linked Securities.

Under the applicable continued listing criteria in proposed Section 4(k) of Chapter IV of the BOX Rules, options on Index-Linked Securities initially approved for trading pursuant to proposed Section 3(k) of Chapter IV of the BOX Rules may be subject to the suspension of opening transactions as follows: (1) Non-compliance with the terms of Section 3(k) of Chapter IV of the BOX Rules; (2) non-compliance with the terms of Section 4(b) of Chapter IV of the BOX Rules, except in the case of options covering Index-Linked Securities approved pursuant to Section 3(k)(iii)(2) of Chapter IV of the BOX Rules that are redeemable at the option of the holder at least on a weekly basis, then option contracts of the class covering such securities may only continue to be open for trading as long as the securities are listed on a national securities exchange and are an ''NMS stock'' as defined in Rule 600 of Regulation NMS; (3) in the case of any Index-Linked Security trading pursuant to Section 3(k) of Chapter IV of the BOX Rules, the value of the Reference Asset is no longer calculated or available; or (4) such other event shall occur or condition exist that in the opinion of the Exchange makes further dealing in such options on BOX inadvisable.

The Exchange represents that the listing and trading of options on Index-Linked Securities under Section 3(k) of Chapter IV of the BOX Rules will not have any effect on the rules pertaining to position and exercise limits [8] or margin.[9]

The Exchange will implement surveillance procedures for options on Index-Linked Securities, including adequate comprehensive surveillance sharing agreements with markets trading in non-U.S. components, as applicable. The Exchange represents that these procedures will be adequate to properly monitor Exchange trading of options on these securities and to deter and detect violations of Exchange rules.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and

[6] The Exchange proposes to define the term ''Commodity-Based Trust Shares'' in Supplementary Material .01 to Section 3 of Chapter IV of the BOX Rules.

[7] *See* Section 3(i) of Chapter IV of the BOX Rules. The term ''Currency Trust Shares'' is defined as securities that represent interests in a trust that holds a specified non-U.S. currency or currencies deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency or currencies and pays the beneficial owner interest and other distributions on deposited non-U.S. currency or currencies, if any, declared and paid by the trust.

[8] *See* Section 7 of Chapter III of the BOX Rules.

[9] *See* Section 3 of Chapter XIII of the BOX Rules.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rules applicable to trading pursuant to generic listing and trading criteria together with the Exchange's surveillance procedures applicable to trading in the securities covered by the proposed rules, serve to foster investor protection.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of filing (or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest), the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and subparagraph (f)(6) of Rule 19b–4 thereunder.[13]

The Exchange has requested that the Commission waive the 30-day operative delay and designate the proposed rule change as operative upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The proposed rule change is substantially similar to those of other options exchanges that have been previously approved by the Commission [14] and does not appear to present any novel regulatory issues. Therefore, the Commission designates the proposal operative upon filing to enable the Exchange to list and trade options on index-linked securities without delay.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in the 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–BSE–2008–50 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–BSE–2008–50. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BSE–2008–50 and should be submitted on or before December 11, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Acting Secretary.

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[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). The Exchange has satisfied the five-day pre-filing requirement of Rule 19b–4(f)(6)(iii).

[14] *See* Exchange Act Release Nos. 58203 (July 22, 2008), 73 FR 43812 (July 28, 2008) (SR–NYSEArca–2008–57) and 58204 (July 22, 2008), 73 FR 43807 (July 28, 2008) (SR–CBOE–2008–64) (approving the listing and trading of options based on index-linked securities on NYSE Arca and CBOE).

[15] For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58942; File No. SR–BSE–2008–49]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend a Pilot Program That Allows for No Minimum Size Order Requirement for the Price Improvement Period Process on the Boston Options Exchange Facility

November 13, 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 November 5, 2008 the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Exchange filed the 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 from interested persons.

[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).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Supplementary Material to Section 18 (The Price Improvement Period ''PIP'') of Chapter V of the Rules of the Boston Options Exchange Group, LLC (''BOX'') to extend a pilot program that permits BOX to have no minimum size requirement for orders entered into the PIP and under certain circumstances permits the premature termination of the PIP process (''PIP Pilot Program''). The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://nasdaqtrader.com/Trader.aspx?id=Boston_Stock_Exchange*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to extend the PIP Pilot Program under the BOX Rules for eight (8) additional months. The PIP Pilot Program allows BOX to have no minimum size requirement for orders entered into the PIP process and under certain circumstances permits the premature termination of the PIP process.[5] The proposed rule change reflects change to the text of Supplementary Material .01 to Section 18 of Chapter V of the BOX Rules and seeks to extend the operation of the PIP Pilot Program until July 18, 2009. In two places, BOXR will be replaced with BOX to reflect that BOX is submitting the data to the U.S. Securities and Exchange Commission (''Commission''). Although, BOX is submitting the reports, the Exchange notes that it is also responsible for the timeliness and the accuracy of the information.

The Exchange notes that the PIP Pilot Program provides small customer orders with benefits not available under the rules of some other exchanges. One of the important factors of the PIP Pilot Program is that it guarantees Participants the right to trade with their customer orders that are less than 50 contracts. In particular, any order entered into the PIP is guaranteed an execution at the end of the auction at a price at least one penny better than the national best bid or offer.

In further support of this proposed rule change, and as required by the Original PIP Pilot Program Approval Order, BOX has represented to both BSE and to the Commission that it has been submitting to BSE and to the Commission a PIP Pilot Program Report, offering detailed data from, and analysis of, the PIP Pilot Program.

To aid the Commission in its evaluation of the PIP Pilot Program, BOX has represented to BSE that BOX will provide the following additional information each month: (1) The number of orders of 50 contracts or greater entered into the PIP auction; (2) The percentage of all orders of 50 contracts or greater sent to BOX that are entered into BOX's PIP auction; (3) The spread in the option, at the time an order of 50 contracts or greater is submitted to the PIP auction; (4) Of PIP trades for orders of fewer than 50 contracts, the percentage done at the National Best Bid or Offer (''NBBO'') plus $.01, plus $.02, plus $.03, etc.; (5) Of PIP trades for orders of 50 contracts or greater, the percentage done at the NBBO plus $.01, plus $.02, plus $.03, etc.; (6) The number of orders submitted by Order Flow Providers (''OFPs'') when the spread was $.05, $.10, $.15, etc. For each spread, BOX will specify the percentage of contracts in orders of fewer than 50 contracts submitted to BOX's PIP that were traded by: (a) the OFP that submitted the order to the PIP; (b) BOX Market Makers assigned to the class; (c) other BOX Participants; (d) Public Customer Orders (including Customer PIP Orders (''CPOs'')); and (e) unrelated orders (orders in standard increments entered during PIP). For each spread, BOX will also specify the percentage of contracts in orders of 50 contracts or greater submitted to BOX's PIP that were traded by: (a) The OFP that submitted the order to the PIP; (b) BOX Market Makers assigned to the class; (c) other BOX Participants; (d) Public Customer Orders (including CPOs); and (e) unrelated orders (orders in standard increments entered during PIP); (7) For the first Wednesday of each month: (a) The total number of PIP auctions on that date; (b) the number of PIP auctions where the order submitted to the PIP was fewer than 50 contracts; (c) the number of PIP auctions where the order submitted to the PIP was 50 contracts or greater; (d) the number of PIP auctions (for orders of fewer than 50 contracts) with 0 participants (excluding the initiating participant), 1 participant (excluding the initiating participant), 2 participants (excluding the initiating participant), 3 participants (excluding the initiating participant), 4 participants (excluding the initiating participant), etc., and (e) the number of PIP auctions (for orders of 50 contracts or greater) with 0 participants (excluding the initiating participant), 1 participant (excluding the initiating participant), 2 participants (excluding the initiating participant), 3 participants (excluding the initiating participant), 4 participants (excluding the initiating participant), etc.; and (8) For the third Wednesday of each month: (a) The total number of PIP auctions on that date; (b) the number of PIP auctions where the order submitted to the PIP was fewer than 50 contracts; (c) the number of PIP auctions where the order submitted to the PIP was 50 contracts or greater; (d) the number of PIP auctions (for orders of fewer than 50 contracts) with 0 participants (excluding the initiating participant), 1 participant (excluding the initiating participant), 2 participants (excluding the initiating participant), 3 participants (excluding the initiating participant), 4 participants (excluding the initiating participant), etc., and (e) the number of PIP auctions (for orders of 50 contracts or greater) with 0 participants (excluding the initiating participant), 1 participant (excluding the initiating participant), 2 participants (excluding the initiating participant), 3 participants (excluding the initiating participant), 4 participants (excluding the initiating participant), etc.

2. Basis

The Exchange believes that the proposal is consistent with the

[5] The Pilot Program is currently set to expire on November 18, 2008. *See* Securities Exchange Act Release No. 58195 (July 18, 2008), 73 FR 43801 (July 28, 2008) (SR–BSE–2008–39); *See also* Securities Exchange Act Release No. 55999 (July 2, 2007), 72 FR 37549 (July 10, 2007) (SR–BSE–2007–27); *See also* Securities Exchange Act Release No. 54066 (June 29, 2006), 71 FR 38434 (July 6, 2006) (SR–BSE–2006–24); *See also* Securities Exchange Act Release No. 52149 (July 28, 2005), 70 FR 44704 (August 3, 2005) (SR–BSE–2005–22); *See also* Securities Exchange Act Release No. 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (SR–BSE–2002–15) (''Original PIP Pilot Program Approval Order''). *See also* Securities Exchange Act Release No. 51821 (June 10, 2005), 70 FR 35143 (June 16, 2005) (SR–BSE–2004–51) (Order approving, among other things, under certain circumstances the premature termination of a PIP process).

requirements of Section 6(b) of the Act,[6] in general, and Section 6(b)(5) of the Act,[7] in particular, in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the data demonstrates that there is sufficient investor interest and demand to extend the PIP Pilot Program for an additional eight (8) months. The Exchange represents that the Pilot Program is designed to provide investors with real and significant price improvement regardless of the size of the order.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this 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)[8] of the Act and Rule 19b–4(f)(6) thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay, which would make the rule change operative upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the PIP pilot program to continue without interruption.[10] Accordingly, the Commission designates the proposed rule change operative upon filing with the Commission.[11]

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–BSE–2008–49 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–BSE–2008–49. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. 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–BSE–2008–49 and should be submitted on or before December 11, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Acting Secretary.

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[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] For purposes only of waiving the 30-day operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of the filing of the proposed rule change.

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58940; File No. SR–ISE–2008–83]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Market Maker Trading Licenses for Foreign Currency Options

November 13, 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 November 7, 2008, the International Securities Exchange, LLC (''Exchange'' or ''ISE'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify its Rule 2213, Market Maker Trading Licenses, related to listing and trading of Foreign Currency Options on the Exchange. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify its Rule 2213, Market Maker Trading Licenses, related to listing and trading of Foreign Currency Options (''FX Options'') on the Exchange. ISE currently lists for trading FX Options on six of the most active currency pairs.[3] Under the Exchange's current FX options rules, FX primary market makers (''FXPMMs'') are required to purchase, through an auction, a three-year trading license, and provide market quality commitments to ISE, to make a market in a particular FX currency pair.[4] At the end of the three-year term, each currency pair is once again auctioned with the incumbent FXPMM of a currency pair retaining the right of first refusal to match the highest bid and market quality commitment to retain its status as a FXPMM in that currency pair.

The Exchange now proposes to amend its FXPMM trading license rule for trading licenses sold on or after January 1, 2009.[5] Specifically, ISE proposes to revise its current auction such that, beginning January 1, 2009, allocation of currency pairs and currency indexes to FX market makers shall be on a permanent basis. The proposed revised auction will be substantially the same as the existing auction in that the allocation of a FX currency pair will still be based on market quality commitments[6] and dollar bid amount[7] submitted by prospective FXPMMs; the only difference being that currency pairs, going forward, will be permanently allocated to FXPMMs rather than for a three-year term. Under this proposal, FXPMMs that are selected by the Exchange pursuant to the auction process will be required to pay ISE the winning bid amount annually for as long as the member chooses to remain a FXPMM in a currency pair. ISE will continue to measure, as it does now, market quality commitments on a quarterly basis to ensure FXPMMs are in compliance with their stated commitments. Continuous failure to meet stated commitments will result in ISE terminating an allocation and conducting an auction to reallocate the failing FXPMM's currency pair and/or FX index option to another FXPMM.

Under both the current rule and the proposal, a FXPMM cannot terminate its trading license. The Exchange notes, however, that there may be instances when a Member is unable to fulfill its market making obligations. For example, a Member may experience connectivity issues that prevent the Member from being in the market, e.g., the Member is unable to quote and trade in the currency pair in which it makes a market. For those instances, the Exchange will rely on the back-up FXPMM, who is selected at the time of the initial auction, to serve as a FXPMM on a temporary basis until the FXPMM is fully back in the market. Further, there may also be instances where a FXPMM determines that it is unable to fulfill its obligations as a market maker and can no longer serve as a FXPMM. For those instances, ISE will relieve that FXPMM of its obligation once all open interest in the product to which that Member was appointed has been closed out or the Exchange is able to conduct a successful auction and reallocate the product, whichever occurs first.

All of the currency pairs that are currently trading on the Exchange already have a market maker. Specifically, the four currency pairs listed for trading on April 17, 2007, e.g., USD/EUR, USD/GBP, USD/JPY, and USD/CAD, were allocated to the market maker that currently serves as a FXPMM for a three (3) year term, ending in December 2010. On February 21, 2008, the Exchange launched 2 additional currency pairs, e.g., USD/CHF and USD/AUD, which were allocated to the market maker that currently serves as a FXPMM for a three (3) year term also, ending in December 2011. ISE will allocate USD/GBP, USD/CAD, USD/EUR, and USD/JPY in December 2010 and USD/CHF and USD/AUD in December 2011[8] on a permanent basis, pursuant to proposed rule 2213(f)(ii). Until such time, the instant proposal will not affect the status of those FXPMMs. The Exchange anticipates utilizing the new auction process when it solicits a market maker for additional currency pairs the Exchange will list at a future date and for a proprietary foreign currency index which the Exchange expects to launch in 2009, pending a filing and approval of a proposed rule change by the Commission. In anticipation of creating a foreign currency index, the Exchange is also proposing to amend its current Rule 802 by adding ''foreign currency indexes'' to the definition of ''Index-Based Products.''

The Exchange believes giving market makers a trading license on a permanent basis, or as long as a firm wishes to remain a market maker in a currency product, will result in a more competitive market at ISE. A permanent allocation will allow FXPMMs to create and execute a long-term strategy to promote growth and trading in the foreign currency product that has been allocated to it.

The Exchange also proposes to make minor amendments to Rule 2213(g) to include references to foreign currency index options. Specifically, the Exchange proposes to add rule text to

[3] Options on the following currency pairs are currently listed for trading on ISE: USD/AUD, USD/GBP, USD/CAD, USD/EUR, USD/CHF, and USD/JPY.

[4] *See* ISE Rule 2213(f)(1).

[5] While the Exchange's current rule for FXPMMs, which applies for trading licenses sold prior to January 1, 2009, shall remain unchanged under this proposal, the Exchange notes that after January 1, 2009, the current rule will no longer be applicable because all foreign currency product auctions after January 1, 2009, shall be conducted pursuant to the rules proposed in this filing. The Exchange will submit a proposed rule change after January 1, 2009 to delete the current rule for FXPMMs.

[6] A Member seeking a FXPMM trading license will continue to be required to provide, at a minimum, market quality commitments regarding (i) the average quotation size it will disseminate in the foreign currency option, and (ii) the maximum quotation spread it will disseminate in such product at least ninety percent (90%) of the time. *See* ISE Rule 2213(f)(2).

[7] The minimum Reserve Price shall continue to be $5,000 per year. *See* ISE Rule 2213(f)(1).

[8] *See* ISE Rule 2213(f)(7). The auction for USD/EUR was conducted on February 26, 2007; for USD/GBP on March 5, 2007; for USD/JPY on March 12, 2007; for USD/CAD on March 19, 2007; for USD/CHF on February 21, 2008 and for USD/AUD on February 21, 2008 also.

indicate that in addition to there being ten (10) FXCMMs for each currency pair listed for trading by the Exchange, there shall also be ten (10) FXCMMs for each foreign currency index option the Exchange may list in the future and that the Exchange will conduct one (1) FXCMM trading license auction per each currency pair and per each foreign currency index option. Finally, members will be limited to holding no more than one (1) FXCMM trading license per currency pair and no more than one (1) FXCMM trading license per foreign currency index option.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the proposed rule change will strengthen the Exchange's foreign currency products by providing them with permanent market making support. A permanent allocation of foreign currency products will also allow FXPMMs to create and execute a long-term strategy to promote growth and trading in the foreign currency product that has been allocated to it.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

This proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, 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 Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing the proposed rule change as required by Rule 19b–4(f)(6).[9] For the foregoing reasons, the Exchange believes the proposed rule filing qualifies for immediate effectiveness as a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 of the Act.

The proposed rule change does not make any substantive changes to the current rule other than to make allocations of FX Options to market makers permanent. In doing so, the proposed rule change will strengthen the Exchange's foreign currency products to the benefit of all market participants. For the foregoing reason, the Exchange believes the proposed rule change is non-controversial, does not raise any new, unique or substantive issues, and is beneficial for competitive purposes and to promote a free and open market for the benefit of investors.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2008–83 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–ISE–2008–83. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2008–83 and should be submitted on or before December 11, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27597 Filed 11–19–08; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58943; File No. SR–Phlx–2008–78]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Temporarily Increasing the Number of Additional Quarterly Option Series in Exchange-Traded Fund Options

November 13, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 12, 2008, NASDAQ OMX PHLX, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Section 19(b)(1) of the Act [3] and Rule 19b–4 thereunder,[4] proposes to amend Phlx Rule 1012, Series of Options Open for Trading, to temporarily increase the number of additional Quarterly Option Series (''QOS'') in exchange-traded fund (''ETF'') options from sixty (60) to one hundred (100) that may be added by the Exchange pursuant to Phlx's QOS pilot program (the ''Pilot Program'') [5].

The text of the proposed rule change is available on the Exchange's Web site at *http://www.phlx.com/regulatory/reg_rulefilings.aspx*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This proposed rule change is based on a recent Chicago Board Options Exchange, Incorporated (''CBOE'') filing.[6]

The purpose of this proposed rule change is to temporarily increase the number of additional QOS in ETF options from sixty (60) to one hundred (100) that may be added by the Exchange. To effect this change, the Exchange is proposing to add new subparagraph (h) to Commentary .08 of its Rule 1012.

Because of the current, unprecedented market conditions, the Exchange has received requests from market participants to add lower priced strikes for QOS in the Energy Select Sector SPDR (''XLE''), the DIAMONDS Trust, Series 1 (''DIA'') and the Standard and Poor's Depositary Receipts/SPDRs (''SPY''). For example, for December 2008 expiration, there is demand for strikes (a) ranging from $20 up through and including $40 for XLE, (b) ranging from $60 up through and including $75 for DIA, and (c) ranging from $74 up through and including $85 for SPY. These strikes are much lower than those currently listed for which there is open interest.

However, under current Commentary .08 to Phlx Rule 1012, the Exchange cannot honor these requests because the maximum number of additional series, sixty (60), has already been listed. The Exchange is therefore seeking to temporarily increase to one hundred (100) the number of additional QOS that may be added. The increase of additional series would be permitted immediately for expiration months currently listed and for expiration months added throughout the last quarter of 2008, including the new expiration month added after December 2008 expiration. The Exchange believes that this proposal is reasonable and will allow for more efficient risk management. The Exchange believes this proposal will facilitate the functioning of the Exchange's market and will not harm investors or the public interest.

The Exchange believes that user demand and the recent downward price movements in the underlying ETFs warrant a temporary increase in the number of strikes for all QOS in ETF options. Currently, the Exchange list QOS in five ETF options: (1) iShares Russell 2000Index Fund (''IWM''); (2) Nasdaq-100 Index Tracking Stock (''QQQQ''); (3) SPY; (4) DIA; and (5) XLE. The chart below provides the historical closing prices of these ETFs over the past couple of months:

ETF	10/27/08	10/13/08	10/6/08	9/30/08	8/29/08	7/31/08
IWM	44.86	56.98	59.72	68.00	73.87	71.32
QQQQ	28.69	35.13	34.86	38.91	46.12	45.46
SPY	83.95	101.35	104.72	115.99	128.79	126.83
DIA	80.26	95.03	99.90	108.36	115.45	113.70
XLE	40.86	50.55	54.89	63.30	74.65	74.40

The additional series will enable the Exchange to list in-demand, lower priced strikes.

It is expected that other options exchanges that have adopted the QOS Pilot Program will submit similar proposals.[7]

The Exchange represents that it has the necessary systems capacity to support the new options series that will result from this proposal. Further, as proposed, the Exchange notes that these series would temporarily become part of the pilot program and will be considered by the Commission when the Exchange seeks to renew or make permanent the Pilot Program in the future. In addition, the Exchange states that in the event that current market volatility continues, it may seek to continue (through a rule filing) the time period during which the additional series proposed by this filing may be added.

2. Statutory Basis

Because the rule proposal is responsive to the current, unprecedented market conditions, is limited in scope as to QOS in ETF options and as to time, and because the additional new series can be added without presenting capacity problems, the Exchange believes the rule proposal is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange and, in

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

[5] Phlx's Pilot Program was established in 2007, *see* Securities Exchange Act Release No. 55301 (February 15, 2007), 72 FR 8238 (February 23, 2007)(SR–Phlx–2007–08), and extended through July 10, 2009, *see* Securities Exchange Act Release No. 58039 (June 26, 2008), 73 FR 38284 (July 3, 2008)(SR–Phlx–2008–44). The American Stock Exchange LLC (''AMEX''), the Boston Stock Exchange, Inc. (''BSE''), the Chicago Board Options Exchange, Incorporated (''CBOE''), the International Stock Exchange LLC (''ISE''), the Nasdaq Stock Market LLC (''NOM''), and NYSEArca, Inc. (''NYSEArca,'' formerly the Pacific Stock Exchange, Inc. or ''PCX'') have similar pilot programs (the pilot programs, together with Phlx's Pilot Program, are together known as the ''QOS Pilot Programs'').

[6] *See* Securities Exchange Act Release No. 58887 (October 30, 2008), 73 FR 66083 (November 6, 2008)(SR–CBOE–2008–111).

[7] *See e.g.*, Securities Exchange Act Release No. 58926 (November 10, 2008) (SR–ISE–2008–82).

particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes that the proposed rule change is consistent with the Section 6(b)(5) of the Act[9] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; or (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, 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]

The Exchange has asked the Commission to waive the operative delay to permit the proposed rule change to become operative prior to the 30th day after filing. The Commission has determined that waiving the 30-day operative delay of the Exchange's proposal is consistent with the protection of investors and the public interest because such waiver will enable the Exchange to better meet customer demand in light of recent increased volatility in the marketplace.[12] Therefore, the Commission designates the proposal operative upon filing.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–Phlx–2008–78 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–Phlx–2008–78. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–Phlx–2008–78 and should be submitted on or before December 11, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27578 Filed 11–19–08; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission deems this requirement to be met.

[12] 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. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58953; File No. SR–NSX–2008–20]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend NSX Rule 11.23(a) Which Defines the Phrase ''Riskless Principal Transaction''

November 14, 2008.

Pursuant to section 19(b)(3)(A) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 13, 2008, National Stock Exchange, Inc. (''NSX®'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change, as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comment on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NSX Rule 11.23(a), which defines the phrase ''riskless principal transaction,'' to make clear that the definition includes transactions where an ETP Holder receives orders that may be executed in whole or in part in other market venues. As explained in further detail below, this amendment will clarify the scope of the exception to NSX's Customer Priority rule contained in Rule 12.6(d), and will more closely align NSX's rules with those used by other self-regulatory organizations (''SROs'').

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NSX Rule 12.6 prohibits an ETP Holder from placing an order for its own account (or an account in which it or one of its associated persons is interested) while it holds an unexecuted, marketable customer order for the same security, unless an exception applies. Specifically, Rule 12.6 provides:

(a) No ETP Holder shall (i) personally buy or initiate the purchase of any security traded on the Exchange for its own account or for any account in which it or any associated person of the ETP Holder is directly or indirectly interested while such an ETP Holder holds or has knowledge that any person associated with it holds an unexecuted market order to buy such security in the unit of trading for a customer, or (ii) sell or initiate the sale of any such security for any such account while it personally holds or has knowledge that any person associated with it holds an unexecuted market order to sell such security in the unit of trading for a customer.

(b) No ETP Holder shall (i) buy or initiate the purchase of any such security for any account in which it or any associated person of the ETP Holder is directly or indirectly interested at or below the price at which it personally holds or has knowledge that any person associated with it holds an unexecuted limited price order to buy such security in the unit of trading for a customer or (ii) sell or initiate the sale of any such security for any such account at or above the price at which it personally holds or has knowledge that any person associated with it holds an unexecuted limited price order to sell such security in the unit of trading for a customer.

Rule 12.6(d) provides an exception to provisions (a) and (b) where ''an ETP Holder engages in trading activity to facilitate the execution, on a riskless principal basis, of another order from its customer * * * *provided that the requirements of Rule 11.23 are satisfied* * * * .'' (emphasis added.) Thus, to meet the exception in Rule 12.6(d), an ETP Holder also must comply with Rule 11.23. In turn, Rule 11.23(a) defines the phrase ''riskless principal transaction'' to mean:

> Two offsetting principal transaction legs in which an ETP Holder, (i) after having received an order to buy a security *that it holds for execution on the Exchange*, purchases the security as principal at the same price, exclusive of markups, markdowns, commissions and other fees, to satisfy all or a portion of the order to buy or (ii) after having received an order to sell a security *that it holds for execution on the Exchange*, sells the security as principal at the same price, exclusive of markups, markdowns, commissions and other fees, to satisfy all or a portion of the order to sell.

(emphasis added.)

Therefore, if an ETP Holder receives an order to buy or sell a security, but does not hold that order for execution *on the Exchange*, any resulting transaction might not meet the definition of a riskless principal transaction in Rule 11.23(a). For the same reason, such a transaction also might not meet the exception in Rule 12.6(d).

In addition, it is unclear whether an order submitted to a ETP Holder without a designated marketplace for execution could be ''[held] for execution on the Exchange,'' particularly where the ETP Holder executes the first leg of what generally would be considered a riskless principal transaction on a market other than the Exchange and completes the transaction with its customer on the Exchange. Because the customer has not designated where the order should be executed, and because the first leg of the order was in fact executed off the Exchange, such an order might not be viewed as being ''[held] for execution on the Exchange.'' Accordingly, the transaction might not be a ''riskless principal transaction'' within the meaning of Rule 11.23(a) and, therefore, might not satisfy the exception contained in Rule 12.6(d), even if the transaction was done to facilitate a customer order.

NSX proposes to remove the requirement that an order be ''[held] for execution on the Exchange'' from the definition of a ''riskless principal transaction'' in Rule 11.23(a) to permit the type of transaction described above to qualify as a ''riskless principal transaction'' and, where the other requirements are met, to meet the exception in Rule 12.6(d). The exception in Rule 12.6(d) is designed to allow ETP Holders to place proprietary trades ahead of customer orders only where such proprietary trades are for the benefit of a customer. This exception recognizes that, in some instances, an ETP Holder's nominal trading ahead may nevertheless benefit, rather than harm, a customer. It makes no difference to this analysis whether the customer specified that its order was to be executed on the Exchange, or whether the order can be characterized as being ''[held] for execution on the Exchange.''

Amended Rule 11.23(a) also would be consistent with other SRO rules. For example, Financial Industry Regulatory Authority (''FINRA'') NASD Rule 2111 and IM–2110–2 both allow a firm to trade ahead of a customer order if, among other things, the member's proprietary trade is a riskless principal transaction, as defined in various NASD rules, that is used to facilitate a customer order. The definition of a riskless principal transaction in NASD rules is substantially similar to the definition in NSX Rule 11.23(a) except, of course, that it is not limited to orders held for execution on any particular securities exchange or in any particular venue.[3] New York Stock Exchange (''NYSE'') Rule 92 also allows firms to trade ahead of customer orders where the firm's proprietary order is a riskless principal transaction designed to facilitate a customer order. NYSE Rule 92 does not require that an order be held for execution on the NYSE or any other venue or securities exchange to qualify for this exception.[4] Amending Rule 11.23(a) will therefore make NSX rules consistent with analogous SRO rules.

Statutory Basis

The Exchange believes that the proposed rule change is consistent with

[3] *See*, e.g., NASD Rule 4632(d)(3)(B) (defining a riskless principal transaction as a ''transaction in which a member after having received an order to buy a security, purchases the security as principal at the same price to satisfy the order to buy or, after having received an order to sell, sells the security as principal at the same price to satisfy the order to sell'') (cited in NASD Rule 2111(f)(1) and IM–2110–2).

[4] NYSE Rule 92(c)(1) (''The facilitated order must be a 'riskless principal transaction,' which is when a member or member organization, after having received an order to buy a security, purchases the security as principal at the same price to satisfy the order to buy or, after having received an order to sell, sells the security as principal at the same price to satisfy the order to sell.'')

the provisions of Section 6(b) of the Securities Exchange Act of 1934 (''Act''),[5] which requires, among other things, that NSX Rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The proposed rule change will clarify the application of Rule 12.6(d) and will more closely align that rule with the rules of other SROs.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change will take effect 30 days from the date of filing (or such shorter time as the Commission may designate) pursuant to Section 19(b)(3)(A)(ii) of the Act[6] and subparagraph (f)(6) of Rule 19b–4[7] thereunder, because the proposal: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the filing date of the proposed rule change.[8]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[9]

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–NSX–2008–20 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–NSX–2008–20. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NSX. 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–NSX–2008–20 and should be submitted on or before December 11, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–27579 Filed 11–19–08; 8:45 am]

BILLING CODE 8011–01–P

[5] 78 U.S.C. 78f(b).

[6] 15 U.S.C. 78s(b)(3)(A)(ii).

[7] 17 CFR 240.19b–4.

[8] As required under Rule 19b–4(f)(6)(iii), NSX provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date.

[9] 15 U.S.C. 78s(b)(3)(C).

[10] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11487]

Indiana Disaster Number IN–00027

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Indiana (FEMA–1795–DR), dated 09/23/2008.

Incident: Severe Storms and Flooding.

Incident Period: 09/12/2008 through 10/06/2008.

Effective Date: 11/07/2008.

Physical Loan Application Deadline Date: 11/24/2008.

Economic Injury (EIDL) Loan Application Deadline Date: 06/23/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Indiana, dated 09/23/2008, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Daviess, La Porte.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E8–27551 Filed 11–19–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11524]

Kansas Disaster # KS–00032

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Kansas (FEMA–1808–DR), dated 10/31/2008.

Incident: Severe Storms, Flooding, and Tornadoes.

Incident Period: 09/11/2008 through 09/17/2008.

Effective Date: 10/31/2008.

Physical Loan Application Deadline Date: 12/30/2008.

Economic Injury (Eidl) Loan Application Deadline Date: 07/31/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 10/31/2008, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Anderson, Butler, Chase, Cowley, Greenwood, Harper, Harvey, Russell, Sumner.

The Interest Rates are:

	Percent
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.250
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage and for economic injury is 11524.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E8–27549 Filed 11–19–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11525 and # 11526]

Missouri Disaster # MO–00033

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Missouri (FEMA–1809–DR), dated 11/13/2008.

Incident: Severe Storms, Flooding, and a Tornado.

Incident Period: 09/11/2008 through 09/24/2008.

Effective Date: 11/13/2008.

Physical Loan Application Deadline Date: 01/12/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 08/13/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 11/13/2008, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Boone, Callaway, Chariton, Lewis, Lincoln, Linn, Marion, Osage, Saint Charles, Saint Louis, Saint Louis City, Schuyler, Stone, Taney, Texas, Webster.

Contiguous Counties (Economic Injury Loans Only):

Missouri: Adair, Audrain, Barry, Carroll, Christian, Clark, Cole, Cooper, Dallas, Dent, Douglas, Franklin, Gasconade, Greene, Grundy, Howard, Howell, Jefferson, Knox, Laclede, Lawrence, Livingston, Macon, Maries, Miller, Moniteau, Monroe, Montgomery, Ozark, Phelps, Pike, Pulaski, Putnam, Ralls, Randolph, Saline, Scotland, Shannon, Shelby, Sullivan, Warren, Wright.

Arkansas: Boone, Carroll, Marion.

Iowa: Appanoose, Davis.

Illinois: Adams, Calhoun, Hancock, Jersey, Madison, Monroe, Pike, Saint Clair.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	5.750
Homeowners Without Credit Available Elsewhere	2.875
Businesses With Credit Available Elsewhere	8.000
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.250
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11525B and for economic injury is 115260.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E8–27545 Filed 11–19–08; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11513]

U.S. Virgin Islands Disaster Number VI–00002

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of U.S. Virgin Islands (FEMA–1807–DR), dated 10/29/2008.

Incident: Hurricane Omar.

Incident Period: 10/14/2008 through 10/16/2008.

Effective Date: 11/10/2008.

Physical Loan Application Deadline Date: 12/28/2008.

Economic Injury (EIDL) Loan Application Deadline Date: 07/29/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster

declaration for Private Non-Profit organizations in the State of U.S. Virgin Islands, dated 10/29/2008, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Saint John.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E8–27550 Filed 11–19–08; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2006–25709, Notice No. 93–87; Docket No. FAA–2008–0517, Notice No. 08–05]

Congestion Management Rules for John F. Kennedy International Airport, Newark Liberty International Airport, and LaGuardia Airport

AGENCY: Federal Aviation Administration.

ACTION: Notice of Slot Auction Bidder Seminar.

SUMMARY: This notice announces a Bidder Seminar for the 2009 New York Slot Auctions, pursuant to the Federal Aviation Administration's congestion management rules for John F. Kennedy International Airport, Newark Liberty International Airport, and LaGuardia Airport (Final Congestion Rules).

[Docket No. FAA–2008–0517, Notice No. 08–05 *and* Docket No. FAA–2006–25709, Notice No. 93–87].

DATES: The Slot Auction Bidder Seminar is scheduled for Friday, December 5, 2008, from 8:30 a.m. to 1 p.m., Eastern Time.

ADDRESSES: The Slot Auction Bidder Seminar will be held at the Marriott Crystal Gateway, 1700 Jefferson Davis Highway, Arlington, VA 22202 (in Crystal City, 5–10 minutes from Washington Reagan National Airport).

FOR FURTHER INFORMATION, TO RSVP OR TO CONTACT THE AGENCY REGARDING THE MEETING: Jeffrey Wharff, Office of Aviation Policy & Plans, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591; *Phone* 202–267–3274; *Fax:* (202) 267–3278; *E-mail: Jeffrey.Wharff@faa.gov*.

To Contact the Auction Manager Regarding the Seminar: Power Auctions LLC, 1000 Potomac Street, NW., Washington, DC 20007; *Phone* 202–342–0909; *Fax:* 202–379–9054; *E-mail: slots@powerauctions.com*. Additional information about the auction can be found at: *https://www.slotauction.com/bidder-seminar*.

SUPPLEMENTARY INFORMATION:

The purpose of the Slot Auction Bidder Seminar is to provide information to all interested parties concerning the congestion management rules for LaGuardia, Kennedy and Newark Airports, what is being auctioned, how an applicant can participate in the auctions, and the associated schedule of events. It will also give attendees the opportunity to ask questions. Key individuals from the Federal Aviation Administration (FAA) and from Power Auctions LLC and Market Design Inc. (PA/MDI), the auction manager, will speak at the seminar.

The Bidder Seminar is open to carriers that currently have slots at the three airports, other carriers that are interested in bidding, the Port Authority of New York and New Jersey, and other government agencies. Each organization should limit its participation to no more than five individuals.

A limited number of hotel rooms at the Marriott Crystal Gateway at $189 per night (singles or doubles) have been reserved for the night of December 4 for Bidder Seminar participants. Individuals should call the hotel at (703) 920–3230 and indicate that they are part of the ''FAA Bidder Seminar'' group. The block of hotel rooms will be held only until November 28 (or until the rooms are all reserved) and participants are advised to book early to avoid disappointment.

RSVPs for the Bidder Seminar are requested by November 28, 2008. Space at the Bidder Seminar is limited so seats are only guaranteed to those persons who RSVP.

Persons with a disability requiring special accommodations, such as an interpreter for the hearing impaired, should contact the FAA contact noted above at least ten (10) calendar days prior to the meeting.

A preliminary agenda is provided below. Information is also available at *https://www.slotauction.com/bidder-seminar*.

Time	Item
8–8:30 a.m.	Registration
8:30–8:50 a.m.	Introduction —Opening comments. —Background to the FAA Slot Auctions and rationale.
8:50–9:15 a.m.	The Slots —Description of what is being offered in the Auctions (exact slot times will not be identified at this time). —Key parameters of the slots.
9:15–10:40 a.m.	The Auction and the Auction Manager —Background on PA/MDI and its role in the Auctions. —The auction methodology and rationale. —Determining the winners of slots. —Determining the prices paid for slots.
10:40–11 a.m.	Break
11–11:30 a.m.	The Auction Software System —How to bid in the Auction. —Overview of the Auction System. —System requirements to access the Auction System.
11:30 a.m.–12 noon	Process leading up to the Auctions and post-auction process —Key dates. —Submission of Expression of Interest. —Submission of bidder deposits. —Receipt of username and password. —Training: Mock auctions.

Time	Item
12 noon–12:45 p.m.	—Live auction. —Post-auction process.
12:45–1:00 p.m.	Q&A Closing comments, including: —Next steps. —Contact details for help-desk.

Robert Robeson,

Manager, Systems & Policy Analysis Division.

[FR Doc. E8–27593 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Eleventh Meeting, Special Committee 215 Aeronautical Mobile Satellite (Route) Services, Next Generation Satellite Services and Equipment

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 215, Aeronautical Mobile Satellite (Route) Services, Next Generation Satellite Services and Equipment.

SUMMARY: The FAA is issuing this notice to advise the public of a second meeting of RTCA Special Committee 215, Aeronautical Mobile Satellite (Route) Services, Next Generation Satellite Services and Equipment.

DATES: The meeting will be held December 10, 2008, 9 a.m. to 5 p.m. December 11, 2008, 9 a.m. to 12 noon.

ADDRESSES: RTCA Headquarters, 1828 L Street, NW, Washington, DC 20036; USA, Tel: + 1 202 833–9339, Fax: + 1 202 833–9434, *http://www.rtca.org*

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW, Suite 805, Washington, DC 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org* for directions. For additional details contact: Kelly O'Keefe, Tel: + 1 202 772–1873, e-mail: *Kelly@accesspartnership.com*

Note: Dress is Business Casual

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 215 meeting. The agenda will include:

December 10, 2008

Opening Plenary Session

- Greetings, Introductions, Administrative Remarks
- Review and Approval of Agenda for 11th Plenary
- Terms of Reference and PMC Chairman's Report—Status Review
- Review and Approval of 10th Meeting Summary

DO–262 Normative Appendix

- Status Update of Final Draft
- PMC Approval of Final Draft

DO–270 Normative Appendix

- Report from Drafting Group
- Approval of DO–270 Normative Appendix for Final Review and Comment (FRAC)
- Sub network Operational Approval—FAA Requirements for DO–270

December 11, 2008

Closing Plenary

- Any Other Business
- Review of Next Plenary Meeting Dates
- Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC on November 12, 2008.

Edward Harris,

RTCA Advisory Committee.

[FR Doc. E8–27542 Filed 11–19–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–55 (Sub-No. 691X)]

CSX Transportation, Inc.—Abandonment Exemption—in Worcester County, MA

CSX Transportation, Inc. (CSXT), has filed a verified notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon a 4.2-mile line of railroad between milepost QBU 0.0 (Fitchburg) and milepost QBU 4.2 (Leominster), in Worcester County, MA (the line).[1] The line traverses United States Postal Service Zip Codes 01420 and 01453.

CSXT has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of a complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental report), 49 CFR 1105.8 (historic report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on December 20, 2008, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[2] formal expressions of intent to

[1] By notice served and published in the **Federal Register** on May 30, 2002 (67 FR 37911), CSXT and New York Central Lines, LLC (NYC), were previously granted abandonment authority for the line under STB Docket Nos. AB–565 (Sub-No. 10X) and AB–55 (Sub-No. 616X). CSXT states that it is re-filing pursuant to 49 CFR 1152.29(e)(2) because the abandonment authority has lapsed. CSXT is NYC's successor by merger. *See CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation,* STB Finance Docket No. 33388 (Sub-No. 94) (STB served Nov. 7, 2003).

[2] The Board will grant a stay if an informed decision on environmental issues (whether raised

Continued

file an OFA under 49 CFR 1152.27(c)(2),[3] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by December 1, 2008. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by December 10, 2008, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CSXT's representative: Kathryn R. Barney, CSX Transportation, Inc., 500 Water Street, J–150, Jacksonville, FL 32202.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

CSXT has filed environmental and historic reports that address the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by November 25, 2008. Interested persons may obtain a copy of the EA by writing to SEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 245–0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), CSXT shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by CSXT's filing of a notice of consummation by November 20, 2009, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: November 13, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E8–27418 Filed 11–19–08; 8:45 am]

BILLING CODE 4915–01–P

by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[3] Effective July 18, 2008, the filing fee for an OFA increased to $1,500. *See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services—2008 Update,* STB Ex Parte No. 542 (Sub-No. 15) (STB served June 18, 2008).

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 14, 2008.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, and 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before December 22, 2008 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–2103.

Type of Review: Extension.

Title: REG–146895–05—Election to Expense Certain Refineries (NPRM); TD 9412 (Temp. Regs.).

Description: The regulations provide guidance with respect to section 179C, which provides a taxpayer can elect to treat 50% of the cost of ''qualified refiner property'' as a deductible expense not chargeable to capital account. The taxpayer may not claim a deduction under section 179C for any taxable year unless the taxpayer files a report with the Secretary containing information with respect to the operation of the taxpayer's refinery. The report must specify (i) the name and address of the refinery; (ii) which production capacity requirement under section 179C(e) the taxpayer's qualified refinery qualifies under; (iii) whether the production capacity requirements of section 179C(e)(1) or 179C(e)(2) have been met. The regulations also provide that if the taxpayer is a cooperative described in section 1381, and one or more persons directly holding an ownership interest in the taxpayer are organizations described in section 1381, the taxpayer/cooperative can elect to allocate all or a portion of the deduction allowable under section 179C to those persons. If the taxpayer cooperative makes such an election, it must provide written notice of the amount of the allocation to any owner receiving an allocation by written notice on Form 1099–PAT ''Taxable Distributions Received from Cooperatives.'' The collection of information in the proposed and temporary regulations involves a written notice.

Respondents: Private Sector.

Estimated Total Burden Hours: 120 hours.

OMB Number: 1545–1002.

Type of Review: Extension.

Form: 8621.

Title: Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund.

Description: Form 8621 is Filed by a U.S. shareholder who owns stock in a foreign investment company. The form is used to report income, make an election to extend the time for payment of tax, and to pay an additional tax and interest amount. The IRS uses Form 8621 to determine if these shareholders have correctly reported amounts of income, made the election correctly, and have correctly computed the additional tax and interest amount.

Respondents: Private Sector.

Estimated Total Burden Hours: 42,003 hours.

OMB Number: 1545–1421.

Type of Review: Extension.

Title: IA–62–93 (Final) Certain Elections Under the Omnibus Budget Reconcillation Act of 1993.

Description: These regulations establish various elections enacted by the Omnibus Budget Reconcillation Act of 1993 (Act). The regulations provide guidance that enable taxpayers to take advantage of various benefits provided by the Act and the Internal Revenue Code.

Respondents: Private Sector.

Estimated Total Burden Hours: 202,500 hours.

OMB Number: 1545–1500.

Type of Review: Extension.

Form: 8850.

Title: Pre-Screening Notice and Certification Request for the Work Opportunity and Welfare-to-Work Credits.

Description: A job applicant completes and signs, under penalties of perjury, the top portion of the form to indicate that he or she is a member of a targeted group. If the employer has a belief that the applicant is a member of a targeted group, the employer signs the other portion of the form under penalties of perjury and submits it to the SESA as part of a written request for certification.

Respondents: Private Sector.
Estimated Total Burden Hours: 1,596,000 hours.

OMB Number: 1545–0143.
Type of Review: Extension.
Form: 2290–SP, 2290, 2290–FR.
Title: Heavy Highway Vehicle Use Tax Return.
Description: Form 2290 is used to compute and report the tax imposed by section 4481 on the highway use of certain motor vehicles. The information is used to determine whether the taxpayer has paid the correct amount of tax.
Respondents: Private Sector.
Estimated Total Burden Hours: 27,548,640 hours.

OMB Number: 1545–1686.
Type of Review: Extension.
Form: 13976.
Title: REG–103043–05 (Final) Material Advisor of Reportable Transaction Must Keep List of Advisees, etc. (previously REG–103736–00, Requirement to Maintain List of Investors in Potentially Abusive Tax Shelte.
Description: The regulations provide guidance on the requirement under section 6112 to maintain a list of investors in potentially abusive tax shelters. As per regulations section 301.6112–1(b)(1), the form provides material advisors a format for preparing and maintaining the itemized statement component of the list with respect to a reportable transaction. This form contains space for all of the elements required by regulations section 301.6112–1(b)(3)(i). Material advisors may use this form as a template for creating a similar form on a software program used by the material advisor. If a material advisor is required to maintain a list under a prior version of the regulations, this form may be modified or a similar form containing all the information required under the prior version of the regulations may be created and used.
Respondents: Private Sector.
Estimated Total Burden Hours: 50,000 hours.

OMB Number: 1545–1519.
Type of Review: Extension.
Form: 1099–LTC.
Title: Long-Term Care and Accelerated Death Benefits.
Description: Under the terms of IRC sections 7702B and 101g, qualified long-term care and accelerated death benefits paid to chronically ill individuals are treated as amounts received for expenses incurred for medical care. Amounts received on a per diem basis in excess of $175 per day are taxable. Section 6050Q requires all such amounts to be reported.
Respondents: Private Sector.
Estimated Total Burden Hours: 18,181 hours.

OMB Number: 1545–1662.
Type of Review: Extension.
Title: REG–121063–97 (TD 8972—Final) Averaging of Farm Income.
Description: Code section 1301 allows an individual engaged in a farming business to elect to reduce his or her regular tax liability by treating all or a portion of the current year's farming income as if it had been earned in equal proportions over the prior three years. The regulation provides that the election for averaging farm income is made by filing Schedule J of Form 1040, which is also used to record and total the amount of tax for each year of the four year calculation.
Respondents: Private Sector.
Estimated Total Burden Hours: 1 hour.

OMB Number: 1545–2105.
Type of Review: Extension.
Title: Notice 2008–56, Relief from Certain Low-Income Housing Credit Requirements Due to Severe Storms and Flooding in Indiana.
Description: The Internal Revenue Service is suspending certain requirements under section 42 of the Internal Revenue Code for low-income housing credit projects in the United States to provide emergency housing relief needed as a result of the devastation caused by severe storms and flooding in Indiana beginning on June 6, 2008.
Respondents: Individuals and households.
Estimated Total Burden Hours: 125 hours.

OMB Number: 1545–1237.
Type of Review: Extension.
Title: REG–209831–96 (TD 8823 (Final)) Consolidated Returns—Limitation on the Use of Certain Losses and Deductions.
Description: Section 1502 provides for the promulgation of regulations with respect to corporations that file consolidated income tax returns. These regulations amend the current regulations regarding the use of certain losses and deductions by such corporations.
Respondents: Private Sector.
Estimated Total Burden Hours: 2,000 hours.

Clearance Officer: Glenn P. Kirkland, (202) 622–3428, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.
OMB Reviewer: Nicholas A. Fraser, (202) 395–5887, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Celina Elphage,
Treasury PRA Clearance Officer.
[FR Doc. E8–27625 Filed 11–19–08; 8:45 am]
BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 13, 2008.

The Department of the Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the publication date of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before December 22, 2008 to be assured of consideration.

Community Development Financial Institutions Fund

OMB Number: 1559–0005.
Type of Review: Reinstatement with Change.
Title: Bank Enterprise Award Program Application.
Form: CDFI–0002.
Description: The BEA Program provides incentives to insured depository institutions to increase their support of CDFIs and their activities in economically distressed communities.
Respondents: Businesses and other for-profit institutions.
Estimated Total Burden Hours: 900 hours.
Clearance Officer: Ashanti McCallum (202) 622–9018, Community Development Financial Institutions Fund, Department of the Treasury, 601 13th Street, NW., Suite 200 South, Washington, DC 20005.
OMB Reviewer: Nicolas Fraser (202) 395–5887, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Robert Dahl,
Treasury PRA Clearance Officer.
[FR Doc. E8–27627 Filed 11–19–08; 8:45 am]
BILLING CODE 4810–70–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 17, 2008.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, and 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before December 22, 2008 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1943.

Type of Review: Extension.

Title: Notice 2005–38—Section 965—Limitations on Dividends Received Deduction and Other Guidance.

Description: This document provides guidance under new section 965, which was enacted by the American Jobs Creation Act of 2004 (Pub. L. 108–357). In general, and subject to limitations and conditions, section 965(a) provides that a corporation that is a U.S. shareholder of a controlled foreign corporation (CFC) may elect, for one taxable year, an 85 percent dividends received deduction (DRD) with respect to certain cash dividends it receives from its CFCs. This document addresses limitations imposed on the maximum amount of section 965(a) DRD under section 965(b)(1) under which the maximum amount of eligible dividends is the greatest of $500 million, or earnings permanently reinvested outside the United States), section 965(b)(2) (regarding certain base-period repatriations), section 965(b)(3) (regarding certain increases in related party indebtedness), and certain miscellaneous limitations (related to the foreign tax credit).

Respondents: Private Sector.

Estimated Total Burden Hours: 1,250,000 hours.

Clearance Officer: Glenn P. Kirkland (202) 622–3428, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Nicholas A. Fraser (202) 395–5887, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Celina Elphage,

Treasury PRA Clearance Officer.

[FR Doc. E8–27631 Filed 11–19–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designation of an Entity Pursuant to Executive Order 13224

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 one newly-designated entity whose property and interests in property are blocked pursuant to Executive Order 13224 of September 23, 2001, ''Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism.''

DATES: The designation by the Director of OFAC of the one entity identified in this notice, pursuant to Executive Order 13224, is effective on November 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/ofac*) or via facsimile through a 24-hour fax-on-demand service, tel.: 202/622–0077.

Background

On September 23, 2001, the President issued Executive Order 13224 (the ''Order'') pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701–1706, and the United Nations Participation Act of 1945, 22 U.S.C. 287c. In the Order, the President declared a national emergency to address grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the September 11, 2001, terrorist attacks in New York, Pennsylvania, and at the Pentagon. The Order imposes economic sanctions on persons who have committed, pose a significant risk of committing, or support acts of terrorism. The President identified in the Annex to the Order, as amended by Executive Order 13268 of July 2, 2002, 13 individuals and 16 entities as subject to the economic sanctions. The Order was further amended by Executive Order 13284 of January 23, 2003, to reflect the creation of the Department of Homeland Security.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in or hereafter come within the United States or the possession or control of United States persons, of: (1) Foreign persons listed in the Annex to the Order; (2) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States; (3) persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order; and (4) except as provided in section 5 of the Order and after such consultation, if any, with foreign authorities as the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, deems appropriate in the exercise of his discretion, persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to the Order or determined to be subject to the Order or to be otherwise associated with those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order.

On November 12, 2008, the Director of OFAC, in consultation with the Departments of State, Homeland Security, Justice and other relevant agencies, designated, pursuant to one or more of the criteria set forth in subsections 1(b), 1(c) or 1(d) of the Order, one entity whose property and interests in property are blocked pursuant to Executive Order 13224.

The designee is as follows:

1. UNION OF GOOD (a.k.a. 101 DAYS CAMPAIGN; a.k.a. CHARITY COALITION; a.k.a. COALITION OF GOOD; a.k.a. ETELAF AL–KHAIR; a.k.a. ETILAFU EL–KHAIR; a.k.a. I'TILAF AL–KHAIR; a.k.a. I'TILAF AL–KHAYR), P.O. Box 136301, Jeddah 21313, Saudi Arabia [SDGT].

Dated: November 12, 2008.

Barbara C. Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. E8–27632 Filed 11–19–08; 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 names of 21 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 21 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 November 13, 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 this 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 this Order.

On November 13, 2008, the Director of OFAC removed from the list of Specially Designated Narcotics Traffickers 21 individuals listed below, whose property and interests in property were blocked pursuant to the Order.

The listing of the unblocked individuals follows:

1. AGUAS LOZADA, Rafael, c/o COSMEPOP, Bogota, Colombia; c/o DROGAS LA REBAJA BOGOTA S.A., Bogota, Colombia; c/o LABORATORIOS BLAIMAR DE COLOMBIA S.A., Bogota, Colombia; DOB 6 Feb 1967; Cedula No. 11385426 (Colombia) (individual) [SDNT]
2. CHACON PACHON, Rodolfo, c/o DISTRIBUIDORA DE DROGAS CONDOR S.A., Bogota, Colombia; c/o COSMEPOP, Bogota, Colombia; DOB 23 Feb 1970; Cedula No. 79538033 (Colombia) (individual) [SDNT]
3. CUECA VILLARAGA, Miguel Antonio, c/o ADMACOOP, Bogota, Colombia; c/o FARMACOOP, Bogota, Colombia; c/o LABORATORIOS KRESSFOR DE COLOMBIA S.A., Bogota, Colombia; Cedula No. 11386978 (Colombia) (individual) [SDNT]
4. DUQUE MARTINEZ, Carmen Lucia, c/o COMEDICAMENTOS S.A., Bogota, Colombia; c/o GLAJAN S.A., Bogota, Colombia; c/o PATENTES MARCAS Y REGISTROS S.A., Bogota, Colombia; c/o FOGENSA S.A., Bogota, Colombia; DOB 16 Jul 1966; Cedula No. 51988916 (Colombia); Passport 51988916 (Colombia) (individual) [SDNT]
5. ESPITIA PERILLA, Ruben Nowerfaby, c/o ADMACOOP, Bogota, Colombia; c/o DROMARCA Y CIA. S.C.S., Bogota, Colombia; c/o LABORATORIOS KRESSFOR DE COLOMBIA S.A., Bogota, Colombia; Cedula No. 79280623 (Colombia) (individual) [SDNT]
6. FONSECA DELGADO, Luis Jairo, c/o DROCARD S.A., Bogota, Colombia; c/o FARMACOOP, Bogota, Colombia; c/o GENERICOS ESPECIALES S.A., Bogota, Colombia; DOB 12 Aug 1962; Cedula No. 19493765 (Colombia); Passport 19493765 (Colombia) (individual) [SDNT]
7. FRANCO BELTRAN, Luis Fernando, c/o DROCARD S.A., Bogota, Colombia; c/o FARMACOOP, Bogota, Colombia; DOB 12 Aug 1953; Cedula No. 230809 (Colombia); Passport 230809 (Colombia) (individual) [SDNT]
8. GONZALEZ ALARCON, Sandra Judith, c/o CODISA, Bogota, Colombia; c/o FARMACOOP, Bogota, Colombia; DOB 7 Jul 1970; Cedula No. 52551222 (Colombia); Passport 52551222 (Colombia) (individual) [SDNT]
9. JIMENEZ MARIN, William Edison, c/o CODISA, Bogota, Colombia; c/o ESPIBENA S.A., Quito, Ecuador; c/o LABORATORIOS KRESSFOR DE COLOMBIA S.A., Bogota, Colombia; Cedula No. 19415821 (Colombia); Passport 19415821 (Colombia); RUC # 1720269099 (Ecuador) (individual) [SDNT]
10. LARA SANCHEZ, Giovanni Mauricio, c/o BONOMERCAD S.A., Bogota, Colombia; c/o DECAFARMA S.A., Bogota, Colombia; c/o FARMACOOP, Bogota, Colombia; c/o INTERFARMA S.A., San Jose, Costa Rica; c/o JOMAGA DE COSTA RICA S.A., San Jose, Costa Rica; c/o PATENTES MARCAS Y REGISTROS S.A., Bogota, Colombia; c/o PENTACOOP, Bogota, Colombia; DOB 20 Jan 1971; Cedula No. 79504253 (Colombia); Passport 79504253 (Colombia) (individual) [SDNT]
11. MEJIA ARISTIZABAL, Carlos Alberto, c/o ADMACOOP, Bogota, Colombia; c/o CODISA, Bogota, Colombia; c/o DROCARD S.A., Bogota, Colombia; DOB 17 Jun

1957; Cedula No. 10162459 (Colombia); Passport 10162459 (Colombia) (individual) [SDNT]

12. NEGRETE AYALA, Nubis del Carmen, c/o FARMA 3.000 LIMITADA, Barranquilla, Colombia; DOB 15 Jan 1966; Cedula No. 26174837 (Colombia); Passport 26174837 (Colombia) (individual) [SDNT]
13. PRIETO, Dioselina (a.k.a. PRIETO, Diocelina), Carrera 12 No. 2–81, Bogota, Colombia; c/o COMEDICAMENTOS S.A., Bogota, Colombia; c/o DISTRIBUIDORA AGROPECUARIA COLOMBIANA S.A., Cali, Colombia; c/o GLAJAN S.A., Bogota, Colombia; c/o INVERSIONES BOMBAY S.A., Bogota, Colombia; c/o FOGENSA S.A., Bogota, Colombia; c/o SHARVET S.A., Bogota, Colombia; DOB 3 Dec 1956; Cedula No. 41760201 (Colombia); Passport 41760201 (Colombia) (individual) [SDNT]
14. RIVEROS TRIANA, Raul, c/o COMEDICAMENTOS S.A., Bogota, Colombia; c/o DECAFARMA S.A., Bogota, Colombia; c/o FARMACOOP, Bogota, Colombia; c/o PATENTES MARCAS Y REGISTROS S.A., Bogota, Colombia; c/o SHARPER S.A., Bogota, Colombia; c/o BONOMERCAD S.A., Bogota, Colombia; c/o FOGENSA S.A., Bogota, Colombia; c/o GENERICOS ESPECIALES S.A., Bogota, Colombia; c/o INVERSIONES BOMBAY S.A., Bogota, Colombia; c/o SHARVET S.A., Bogota, Colombia; DOB 13 May 1951; Cedula No. 3252672 (Colombia); Passport 3252672 (Colombia) (individual) [SDNT]
15. ROMERO PENAGOS, Cesar Augusto, c/o CODISA, Bogota, Colombia; c/o FARMACOOP, Bogota, Colombia; DOB 20 Jan 1972; Cedula No. 791384496 (Colombia); Passport 791384496 (Colombia) (individual) [SDNT]
16. ROZO VARON, Luis Carlos, c/o LABORATORIOS GENERICOS VETERINARIOS, Bogota, Colombia; c/o BLANCO PHARMA S.A., Bogota, Colombia; c/o FARMATODO S.A., Bogota, Colombia; c/o LABORATORIOS KRESSFOR, Bogota, Colombia; DOB 11 Apr 1959; Cedula No. 5838525 (Colombia); Passport AF101921 (Colombia) (individual) [SDNT]
17. SANABRIA NINO, Alexander, c/o CAJA SOLIDARIA, Bogota, Colombia; c/o COSMEPOP, Bogota, Colombia; c/o SERVICIOS FUTURA LIMITADA, Bogota, Colombia; c/o SERVICIOS LOGISTICOS Y MARKETING LTDA., Bogota, Colombia; DOB 12 Jul 1967; Cedula No. 79420501 (Colombia); Passport 79420501 (Colombia) (individual) [SDNT]
18. SOSSA RIOS, Diego Alberto (a.k.a. SOSA RIOS, Diego Alberto), Calle 46 No. 13–56 of. 111, Bogota, Colombia; c/o BONOMERCAD S.A., Bogota, Colombia; c/o DECAFARMA S.A., Bogota, Colombia; c/o FARMACOOP, Bogota, Colombia; c/o PENTAPHARMA DE COLOMBIA S.A., Bogota, Colombia; c/o SHARPER S.A., Bogota, Colombia; c/o COMEDICAMENTOS S.A., Bogota, Colombia; c/o GLAJAN S.A., Bogota, Colombia; c/o DISTRIBUIDORA AGROPECUARIA COLOMBIANA S.A., Cali, Colombia; c/o INVERSIONES BOMBAY S.A., Bogota, Colombia; Cedula No. 71665932 (Colombia) (individual) [SDNT]
19. SOTO PACHECO, Armando, c/o FARMA 3.000 LIMITADA, Barranquilla, Colombia; DOB 21 Sep 1966; Cedula No. 10124018 (Colombia); Passport 10124018 (Colombia) (individual) [SDNT]
20. VALLEJO BAYONA, Diego, c/o ADMACOOP, Bogota, Colombia; c/o COMEDICAMENTOS S.A., Bogota, Colombia; c/o LABORATORIOS KRESSFOR DE COLOMBIA S.A., Bogota, Colombia; c/o LABORATORIOS PROFARMA LTDA., Bogota, Colombia; c/o MATERIAS PRIMAS Y SUMINISTROS S.A., Bogota, Colombia; Cedula No. 19285053 (Colombia); Passport 19285053 (Colombia) (individual) [SDNT]
21. VARGAS CANTOR, Horacio, c/o DROCARD S.A., Bogota, Colombia; c/o FARMACOOP, Bogota, Colombia; c/o FOGENSA S.A., Bogota, Colombia; c/o GENERICOS ESPECIALES S.A., Bogota, Colombia; c/o SHARVET S.A., Bogota, Colombia; DOB 30 Dec 1960; Cedula No. 79201297 (Colombia); Passport 79201297 (Colombia) (individual) [SDNT]

Dated: November 13, 2008.

Barbara C. Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. E8–27649 Filed 11–19–08; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice and request for comments.

SUMMARY: This document contains a correction to a notice and request for comments, that was published in the **Federal Register** on Thursday, October 30, 2008 (73 FR 64663) inviting 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)) and as part of its continuing effort to reduce paperwork and respondent burden by the Department of the Treasury. Currently, the IRS is soliciting comments concerning a final regulation, REG–146459–05 (TD 9324), Designated Roth Contributions under Section 402A.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to Carolyn N. Brown, (202) 622–6688, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Carolyn.N.Brown@irs.gov*.

SUPPLEMENTARY INFORMATION:

Background

The notice and request for comments that is the subject of the correction is required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

Need for Correction

As published, the notice and request for comments for Proposed Collection; Comment Request for Regulation Project contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the notice and request for comments for Proposed Collection; Comment Request for Regulation Project, which were the subjects of FR Doc. E8–25853, is corrected as follows:

On page 64663, column 3, under the caption **SUPPLEMENTARY INFORMATION**, line 3, the language ''*OMB Number:*

1545–1922.'' is corrected to read ''*OMB Number:* 1545–1992.''.

LaNita Van Dyke,

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

[FR Doc. E8–27552 Filed 11–19–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1040 and Schedules A, B, C, C–EZ, D, D–1, E, EIC, F, H, J, R, and SE, Form 1040A and Schedules 1, 2, and 3, and Form 1040EZ, and All Attachments to These Forms

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, 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 continuing information collections, as required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). This notice requests comments on all forms used by individual taxpayers: Form 1040, U.S. Individual Income Tax Return, and Schedules A, B, C, C–EZ, D, D–1, E, EIC, F, H, J, R, and SE; Form 1040A and Schedules 1, 2, and 3; Form 1040EZ; and all attachments to these forms (see the Appendix to this notice).

DATES: Written comments should be received on or before January 20, 2009 to be assured of consideration.

ADDRESSES: Direct all written comments to The OMB Unit, SE:W:CAR:MP:T:T:SP, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Chief, RAS:R:FSA, NCA 7th Floor, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

PRA Approval of Forms Used by Individual Taxpayers

Under the PRA, OMB assigns a control number to each ''collection of information'' that it reviews and approves for use by an agency. The PRA also requires agencies to estimate the burden for each collection of information. The burden estimates for each control number are displayed in (1) the PRA notices that accompany collections of information, (2) **Federal Register** notices such as this one, and (3) OMB's database of approved information collections.

The Individual Taxpayer Burden Model (ITBM) estimates burden experienced by individual taxpayers when complying with the Federal tax laws. The ITBM's approach to measuring burden focuses on the characteristics and activities of individual taxpayers in meeting their tax return filing compliance obligation. Key determinants of taxpayer burden in the model are the way the taxpayer prepares the return, e.g. with software or paid preparer, and the taxpayer's activities, e.g., recordkeeping and tax planning.

Burden is defined as the time and out-of-pocket costs incurred by taxpayers in complying with the Federal tax system. Time expended and out-of-pocket costs incurred are estimated separately. The methodology distinguishes among preparation methods, taxpayer activities, types of individual taxpayer, filing methods, and income levels. Indicators of tax law and administrative complexity as reflected in tax forms and instructions are incorporated in the model. The preparation methods reflected in the model are:

- Self-prepared without software
- Self-prepared with software
- Used a paid preparer

The types of taxpayer activities reflected in the model are:

- Recordkeeping
- Form completion
- Form submission (electronic and paper)
- Tax planning
- Use of services (IRS and paid professional)
- Gathering tax materials

The methodology incorporates results from a burden survey of 14,932 taxpayers conducted in 2000 and 2001, and estimates taxpayer burden based on those survey results. Summary level results using this methodology are presented in the table below.

Taxpayer Burden Estimates

Time spent and out-of-pocket costs are estimated separately. Out-of-pocket costs include any expenses incurred by taxpayers to prepare and submit their tax returns. Examples of out-of-pocket costs include tax return preparation and submission fees, postage, tax preparation software costs, photocopying costs, and phone calls (if not toll-free).

Both time and cost burdens are national averages and do not necessarily reflect a ''typical'' case. For instance, the average time burden for all taxpayers filing a 1040, 1040A, or 1040EZ is estimated at 26.4 hours, with an average cost of $209 per return. This average includes all associated forms and schedules, across all preparation methods and all taxpayer activities. Taxpayers filing Form 1040 have an expected average burden of about 33 hours, and taxpayers filing Form 1040A and Form 1040EZ are expected to average about 11 hours. However, within each of these estimates, there is significant variation in taxpayer activity. Similarly, tax preparation fees vary extensively depending on the taxpayer's tax situation and issues, the type of professional preparer, and the geographic area.

The data shown are the best forward-looking estimates available as of November 4, 2008, for income tax returns filed for 2008. The estimates are subject to change as new data become available. The estimates include burden for activities up through and including filing a return but do not include burden associated with post-filing activities. However, operational IRS data indicate that electronically prepared and e-filed returns have fewer arithmetic errors, implying a lower associated post-filing burden.

Taxpayer Burden Model

The table below shows burden estimates by form type and type of taxpayer. Time burden is further broken out by taxpayer activity. The largest component of time burden for all taxpayers is recordkeeping, as opposed to form completion and submission. In addition, the time burden associated with form completion and submission activities is closely tied to preparation method (self-prepared without software, self-prepared with software, and prepared by paid preparer).

Proposed PRA Submission to OMB

Title: U.S. Individual Income Tax Return.

OMB Number: 1545–0074.

Form Numbers: Form 1040 and Schedules A, B, C, C–EZ, D, D–1, E, EIC, F, H, J, R, and SE; Form 1040A and Schedules 1, 2 and 3; Form 1040EZ; and all attachments to these forms (see the Appendix to this notice).

Abstract: These forms are used by individuals to report their income tax liability. The data is used to verify that the items reported on the forms are correct, and also for general statistics use.

Current Actions: Changes are being made to some of the forms. The projected number of responses for FY 09

is lower than FY 08. This is because most of the one-time Economic Stimulus filing volume is no longer in the underlying return volume. The return volume in FY 09 reflects the normal demographic growth to the expected filing population. These changes have resulted in an overall decrease of 86,792,628 total hours in taxpayer burden previously approved by OMB.

Type of Review: Revision of currently approved collections.

Affected Public: Individuals or households.

Estimated Number of Respondents: 140,600,000

Total Estimated Time: 3.703 billion hours (3,703,000,000 hours).

Estimated Time per Respondent: 26.4 hours.

Total Estimated Out-of-Pocket Costs: $29.33 billion ($29,336,000,000).

Estimated Out-of-Pocket Cost per Respondent: $209.00

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 will 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: November 10, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

ESTIMATED AVERAGE TAXPAYER BURDEN FOR INDIVIDUALS BY ACTIVITY

Major form filed or type of taxpayer	Percentage of returns (percent)	Time burden						Money burden
		Average time burden (hours)						Average cost (dollars)
		Total time	Record-keeping	Tax planning	Form completion	Form submission	All other	
All Taxpayers	100	26.4	15.1	4.6	3.4	0.6	2.8	$209
Major Forms Filed:								
1040	71	32.7	19.3	5.7	3.7	0.6	3.4	264
1040A & 1040EZ	29	10.6	4.5	1.8	2.6	0.5	1.4	73
Type of Taxpayer:								
Nonbusiness*	72	14.2	5.8	3.3	3.0	0.5	1.7	114
Business*	28	57.1	38.5	8.0	4.2	0.7	5.7	447

*You are a ''business'' filer if you file one or more of the following with Form 1040: Schedule C, C–EZ, E, or F or Form 2106 or 2106–EZ. You are a ''nonbusiness'' filer if you did not file any of those schedules or forms with Form 1040.

APPENDIX

Forms	Title
673	Statement for Claiming Exemption from Withholding on Foreign Earned Income Eligible for the Exclusions Provided by Section 911
926	Return by a U.S. Transferor of Property to a Foreign Corporation.
970	Application To Use LIFO Inventory Method.
972	Consent of Shareholder To Include Specific Amount in Gross Income.
982	Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment).
1040	U.S. Individual Income Tax Return.
1040 SCH A	Itemized Deductions.
1040 SCH B	Interest and Ordinary Dividends.
1040 SCH C	Profit or Loss From Business.
1040 SCH C–EZ	Net Profit From Business.
1040 SCH D	Capital Gains and Losses.
1040 SCH D–1	Continuation Sheet for Schedule D.
1040 SCH E	Supplemental Income and Loss.
1040 SCH EIC	Earned Income Credit.
1040 SCH F	Profit or Loss From Farming.
1040 SCH H	Household Employment Taxes.
1040 SCH J	Income Averaging for Farmers and Fishermen.
1040 SCH R	Credit for the Elderly or the Disabled.
1040 SCH SE	Self-Employment Tax.
1040 A	U.S. Individual Income Tax Return.
1040 A–SCH 1	Interest and Ordinary Dividends for Form 1040A Filers.
1040 A–SCH 2	Child and Dependent Care Expenses for Form 1040A Filers.
1040 A–SCH 3	Credit for the Elderly or the Disabled+F66 for Form 1040A Filers.
1040ES (NR)	U.S. Estimated Tax for Nonresident Alien Individuals.
1040 ES/V–OCR	Estimated Tax for Individuals (Optical Character Recognition With Form 1040V).
1040 ES–OCR–V	Payment Voucher.

APPENDIX—Continued

Forms	Title
1040 ES–OTC	Estimated Tax for Individuals.
1040 EZ	Income Tax Return for Single and Joint Filers With No Dependents.
1040 NR	U.S. Nonresident Alien Income Tax Return.
1040 NR–EZ	U.S. Income Tax Return for Certain Nonresident Aliens With No Dependents.
1040 V	Payment Voucher.
1040 X	Amended U.S. Individual Income Tax Return.
1045	Application for Tentative Refund.
1116	Foreign Tax Credit.
1127	Application for Extension of Time For Payment of Tax.
1128	Application To Adopt, Change, or Retain a Tax Year.
1310	Statement of Person Claiming Refund Due a Deceased Taxpayer.
2106	Employee Business Expenses.
2106 EZ	Unreimbursed Employee Business Expenses.
2120	Multiple Support Declaration.
2210	Underpayment of Estimated Tax by Individuals, Estates, and Trusts.
2210 F	Underpayment of Estimated Tax by Farmers and Fishermen.
2350	Application for Extension of Time To File U.S. Income Tax Return.
2350 SP	Solicitud de Prórroga para Presentar la Declaración del Impuesto Personal sobre el Ingreso de los Estados Unidos.
2439	Notice to Shareholder of Undistributed Long-Term Capital Gains.
2441	Child and Dependent Care Expenses.
2555	Foreign Earned Income.
2555 EZ	Foreign Earned Income Exclusion.
2848	Power of Attorney and Declaration of Representative.
3115	Application for Change in Accounting Method.
3468	Investment Credit.
3520	Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts.
3800	General Business Credit.
3903	Moving Expenses.
4029	Application for Exemption From Social Security and Medicare Taxes and Waiver of Benefits.
4070	Employee's Report of Tips to Employer.
4070 A	Employee's Daily Record of Tips.
4136	Credit for Federal Tax Paid on Fuels.
4137	Social Security and Medicare Tax on Unreported Tip Income.
4255	Recapture of Investment Credit.
4361	Application for Exemption From Self-Employment Tax for Use by Ministers, Members of Religious Orders, and Christian Science Practitioners.
4562	Depreciation and Amortization.
4563	Exclusion of Income for Bona Fide Residents of American Samoa.
4684	Casualties and Thefts.
4797	Sales of Business Property.
4835	Farm Rental Income and Expenses.
4852	Substitute for Form W–2, Wage and Tax Statement or Form 1099–R, Distributions From Pension Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.
4868	Application for Automatic Extension of Time To File Individual U.S. Income Tax Return.
4868 SP	Solicitud de Prórroga Automática para Presentar la Declaración del Impuesto sobre el Ingreso Personal de los Estados Unidos.
4952	Investment Interest Expense Deduction.
4970	Tax on Accumulation Distribution of Trusts.
4972	Tax on Lump-Sum Distributions.
5074	Allocation of Individual Income Tax to Guam or the Commonwealth of the Northern Mariana Islands (CNMI).
5213	Election To Postpone Determination as to Whether the Presumption Applies That an Activity Is Engaged in for Profit.
5329	Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts.
5405	First-Time Homebuyer Credit.
5471	Information Return of U.S. Persons With Respect to Certain Foreign Corporations.
5471 SCH J	Accumulated Earnings and Profits (E&P) of Controlled Foreign Corporation.
5471 SCH M	Transactions Between Controlled Foreign Corporation and Shareholders or Other Related Persons.
5471 SCH O	Organization or Reorganization of Foreign Corporation, and Acquisitions and Dispositions of Its Stock.
5695	Residential Energy Credits.
5713	International Boycott Report.
5713 SCH A	International Boycott Factor (Section 999(c)(1)).
5713 SCH B	Specifically Attributable Taxes and Income (Section 999(c)(2)).
5713 SCH C	Tax Effect of the International Boycott Provisions.
5754	Statement by Person(s) Receiving Gambling Winnings.
5884	Work Opportunity Credit.
6198	At-Risk Limitations.
6251	Alternative Minimum Tax—Individuals.
6252	Installment Sale Income.
6478	Credit for Alcohol Used as Fuel.
6765	Credit for Increasing Research Activities.
6781	Gains and Losses From Section 1256 Contracts and Straddles.
8082	Notice of Inconsistent Treatment or Administrative Adjustment Request (AAR).
8275	Disclosure Statement.

APPENDIX—Continued

Forms	Title
8275 R	Regulation Disclosure Statement.
8283	Noncash Charitable Contributions.
8332	Release of Claim to Exemption for Child of Divorced or Separated Parents.
8379	Injured Spouse Claim and Allocation.
8396	Mortgage Interest Credit.
8453	U.S. Individual Income Tax Declaration for an IRS e-file Return.
8582	Passive Activity Loss Limitations.
8582 CR	Passive Activity Credit Limitations.
8586	Low-Income Housing Credit.
8594	Asset Acquisition Statement.
8606	Nondeductible IRAs.
8609–A	Annual Statement for Low-Income Housing Credit.
8611	Recapture of Low-Income Housing Credit.
8615	Tax for Certain Children Who Have Investment Income of More Than $1,800.
8621	Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund.
8621–A	Late Deemed Dividend or Deemed Sale Election by a Passive Foreign Investment Company.
8689	Allocation of Individual Income Tax to the Virgin Islands.
8693	Low-Income Housing Credit Disposition Bond.
8697	Interest Computation Under the Look-Back Method for Completed Long-Term Contracts.
8801	Credit for Prior Year Minimum Tax—Individuals, Estates, and Trusts.
8812	Additional Child Tax Credit.
8814	Parents' Election To Report Child's Interest and Dividends.
8815	Exclusion of Interest From Series EE and I U.S. Savings Bonds Issued After 1989.
8818	Optional Form To Record Redemption of Series EE and I U.S. Savings Bonds Issued After 1989.
8820	Orphan Drug Credit.
8821	Tax Information Authorization.
8822	Change of Address.
8824	Like-Kind Exchanges.
8826	Disabled Access Credit.
8828	Recapture of Federal Mortgage Subsidy.
8829	Expenses for Business Use of Your Home.
8832	Entity Classification Election.
8833	Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b).
8834	Qualified Electric Vehicle Credit.
8835	Renewable Electricity and Refined Coal Production Credit.
8838	Consent To Extend the Time To Assess Tax Under Section 367—Gain Recognition Statement.
8839	Qualified Adoption Expenses.
8840	Closer Connection Exception Statement for Aliens.
8843	Statement for Exempt Individuals and Individuals With a Medical Condition.
8844	Empowerment Zone and Renewal Community Employment Credit.
8845	Indian Employment Credit.
8846	Credit for Employer Social Security and Medicare Taxes Paid on Certain Employee Tips.
8847	Credit for Contributions to Selected Community Development Corporations.
8853	Archer MSAs and Long-Term Care Insurance Contracts.
8854	Initial and Annual Expatriation Information Statement.
8858	Information Return of U.S. Persons With Respect to Foreign Disregarded Entities.
8858 SCH M	Transactions Between Controlled Foreign Disregarded Entity and Filer or Other Related Entities.
8859	District of Columbia First-Time Homebuyer Credit.
8860	Qualified Zone Academy Bond Credit.
8861	Welfare-to-Work Credit.
8862	Information to Claim Earned Income Credit After Disallowance.
8863	Education Credits.
8864	Biodiesel Fuels Credit.
8865	Return of U.S. Persons With Respect to Certain Foreign Partnerships.
8865 SCH K–1	Partner's Share of Income, Credits, Deductions, etc.
8865 SCH O	Transfer of Property to a Foreign Partnership.
8865 SCH P	Acquisitions, Dispositions, and Changes of Interests in a Foreign Partnership.
8866	Interest Computation Under the Look-Back Method for Property Depreciated Under the Income Forecast Method.
8873	Extraterritorial Income Exclusion.
8874	New Markets Credit.
8878	IRS e-file Signature Authorization for Form 4868 or Form 2350.
8878 SP	Autorizacion de firma para presentar por medio del IRS e-file para el Formulario 4868(SP) o el Formulario 2350(SP).
8879	IRS e-file Signature Authorization.
8879 SP	Autorizacion de firma para presentar la Declaracion por medio del IRS e-file.
8880	Credit for Qualified Retirement Savings Contributions.
8881	Credit for Small Employer Pension Plan Startup Costs.
8882	Credit for Employer-Provided Childcare Facilities and Services.
8885	Health Coverage Tax Credit.
8886	Reportable Transaction Disclosure Statement.
8888	Direct Deposit of Refund to More Than One Account.
8889	Health Savings Accounts (HSAs).
8891	U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans.

APPENDIX—Continued

Forms	Title
8896	Low Sulfur Diesel Fuel Production Credit.
8898	Statement for Individuals Who Begin or End Bona Fide Residence in a U.S. Possession.
8900	Qualified Railroad Track Maintenance Credit.
8901	Information on Qualifying Children Who Are Not Dependents (For Child Tax Credit Only).
8903	Domestic Production Activities Deduction.
8906	Distills Spirits Credit.
8907	Nonconventional Source Fuel Credit.
8908	Energy Efficient Home Credit.
8910	Alternative Motor Vehicle Credit.
8911	Alternative Fuel Vehicle Refueling Property Credit.
8915	Qualified Hurricane Retirement Plan Distribution and Repayments.
8917	Tuition and Fees Deduction.
8919	Uncollected Social Security and Medicare Tax on Wages.
8925	Report of Employer-Owned Life Insurance Contracts.
8931	Agricultural Chemicals Security Credit.
8932	Credit for Employer Differential Wage Payments.
9465	Installment Agreement Request.
9465 SP	Solicitud para un Plan de Pagos a Plazos.
Notice 2006–52.	
Notice 160920–05	Deduction for Energy Efficient Commercial Buildings.
Pub 972 Tables	Child Tax Credit.
REG–149856–03	Notice of Proposed Rulemaking Dependent Child of Divorced or Separated Parents or Parents Who Live Apart.
SS–4	Application for Employer Identification Number.
SS–8	Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.
T (Timber)	Forest Activities Schedules.
W–4	Employee's Withholding Allowance Certificate.
W–4 P	Withholding Certificate for Pension or Annuity Payments.
W–4 S	Request for Federal Income Tax Withholding From Sick Pay.
W–4 SP	Certificado de Exencion de la Retencion del Empleado.
W–4 V	Voluntary Withholding Request.
W–5	Earned Income Credit Advance Payment Certificate.
W–5 SP	Certificado del pago por adelantado del Credito por Ingreso del Trabajo.
W–7	Application for IRS Individual Taxpayer Identification Number.
W–7 A	Application for Taxpayer Identification Number for Pending U.S. Adoptions.
W–7 SP	Solicitud de Numero de Identicacion Personal del Contribuyente del Servicio de Impuestos Internos.

Forms removed from this ICR:	Reason for removal:
(1) Forms 1040 ES–E	Obsolete.
(2) Form 1040–V–OCR–ES	Obsolete.
(3) Form 1040–ES–OCR	Obsolete.
(4) Form 5471 (Sch N)	Obsolete.
(5) Form 8453–OL	Obsolete.
(6) Form 8453–OL(SP)	Obsolete.
(7) Form 8830	Obsolete.
(8) Forms 8836 & Sch's	Obsolete.
(9) Form 8836–SP & Sch's	Obsolete.
(10) Form 8913	Obsolete.
(11) Form 8914	Obsolete.
Forms added to this ICR:	**Justification for addition:**
(1) Form 1127	Application for Extension of Time for Payment of Tax.
(2) Form 5405	First-Time Homebuyer Credit.
(3) Form 8925	Report of Employer-Owned Life Insurance Contracts.
(4) Form 8931	Agricultural Chemicals Security Credit.
(5) Form 8932	Credit for Employer Differential Wage Payments.

[FR Doc. E8–27554 Filed 11–19–08; 8:45 am]
BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[Notice 2006–96 (REG–140029–07)]

Proposed Collection; Comment Request for Notice 2006–96 (REG–140029–07)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

Currently, the IRS is soliciting comments concerning Notice 2006–96, Guidance Regarding Appraisal and Reporting Requirements for Noncash Charitable Contributions/REG–140029–07, Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions.

DATES: Written comments should be received on or before January 20, 2009 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Carolyn N. Brown at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–6688, or through the Internet at *Carolyn.N.Brown@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Guidance Regarding Appraisal and Reporting Requirements for Noncash Charitable Contributions (Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions).

OMB Number: 1545–1953.

Regulation Project Number: Notice 2006–96 (REG–140029–07).

Abstract: The notice provides guidance under new Subsection 170(f)(11) regarding substantiation and reporting requirements for charitable contributions.

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: 36,285.

Estimated Time per Respondent: 26 minutes.

Estimated Total Annual Burden Hours: 15,629.

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: November 4, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8–27553 Filed 11–19–08; 8:45 am]
BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Disability Compensation; Notice of Meeting

The Department of Veterans Affairs gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on Disability Compensation will meet on December 8, 2008. The meeting will be held at the St. Regis Washington DC, 923 16th and K Streets, NW., in the Carlton Room, from 8:30 a.m. to 5:30 p.m. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on establishing and supervising a schedule to conduct periodic reviews of the VA Schedule for Rating Disabilities.

The Committee will receive briefings about studies on compensation for veterans with service-connected disabilities and other veteran benefits programs. An open forum for verbal statements from the public will be available in the afternoon. People wishing to make verbal statements before the Committee will be accommodated on a first-come, first-served basis and will be provided three minutes per statement.

Interested persons may submit written statements to the Committee before the meeting, or within 10 days after the meeting, by sending them to Ms. Ersie Farber, Designated Federal Officer, Department of Veterans Affairs, Veterans Benefits Administration (211A), 810 Vermont Avenue, NW., Washington, DC 20420. Any member of the public wishing to attend the meeting should contact Ms. Farber at (202) 461–9728.

Dated: November 14, 2008.

By Direction of the Secretary.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. E8–27660 Filed 11–19–08; 8:45 am]
BILLING CODE 8320–01–P

Federal Register

Thursday,
November 20, 2008

Part II

Environmental Protection Agency

40 CFR Parts 9, 122, and 412

Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 122, and 412

[EPA–HQ–OW–2005–0037; FRL–8738–9]

RIN 2040–AE80

Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Under the Federal Water Pollution Control Act (Clean Water Act or CWA), EPA is revising the National Pollutant Discharge Elimination System (NPDES) permitting requirements and Effluent Limitations Guidelines and Standards (ELGs) for concentrated animal feeding operations (CAFOs) in response to the order issued by the U.S. Court of Appeals for the Second Circuit in *Waterkeeper Alliance et al.* v. *EPA*, 399 F.3d 486 (2d Cir. 2005). This final rule responds to the court order while furthering the statutory goal of restoring and maintaining the nation's water quality by ensuring that CAFOs properly manage manure generated by their operations.

This final rule revises several aspects of EPA's current regulations governing discharges from CAFOs. EPA is modifying the requirement to apply for a permit by specifying that an owner or operator of a CAFO that discharges or proposes to discharge must apply for an NPDES permit. The final rule also includes an option for an unpermitted CAFO to certify to the permitting authority that the CAFO does not discharge or propose to discharge. In addition, EPA is clarifying how the agricultural stormwater discharge exemption criteria are interpreted for unpermitted Large CAFOs. EPA is also requiring CAFOs seeking permit coverage to submit their nutrient management plans (NMPs) with their applications for individual permits or notices of intent to be authorized under general permits. Permitting authorities are required to review the NMPs and provide the public with an opportunity for meaningful public review and comment. Permitting authorities are also required to incorporate terms of NMPs as NPDES permit conditions. Additionally, this action removes the provision that allowed CAFOs to use a 100-year, 24-hour containment structure to fulfill the no discharge requirement for new source swine, poultry, and veal calf operations. Instead, this action authorizes permit writers, upon request by swine, poultry, and veal calf CAFOs that are new sources, to establish best management practice no discharge effluent limitations when the facility demonstrates that it has designed an open containment system that will comply with the no discharge requirements.

This final rule also responds to the court's remand orders regarding water quality-based effluent limitations (WQBELs) and pathogens. EPA is clarifying that WQBELs may be required in permits with respect to production area discharges and discharges from land application areas that are not exempt as agricultural stormwater. Finally, EPA is making the finding that the best conventional technology (BCT) limitations established in 2003 also apply to fecal coliform.

DATES: These final regulations are effective December 22, 2008. For judicial review purposes, this final rule is promulgated as of 1 p.m. Eastern Daylight Time, on December 4, 2008, as provided in 40 CFR 23.2.

ADDRESSES: The record for this rulemaking is available for inspection and copying at the Water Docket, located at the EPA Docket Center (EPA/DC), EPA West 1301 Constitution Ave., NW., Washington, DC 20004. The record is also available via EPA Dockets at *http://www.regulations.gov* under docket number OW–2005–0037. The rule and key supporting documents are also available electronically on the Internet at *http://www.epa.gov/npdes/caforule*.

FOR FURTHER INFORMATION CONTACT: For additional information contact Rebecca Roose, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, telephone number: (202) 564–0758, e-mail address: *roose.rebecca@epa.gov.* For additional information specific to New Source Performance Standards and BCT Limitations contact Paul Shriner, Engineering and Analysis Division, Office of Science and Technology (4303T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, telephone number: (202) 566–1076, e-mail address: *shriner.paul@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

This action applies to concentrated animal feeding operations (CAFOs) as specified in section 502(14) of the Clean Water Act (CWA), 33 U.S.C. 1362(14) and defined in the NPDES regulations at 40 CFR 122.23. Table 1.1 provides a list of standard industrial codes for operations potentially regulated under this revised rule. The rule also applies to States and Tribes with authorized NPDES Programs.

TABLE 1.1—OPERATIONS POTENTIALLY REGULATED BY THIS RULE

Category	Examples of regulated entities	North American Industry Classification System (NAICS)	Standard Industrial Classification (SIC)
Industry	Operators of animal production operations that meet the definition of a CAFO:		
	Beef cattle feedlots (including veal calves)	112112	0211
	Beef cattle ranching and farming	112111	0212
	Hogs	11221	0213
	Sheep and Goats	11241, 11242	0214
	General livestock except dairy and poultry	11299	0219
	Dairy farms	11212	0241
	Broilers, fryers, and roaster chickens	11232	0251
	Chicken eggs	11231	0252
	Turkey and turkey eggs	11233	0253
	Poultry hatcheries	11234	0254
	Poultry and eggs	11239	0259
	Ducks	11239	0259
	Horses and other equines	11292	0272

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated under this rulemaking, you should carefully examine the applicability criteria in § 122.23. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. EPA–HQ–OW–2005–0037. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Water Docket in the EPA Docket Center, EPA West, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

2. *Electronic Access.* This **Federal Register** document and key supporting documents are also electronically available on the Internet at *http://www.epa.gov/npdes/agriculture*.

C. Under What Legal Authority Is This Final Rule Issued?

This final rule is issued under the authority of sections 101, 301, 304, 306, 308, 402, and 501 of the CWA. 33 U.S.C. 1251, 1311, 1314, 1316, 1317, 1318, 1342, and 1361.

D. What Is the Comment Response Document?

EPA received a large number of comments on the 2006 proposed rule (71 FR 37,744–87; June 20, 2006) and the 2008 supplemental proposal (73 FR 12,321–40; March 7, 2008). EPA evaluated all of the comments submitted and prepared a Comment Response Document containing both the comments received and the Agency's responses to those comments. The Comment Response Document complements and supplements this preamble by providing more detailed explanations of EPA's final action. The Comment Response Document is available in the Docket.

II. Background

A. The Clean Water Act

Congress enacted the Federal Water Pollution Control Act (1972), also known as the Clean Water Act (CWA), to ''restore and maintain the chemical, physical, and biological integrity of the nation's waters'' (CWA section 101(a)). Among the core provisions, the CWA establishes the NPDES permit program to authorize and regulate the discharge of pollutants from point sources to waters of the U.S. (CWA section 402). Section 502(14) of the CWA specifically includes CAFOs in the definition of the term ''point source.'' Section 502(12) defines the term ''discharge of a pollutant'' to mean ''*any* addition of any pollutant to navigable waters from any point source'' (emphasis added). EPA has issued comprehensive regulations that implement the NPDES program at 40 CFR part 122. The Act also provides for the development of technology-based and water quality-based effluent limitations that are imposed through NPDES permits to control the discharge of pollutants from point sources. CWA sections 301(a) and (b).

B. History of Actions To Address CAFOs Under the NPDES Permitting Program

EPA began regulating discharges of wastewater and manure from CAFOs in the 1970s. EPA initially issued national effluent limitations guidelines and standards for feedlots on February 14, 1974 (39 FR 5704), and NPDES CAFO regulations on March 18, 1976 (41 FR 11,458).

In February 2003, EPA issued revisions to these regulations that focused on the 5% of the nation's animal feeding operations (AFOs) that presented the highest risk of impairing water quality and public health (68 FR 7176–7274; February 12, 2003) (''the 2003 CAFO rule''). The 2003 CAFO rule required the owners or operators of all CAFOs[1] to seek coverage under an NPDES permit, unless they demonstrated no potential to discharge.

[1] The Clean Water Act regulates the conduct of persons, which includes the owners and operators of CAFOs, rather than the facilities or their discharges. To improve readability in this preamble, reference is made to ''CAFOs'' as well as ''owners'' and ''operators'' of CAFOs. No change in meaning is intended.

A number of CAFO industry organizations (American Farm Bureau Federation, National Pork Producers Council, National Chicken Council, and National Turkey Federation (NTF), although NTF later withdrew its petition) and several environmental groups (Waterkeeper Alliance, Natural Resources Defense Council, Sierra Club, and American Littoral Society) filed petitions for judicial review of certain aspects of the 2003 CAFO rule. This case was brought before the U.S. Court of Appeals for the Second Circuit. On February 28, 2005, the court ruled on these petitions and upheld most provisions of the 2003 rule but vacated and remanded others. *Waterkeeper Alliance, et al.* v. *EPA*, 399 F.3d 486 (2d Cir. 2005). The court's decision is described in detail below.

The revisions to the 2003 CAFO rule being published today relate directly to the changes required by the court's decision and continue to maintain the focus on regulating discharges from the universe of high-risk AFOs.

C. Ruling by the U.S. Court of Appeals for the Second Circuit

The Second Circuit's decision in *Waterkeeper* upheld certain challenged provisions of the 2003 rule and vacated or remanded others, as follows.

1. Issues Upheld by the Court

This section discusses provisions of the 2003 CAFO rule that were challenged by either industry or environmental petitioners, but were upheld by the *Waterkeeper* Court and therefore remain unchanged. EPA is not revising any of these provisions and did not solicit comment on them.

(a) Land Application Regulatory Framework and Interpretation of ''Agricultural Stormwater''

The *Waterkeeper* Court upheld EPA's authority to regulate, through NPDES permits, the discharge of manure, litter, or process wastewater that a CAFO applies to its land application area. The court rejected the industry petitioners' claim that land application runoff must be channelized before it can be considered to be a point source discharge subject to permitting. The court noted that the CWA expressly defines the term ''point source'' to include ''any * * * concentrated animal feeding operation * * * from which pollutants are or may be discharged,'' and found that the Act ''not only permits, but demands'' that land application discharges be construed as discharges ''from'' a CAFO. 399 F.3d at 510.

The *Waterkeeper* Court also upheld EPA's determination in the 2003 CAFO rule that precipitation-related discharges of manure, litter, or process wastewater from land application areas under the control of a CAFO qualify as ''agricultural stormwater'' only where the CAFO has applied the manure in accordance with nutrient management practices that ensure ''appropriate agricultural utilization'' of the manure, litter, or process wastewater nutrients. EPA's interpretation of the Act in this regard was reasonable, the court found, in light of Congressional intent in excluding agricultural stormwater from the meaning of the term ''point source'' and given the precedent set in an earlier Second Circuit case, *Concerned Area Residents for the Environment* v. *Southview Farm*, 34 F.3d 114 (2d Cir. 1994). 399 F.3d at 508–09.

(b) Effluent Guidelines

The court rejected the environmental organizations' claim that EPA, in developing best available technology effluent limitations guidelines, had failed to consider the single best performing CAFO and adopt limitations that reflected its performance. The court found that EPA had collected extensive data on the waste management systems at CAFOs and had considered approximately 11,000 public comments on the proposed CAFO rule. The court determined that EPA had either adopted as the basis for its limitations the best performing technology or declined to do so for permissible reasons. 399 F.3d at 513.

The court upheld EPA's decision in the 2003 rule relating to groundwater controls. In the 2003 rule, EPA stated that the Agency believed that requirements limiting the discharge of pollutants to surface water via groundwater that has a direct hydrologic connection to surface water should be addressed on a site-specific basis. The Agency also stated that nothing in the 2003 rule was to be construed to expand, diminish, or otherwise affect the jurisdiction of the CWA over discharges to surface water via groundwater that has a direct hydrologic connection to surface water. 399 F.3d at 514–15.

The court upheld the analytic methodologies that EPA used for determining whether the technology-based permit requirements for CAFOs set in the 2003 rule would be economically achievable by the industry as a whole. 399 F.3d at 515–18.

2. Issues Vacated by the Court

The following are the elements of the 2003 rule that the *Waterkeeper* Court found to be unlawful and therefore vacated.

(a) Duty To Apply

The CAFO industry organizations argued that EPA exceeded its statutory authority by requiring all CAFOs to either apply for NPDES permits or demonstrate that they have no potential to discharge. The court agreed with the CAFO industry petitioners on this issue and therefore vacated the ''duty to apply'' provision of the 2003 CAFO rule.

The court found that the duty to apply, based on the potential to discharge, was invalid because the CWA subjects only actual discharges to permitting requirements rather than potential discharges. The court acknowledged EPA's policy considerations for seeking to impose a duty to apply based on the potential to discharge but found that the Agency lacked statutory authority to do so. 399 F.3d at 505.

(b) Nutrient Management Plans (NMPs)

The court concluded that the 2003 CAFO rule impermissibly: (1) Empowered permitting authorities to issue permits without any meaningful review of a CAFO's NMP, (2) failed to require that the terms of the nutrient management plan be included as effluent limitations in the NPDES permit, and (3) violated the CWA's public participation requirements. The court agreed with the environmental petitioners on these three issues.

The court relied on provisions of the Act that authorize point source discharges only where NPDES permits ''ensure that every discharge of pollutants will comply with all applicable effluent limitations and standards,'' citing CWA sections 402(a)(1), (a)(2), and (b). Because the 2003 CAFO rule did not provide for permitting authority review of a CAFO's nutrient management plan before the permit was issued, the court found that the rule did not ensure that each CAFO's discharges comply with these CWA provisions. The court also found that the terms of the NMP themselves are ''effluent limitations'' as that term is defined in the Act and therefore must be made part of the permit and be enforceable as required under CWA sections 301 and 402. The court also held that as effluent limitations, those terms must be made available for public review. 399 F.3d at 499–502.

3. Issues Remanded by the Court

The *Waterkeeper* Court also remanded other aspects of the CAFO rule to EPA ''for further clarification and analysis.''

(a) Water Quality-Based Effluent Limits

The court agreed with EPA that agricultural stormwater is excluded from the meaning of the term ''point source'' and therefore is not subject to water quality-based effluent limitations in permits. However, the court directed EPA to ''clarify the statutory and evidentiary basis for failing to promulgate water quality-based effluent limitations for discharges other than agricultural stormwater discharges as that term is defined in 40 CFR 122.23(e),'' and to ''clarify whether States may develop water quality-based effluent limitations on their own.'' 399 F.3d at 524.

(b) New Source Performance Standards—100-Year Storm Standard

The 2003 CAFO rule set new source performance standards (NSPS) for swine, poultry, and veal calf CAFOs at no discharge. A CAFO in these categories could fulfill this requirement by showing that either (1) its production area was designed to contain all manure, litter, or process wastewater, and precipitation from a 100-year, 24-hour storm, or (2) it would comply with ''voluntary superior environmental performance standards'' based on innovative technologies, under which a discharge from the production area would be allowed if it was accompanied by an equivalent or greater reduction in the quantity of pollutants released to other media (*e.g.*, air emissions). The court found that EPA had neither justified in the record nor provided an adequate opportunity for public comment for either of these provisions. As a result, the court remanded these provisions to EPA to clarify, via a process that adequately involves the public, the statutory and evidentiary basis for them. 399 F.3d at 520–21.

(c) BCT Effluent Guidelines for Pathogens

The court held that the 2003 CAFO rule violated the CWA because EPA had not made an affirmative finding that the BCT-based Effluent Limitations Guidelines (ELGs), *i.e.*, the ''best conventional technology'' guidelines for conventional pollutants such as fecal coliform, do in fact represent BCT for pathogens. The court remanded this issue to EPA for such a finding. 399 F.3d at 519.

D. What Requirements Still Apply to CAFOs?

The *Waterkeeper* decision either upheld or did not address most provisions of the 2003 CAFO rule. This section describes certain key portions of the rule that were not challenged in *Waterkeeper*. These unchallenged provisions are addressed in this final rule only to provide background information and are not in any way reopened or affected by this rulemaking.

The definitions provided in 40 CFR 122.23(b) of the 2003 CAFO rule remain in effect and are unchanged. First, an operation must be defined as an animal feeding operation (AFO) before it can be defined as a concentrated animal feeding operation (CAFO). 40 CFR 122.23. The term ''animal feeding operation'' is defined by EPA regulation as a ''lot or facility'' where animals ''have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period and crops, vegetation, forage growth, or post harvest residues are not sustained in the normal growing season over any portion of the lot or facility.''

Whether an AFO is a CAFO depends primarily on the number of animals confined, which is also unchanged. Large CAFOs are AFOs that confine more than the threshold number of animals detailed in 40 CFR 122.23(b)(4). Medium CAFOs confine fewer animals than Large CAFOs and also: (1) Discharge pollutants into waters of the U.S. through a man-made ditch, flushing system, or other similar man-made device; or (2) discharge pollutants into waters of the U.S. which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the confined animals. 40 CFR 122.23(b)(6)(ii). The NPDES permitting authority also may, on a case-by-case basis, designate any medium or small AFO, as a CAFO after conducting an on-site inspection and finding that the facility ''is a significant contributor of pollutants to waters of the United States.'' 40 CFR 122.23(c). The permitting authority may not exercise its authority to designate a small AFO as a CAFO unless pollutants are discharged into waters of the U.S. through a man-made ditch, flushing system, or other similar man-made device, or are discharged into waters of the U.S. which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation. 40 CFR 122.23(c)(3).

As previously described, the court upheld EPA's definition of ''agricultural stormwater discharge'' in relation to discharges from land application areas under the control of a CAFO in 40 CFR 122.23(e). Discharges of manure, litter, or process wastewater from land application areas under the control of a CAFO are discharges from the CAFO (i.e., point source discharges) unless they are agricultural stormwater discharges, which are exempt from permit requirements. Section 122.23(e) provides that precipitation-related discharges of manure, litter, or process wastewater from a CAFO's land application areas are agricultural stormwater discharges, provided that ''the manure, litter, or process wastewater has been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi)–(ix).''

The court ruling also did not affect the nutrient management planning requirements for permitted CAFOs established in the 2003 CAFO rule. All CAFOs that apply for permits must develop and implement an NMP that meets the requirements of 40 CFR 122.42(e) and, for Large CAFOs subject to 40 CFR part 412, subpart C or D, 40 CFR 412.4. The NMP identifies the necessary actions to ensure that runoff is eliminated or minimized through proper and effective manure, litter, or process wastewater management, including compliance with the ELGs as applicable. Permitted CAFOs must comply with all applicable recordkeeping and reporting requirements, including those specified in § 122.42(e).

The court ruling also did not affect the ELG requirements for Large CAFOs, with the exception of new source performance standards (NSPS) for swine, poultry, and veal calf operations. ELG requirements ensure the appropriate storage of manure, litter, and process wastewater and proper land application practices. They vary depending upon the type of animals confined: Subpart A for horses and sheep; subpart B for ducks; subpart C for dairy cattle, heifers, steers, and bulls; and subpart D for swine, poultry, and veal calves. 40 CFR part 412. Additionally, NSPS for beef and dairy operations were not affected by the decision and remain unchanged (40 CFR 412.35).

Permitted small and medium CAFOs are not subject to the ELGs specified in part 412. Rather, they must comply with technology-based requirements developed by the permitting authority on a case-by-case basis (*i.e.*, best professional judgment (BPJ)), pursuant to CWA section 402(a)(1)(B) and as defined in 40 CFR 125.3(c)(2) and (d).

E. EPA's Response to the Waterkeeper Decision

On June 30, 2006, EPA published a proposed rule to revise the Agency's regulations governing discharges from

CAFO's in response to the *Waterkeeper* decision. 71 FR 37,744. In summary, EPA proposed to require only owners or operators of those CAFOs that discharge or propose to discharge to seek authorization to discharge under a permit. Second, EPA proposed to require CAFOs seeking authorization to discharge under individual permits to submit their NMPs with their permit applications or, under general permits, with their notices of intent. Permitting authorities would be required to review the NMP and provide the public with an opportunity for meaningful public review and comment. Permitting authorities would also be required to incorporate terms of the NMP as NPDES permit requirements. Additionally, EPA proposed a process for modifying a CAFO's NPDES permit to incorporate changes to the NMP during the permit term by designating permit modifications in accordance with that process to be ''minor modifications of permits'' under 40 CFR 122.63. The 2006 proposed rule also addressed the remand of issues for further clarification and analysis. These issues concerned clarifications regarding the applicability of water quality-based effluent limitations (WQBELs) to CAFO discharges; NSPS for swine, poultry, and veal CAFOs; and BCT effluent limitations guidelines for fecal coliform.

A March 7, 2008, **Federal Register** notice supplemented the 2006 proposed rule by proposing additional options considered by EPA for inclusion in this final rule in response to the Second Circuit's decision in the *Waterkeeper* decision. In that notice, EPA proposed a voluntary option for a CAFO to certify that the CAFO does not discharge or propose to discharge based on an objective assessment of the CAFO's design, construction, operation, and maintenance. EPA also proposed a framework for identifying the terms of the NMP and three alternative approaches for addressing rates of application of manure, litter, and process wastewater when identifying terms of the NMP to be included in the permit. In the 2008 supplemental proposal, EPA sought comment only on the issues presented in the 2008 supplemental proposal.

In addition to the changes made through this rulemaking, EPA extended certain deadlines in the NPDES permitting requirements and ELGs in two separate rulemakings in order to allow the Agency adequate time to complete this rulemaking in response to the *Waterkeeper* decision, in advance of those deadlines. The principal purpose of these rulemakings was to provide additional time for the Agency to complete this final rule. Neither of these date extension rules addressed any of the substantive issues addressed in this final rule or promulgated any provisions in response to the *Waterkeeper* decision. The first rule revised dates established in the 2003 CAFO rule by which facilities newly defined as CAFOs were required to seek permit coverage and by which all CAFOs were required to develop and implement nutrient management plans. 71 FR 6978–84 (February 10, 2006). EPA extended the date by which operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date, were required to seek NPDES permit coverage, from February 13, 2006, to July 31, 2007. EPA also amended the date by which operations that become defined as CAFOs after April 14, 2003, due to operational changes that would not have made them a CAFO prior to April 14, 2003, and that are not new sources, were required to seek NPDES permit coverage, from April 13, 2006, to July 31, 2007. Finally, EPA extended the deadline by which CAFOs were required to develop and implement nutrient management plans, from December 31, 2006, to July 31, 2007. That rulemaking revised all references to the date by which CAFOs must develop and implement NMPs as specified in the 2003 CAFO rule.

As a result of the extensive array of public comments on the issues raised by the *Waterkeeper* decision, EPA was unable to complete this final rule prior to July 31, 2007. Thus, EPA published a second revision of the compliance dates on July 24, 2007, extending the dates from July 31, 2007, to February 27, 2009. The preamble to the second date change rule explained EPA's belief that the February 27, 2009, deadlines were appropriate because they would provide additional time for States, the regulated community, and other stakeholders to adjust to the new regulatory requirements. *See* 72 FR 40,245–50. In the 2008 supplemental rule, EPA requested comment on further extending the compliance deadline. For additional discussion of compliance dates, see section III.D of this preamble.

III. The Final Rule: Revisions to the 2003 CAFO Rule in Response to *Waterkeeper*

This final rule responds to the Second Circuit Court's vacature and remand orders.

A. Duty To Apply for a Permit

1. Provisions in the 2003 CAFO Rule

(a) Duty To Apply

The 2003 CAFO rule required all CAFOs to seek authorization to discharge under an NPDES permit unless the Director, *i.e.*, the permitting authority, determined that the CAFO had no potential to discharge.

(b) ''No Potential To Discharge'' Determination

The 2003 CAFO rule included a process for CAFOs to seek a ''no potential to discharge'' determination by the Director. Where the Director determined, based on information supplied by the CAFO operator, that a CAFO had no potential to discharge manure, litter, or process wastewater to waters of the U.S., the CAFO operator had no duty to apply for a permit, unless circumstances at the facility changed such that the facility would have the potential to discharge. Examples of facilities that possibly would have qualified for this exemption included facilities in very arid areas, facilities that are down slope from waters of the U.S., and facilities with completely enclosed operations.

2. Summary of the Second Circuit Court Decision

The Second Circuit Court of Appeals vacated the provision that required all CAFO owners or operators with a potential to discharge to apply for an NPDES permit. The court held that the Clean Water Act (CWA) authorizes EPA to require permits for the actual discharge of pollutants, but not for mere potential discharges. Because the 2003 CAFO rule imposed an obligation on all CAFOs to either apply for an NPDES permit or affirmatively demonstrate that they have no potential to discharge, the court ruled that it exceeded EPA's authority under the CWA. *Waterkeeper Alliance et al.* v. *EPA*, 399 F.3d 486, 506 (2d Cir. 2005).

3. This Final Rule

To address the court's decision on the duty to apply, EPA is revising the 2003 CAFO rule in three ways:

- Deleting the requirement that all CAFOs apply for an NPDES permit to provide instead that all CAFOs that ''discharge or propose to discharge'' have a duty to apply when they propose to discharge;
- Eliminating the procedures for a no potential to discharge determination; and
- Establishing a voluntary option for unpermitted CAFOs to certify that they

do not discharge or propose to discharge.

(a) Duty To Seek Permit Coverage

EPA proposed to replace the ''duty to apply'' requirement adopted in the 2003 rule, which states that all CAFO owners or operators must seek coverage under an NPDES permit unless they demonstrate ''no potential to discharge'' (40 CFR 122.21(a)(1) and 40 CFR 122.23(a) and 40 CFR 122.23(d)(1)) with a modified ''duty to apply'' provision. The 2006 proposed rule would have required that all CAFOs that ''discharge or propose to discharge'' seek coverage under an NPDES permit, which is the same language that applies generally to point sources under longstanding NPDES regulations at § 122.21(a)(1).

This rule adopts the approach in the 2006 proposed rule by replacing the ''duty to apply'' requirement of the 2003 rule with a requirement that a CAFO that ''discharges or proposes to discharge'' must seek authorization to discharge under an NPDES permit. Because a number of commenters misunderstood, or were confused by, the term ''propose to discharge,'' EPA is providing additional clarification in this rule and preamble on how operators should evaluate whether they discharge or propose to discharge. While commenters generally agreed that the changes proposed by EPA were consistent with the Second Circuit decision, some commenters thought that ''propose to discharge'' and ''potential to discharge'' were not sufficiently distinguishable, and that ''proposed'' discharges could be understood as contrary to the *Waterkeeper* court's holding that only ''actual'' discharges are subject to CWA requirements.

EPA disagrees with these commenters. Including a duty to apply for CAFOs that ''propose to discharge'' is not the same as requiring a permit for CAFOs with only a ''potential to discharge.'' Unlike the 2003 rule, which categorically required a permit for any CAFO with a ''potential to discharge,'' this final rule calls for a case-by-case evaluation by the CAFO owner or operator as to whether the CAFO discharges or proposes to discharge from its production area or land application area based on actual design, construction, operation, and maintenance. ''Potential'' connotes the possibility that there might—as opposed to will—be a discharge, which, as the *Waterkeeper* court held, is not sufficient under the CWA to trigger NPDES permitting requirements. In contrast to the 2003 rule, this rule requires a case-by-case assessment by each CAFO to determine whether the CAFO in question, due to its individual attributes, discharges or proposes to discharge. Therefore, revised § 122.23(d)(1) requires only CAFOs that actually discharge to seek permit coverage and clarifies that a CAFO proposes to discharge if based on an objective assessment it is designed, constructed, operated, or maintained such that a discharge will occur, not simply such that it might occur. Consistent with the *Waterkeeper* decision, CAFOs that are required to seek permit coverage must do so when they propose to discharge. (See below for discussion of the provision relating to when a CAFO must seek permit coverage, 40 CFR 122.23(f).) Thus, it is the responsibility of the CAFO owner or operator to seek authorization to discharge at the time they propose to discharge. A CAFO that discharges without a permit is in violation of the CWA section 301(a) prohibition on such discharges and additionally has the burden of establishing that it did not propose to discharge prior to the discharge (unless the permitting authority has a current, complete certification from that CAFO as provided by 40 CFR 122.23(j)(2), discussed below). If it is determined that it did, in fact, propose to discharge prior to the discharge (that is, it was designed, constructed, operated, or maintained such that a discharge would occur), it is also in violation of the § 122.23(d)(1) duty to apply. Section 122.23(j)(2) also clarifies how a CAFO may satisfy the burden of establishing that it did not propose to discharge.

Under section 301(a) of the CWA, only those CAFO discharges authorized by an NPDES permit (or otherwise authorized by the statute), regardless of the volume or duration of the discharge, are allowed. Any discharge from a CAFO, even one that is unplanned or accidental, is illegal unless it is authorized by the terms of a permit or is agricultural stormwater. While EPA recognizes that not every discharge indicates that the CAFO will discharge in the future, an operator should certainly consider any unplanned or accidental discharge that may have occurred in the past in deciding whether to seek permit coverage. CAFO operators must objectively assess whether a discharge from the CAFO, including from the production area or land application areas under the control of the CAFO, is occurring or will occur for purposes of determining whether to obtain permit coverage.

It is well established that ''discharge'' is not limited to continuous discharges of pollutants from a point source to waters of the U.S., but also includes intermittent and sporadic discharges. ''Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition.'' *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield*, 890 F.2d 690, 693 (4th Cir. 1989). Such intermittent, sporadic, even occasional, discharges may in fact be the norm for many CAFOs, but they are nonetheless ''discharges'' under the CWA and are prohibited unless authorized under the terms of an NPDES permit. CAFOs that have had such intermittent or sporadic discharges in the past would generally be expected to have such discharges in the future, and therefore be expected to obtain a permit, unless they have modified their design, construction, operation, or maintenance in such a way as to prevent all discharges from occurring.

EPA received a number of comments concerning past discharges. Some commenters asserted that a prior discharge is not, by itself, a sufficient basis for requiring a permit and observed that it is quite possible that a CAFO may have eliminated the cause of the discharge. EPA agrees that not every past discharge from a CAFO necessarily triggers a duty to apply for a permit; however, a past discharge may indicate that the CAFO discharges or proposes to discharge if the conditions that gave rise to the discharge have not changed or been corrected. See, *e.g., Gwaltney of Smithfield. Ltd.* v. *Chesapeake Bay Foundation,* 484 U.S. 49, 57 (1987) (''a reasonable likelihood that a past polluter will continue to pollute in the future'' is a continuous or intermittent violation); *American Canoe Ass'n* v. *Murphy Farms, Inc.,* 412 F.3d. 536 (4th Cir. 2005) (CWA violation continues where corrective measures are insufficient to eliminate real likelihood of repeated discharges). The same rationale that led the courts in these cases to conclude that the point sources in question were discharging in violation of the CWA underlies the final rule's requirement that CAFOs must seek permit coverage when they discharge or propose to discharge (*i.e.*, are designed, constructed, operated, or maintained such that a discharge will occur). Sections 122.23(d)(1) and (f).

An uncorrected past discharge is not the only indicator that operators should consider in assessing whether the CAFO discharges or proposes to discharge. Other key factors the operator should consider include the proximity of the production area to waters of the U.S., whether the CAFO is upslope from waters of the U.S., and climatic conditions. Similarly, the type of waste storage system, storage capacity, quality

of construction, and presence and extent of built-in safeguards are important factors. Standard operating procedures and level of maintenance are also critical factors for the operator to consider when assessing whether a CAFO discharges or proposes to discharge. Such considerations contributed to EPA's decision to include in this final rule an option for unpermitted CAFOs to certify that they do not discharge or propose to discharge by meeting the criteria in 40 CFR 122.23(i)(2), discussed in detail below. EPA encourages unpermitted CAFOs that choose not to certify to consider the set of criteria for certification eligibility when deciding whether to seek permit coverage, and this final rule provides in § 122.23(j)(2) that these same criteria may be used to establish that a CAFO did not propose to discharge prior to a discharge occurring.

As a result of the revisions to 40 CFR 122.23(d) and (f), only CAFOs that discharge or propose to discharge are required to seek permit coverage, and a CAFO that proposes to discharge must seek coverage as soon as it proposes to discharge in order to avoid having unpermitted discharges. In the event of a discharge from an unpermitted CAFO, the CAFO operator would be in violation of the CWA prohibition against discharging without a permit. Under this final rule, if the CAFO proposed to discharge prior to the discharge, the CAFO would also be in violation of the requirement in § 122.23(d)(1) and (f), implementing sections 308 and 402 of the CWA, that CAFOs seek permit coverage when they propose to discharge.

In revised § 122.23(d)(1), EPA is clarifying that ''a CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur.'' EPA intends that the CAFO operator should make an objective assessment of the operation to determine whether the CAFO will discharge. Such an objective assessment would take into account not only the characteristics of the manmade aspects of the CAFO itself, but climatic, hydrological, topographical, and other characteristics beyond the operator's control that impact whether the CAFO will discharge, given the design, construction, operation and maintenance of the CAFO.

To assist CAFO operators in making this objective assessment and to provide assurance for CAFOs deciding not to seek permit coverage that they are not required to obtain permit coverage, EPA is finalizing a voluntary certification option, proposed in the 2008 supplemental proposal. This option provides a means for a CAFO to certify that it does not discharge or propose to discharge. The voluntary certification provisions are discussed below in section III.A.3(c) of this preamble.

This rule is consistent with the *Waterkeeper* decision because the duty to apply for a permit only arises when a CAFO discharges or proposes to discharge, that is, when it discharges or is designed, constructed, operated, or maintained such that a discharge will occur. It is also consistent with *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield,* discussed above, which found a violation under the CWA where it is reasonably likely that a discharge will occur due to existing circumstances. This rule derives from sections 402(a)(3) and 308 of the CWA, 33 U.S.C. 1342(a)(3), 1318. Under section 402(a)(3), EPA is required to establish a permit program that, among other things, ensures compliance with all applicable requirements of sections 301 (requirements for establishing technology-based and water quality-based effluent limitations), 306 (requirements for establishing new source performance standards), 308 (requirements relating to inspections, monitoring and entry, including requests for information to determine compliance status or support development of effluent limitations) and 402 (NPDES permits).

Section 301(a) prohibits the discharge of pollutants, except in compliance with specific provisions in the CWA. Particularly relevant to CAFOs, section 301(b) provides that ''there shall be achieved'' effluent limitations controlling pollutants discharged from point sources. Section 308(a) provides EPA broad authority to require the owner or operator of any point source (including CAFOs) to provide information necessary to develop effluent limitations, to ''carry out'' section 402, and to ''carry out'' the objectives of the Act, which are set forth in CWA section 101(a). Under section 501(a) EPA is authorized to prescribe ''such regulations as are necessary to carry out'' its functions under the CWA. Any permit program established to carry out section 402 must, of necessity, require point sources that discharge or propose to discharge to submit information to allow the permitting authority to determine prior to issuance of a permit what effluent limitations should apply to a discharger and be included in its permit (including providing the public and any other affected State notice and opportunity for public comment, as required by section 402(b)(3)). It is therefore reasonable for EPA to require those CAFOs that discharge or propose to discharge to apply for NPDES permit coverage.

Some commenters on the 2006 proposed rule opposed regulating entities that ''propose'' to discharge, or alternatively, suggested that EPA should clarify that ''propose'' means ''intend'' or ''plan.'' While EPA acknowledges that ''propose'' to discharge could be understood to mean ''intend'' or ''plan'' to discharge, under this final rule ''propose to discharge'' means that the CAFO is designed, constructed, operated, or maintained such that it will discharge. This is consistent with the *Waterkeeper* decision because a mere ''potential'' to discharge is not sufficient to trigger the revised duty to apply. Accordingly, as previously discussed, revised § 122.23(d)(1) clarifies that ''a CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur.'' The CAFO's decision as to whether to apply for a permit should be based on an objective assessment of conditions at that operation. As discussed below, under this final rule, a CAFO that is not designed, constructed, operated, or maintained in a manner such that the CAFO does or will discharge is not required to seek permit coverage under § 122.23(d)(1) and may choose to take advantage of the voluntary no discharge certification.

Some commenters on the 2006 proposed rule requested that EPA specifically state in the regulation that facilities designed to the 25-year, 24-hour design standard have not ''proposed'' to discharge. One commenter questioned whether existing operations should be required to obtain permit coverage if they have installed structures and production area BMPs using Natural Resources Conservation Service (NRCS) standards and if they have been operating without discharging. The commenter indicated that ''since EPA is requiring that a zero discharge standard be met only for certain new CAFOs and not existing CAFOs, it is unreasonable to expect all existing animal operations that do not otherwise come under a permit to meet a zero discharge standard.''

EPA disagrees that CAFOs designed for the 25-year, 24-hour storm should be categorically excluded from the requirement to apply for a permit simply based on their design standard. EPA also believes that it is reasonable to expect unpermitted CAFOs to meet a zero discharge standard. The CWA is very clear that point source discharges from CAFOs are illegal unless the operator has applied for and obtained an NPDES permit. Thus, ''zero discharge'' is the only standard to which EPA can

hold unpermitted CAFOs under the CWA. Large storms and chronic rainfall events do occur and production areas built to the 25-year, 24-hour storm design standard can and do discharge during precipitation events. Under the CWA, as previously discussed, a violation of the prohibition against discharging without a permit occurs even if the discharge was not planned or intended. Conversely, in the event of a discharge from a permitted CAFO, the discharge will not violate the CWA if the CAFO is in compliance with its permit.

EPA notes that design is only one aspect for a CAFO to consider when assessing whether or not to apply for a permit. Construction, operation, and maintenance are equally important components of a CAFO's operation and can make the difference between a CAFO that discharges and one that does not. With regard to the commenter's question about the applicability of NRCS standards, a CAFO's decision as to whether to seek permit coverage should be based on an objective assessment of conditions at the operation, including, but not limited to, the manure storage design standard. EPA notes that whether or not a CAFO is designed according to NRCS standards may be an important component of the objective evaluation it undertakes to assess whether it is designed, constructed, operated, or maintained such that a discharge will occur. A CAFO that does not discharge or propose to discharge is not required to seek permit coverage under § 122.23(d)(1) and may be eligible for no discharge certification under 40 CFR 122.23(i).

CAFO NPDES permit requirements include, but are not limited to, best management practices (BMPs) to eliminate discharges from the production area under most circumstances and to ensure appropriate agricultural utilization of nutrients in manure, litter, and process wastewater that is applied to land under the CAFO's control. EPA expects that an unpermitted CAFO would also need to implement BMPs in order to ensure that it does not discharge or propose to discharge. However, in many, if not most, cases the BMPs called for will be more rigorous than those required for permitted CAFOs, because the operator of an unpermitted CAFO is never authorized to discharge under CWA section 301(a). Permitted CAFOs have greater flexibility because, in addition to being authorized to discharge under the circumstances prescribed by the permit, other discharges can be excused when the conditions contained in EPA's upset and/or bypass regulations are met. *See* 40 CFR 122.41(m) and (n).

In contrast to commenters who believe that some non-discharging CAFOs will needlessly go through the permitting process, other commenters expressed concern that some CAFOs that should have permits will not seek needed permit coverage. They contended that many CAFOs are currently discharging without a permit and objected to having CAFOs make the determination themselves as to whether or not they discharge or propose to discharge, as such an approach would, in their view, establish a self-permitting scheme. These commenters further contended that the administrative record from the 2003 rule supports the presumption that all Large CAFOs actually discharge and, therefore, such CAFOs should be required to obtain a permit.

EPA does not agree that the rule establishes a self-permitting scheme. As is the case with all point sources, it is up to the operator to determine whether or not to apply for a permit in the first instance, by assessing whether the point source (CAFO) discharges or proposes to discharge. Point sources that do not discharge or propose to discharge are not subject to CWA permitting requirements. *See* § 122.21(a)(1). Regarding the administrative record for the 2003 rule, that rule established a duty to apply for all CAFOs unless the CAFO could demonstrate to the satisfaction of the permitting authority that it had no ''potential to discharge.'' That provision was vacated by the Second Circuit, which noted that EPA did not argue that the administrative record supported a regulatory presumption that all Large CAFOs actually discharge. 399 F.3d at 506, n.22. Thus, consistent with the *Waterkeeper* decision, EPA is promulgating a rule which requires those CAFOs that discharge or propose to discharge, but not CAFOs with a mere ''potential'' to discharge, to seek permit coverage on a case-by-case basis. With regard to the comments that EPA should establish a categorical presumption that all Large CAFOs discharge, the Agency is evaluating various options for exploring the nature of discharges from Large CAFOs.

Finally, this rule revises the regulatory provisions for when a CAFO must seek permit coverage and the duty to maintain permit coverage for CAFOs. The final rule clarifies that those CAFOs that are required under § 122.23(d)(1) to seek permit coverage must do so ''when the CAFO proposes to discharge,'' unless a later deadline, such as February 27, 2009, is specified for the specific category of operation. EPA is recodifying 40 CFR 122.23(g) as § 122.23(f) because the paragraph codified as § 122.23(f) in the 2003 rule is being removed. See section III.A.3(b) of this preamble. Revised § 122.23(f) is consistent with the revised duty to apply requirement in § 122.23(d)(1) and EPA's authority under sections 301, 308 and 402 of the CWA to require CAFOs that actually discharge to seek permit coverage. None of the specific timeframes for the various categories of CAFOs in paragraphs (1)–(5) of § 122.23(f), as amended by the 2007 date change rule (72 FR 40,245), is affected by this rule. The revised language in the introductory paragraph of § 122.23(f) simply conforms to the requirements of § 122.23(d)(1).

EPA is making corresponding revisions to the regulatory text requiring CAFOs to maintain permit coverage. Due to the fact that § 122.23(f) as codified in 2003 is being removed, EPA is recodifying 40 CFR 122.23(h), ''Duty to Maintain Permit Coverage,'' as § 122.23(g). See section III.A.3(b) of this preamble. Also, in the 2006 proposed rule, EPA proposed to revise this provision to address the *Waterkeeper* court's decision vacating the requirement for all CAFOs to seek permit coverage unless they obtained a no potential to discharge determination. *See* 71 FR 37,785. In this final rule (as in the proposed rule), a CAFO would not need to reapply based solely on the fact of having had a permit, if the permit had been terminated in accordance with the NPDES provisions at 40 CFR 122.64(b). Since a CAFO that terminated permit coverage is no longer a permitted CAFO, it is not subject to the duty to maintain permit coverage provision. Consistent with the requirement that only CAFOs that discharge or propose to discharge seek NPDES permit coverage, new § 122.23(g) excludes CAFOs that will not discharge or propose to discharge upon expiration of the permit from the requirement to reapply 180 days in advance of permit expiration.

(b) ''No Potential To Discharge'' Determination

In this final rule, EPA is deleting the regulatory provisions adopted in the 2003 CAFO rule allowing CAFOs to demonstrate that they have no potential to discharge and authorizing the Director to make such a determination. 40 CFR 122.23(d)(2) and 122.23(f). Because EPA is not requiring CAFOs to seek permit coverage based merely on potential to discharge, this provision is no longer relevant to determining whether or not a facility needs to seek permit coverage. This final rule is

unchanged from the 2006 proposed rule in this respect.

Overall, most commenters supported eliminating the ''no potential to discharge'' provisions in the CAFO regulations, noting that it is no longer necessary because only CAFOs that discharge or propose to discharge must apply for permits. One State observed that the ''no potential to discharge'' criteria could still be useful to CAFOs in determining whether they need to apply for a permit. While these criteria may continue to be useful to CAFO owners and operators for that purpose, EPA is eliminating these provisions from 40 CFR 122.23 of the regulations.

(c) Voluntary No Discharge Certification

In this final rule, the Agency is adopting a new provision that allows CAFOs to voluntarily certify that the CAFO does not discharge or propose to discharge. As discussed above, EPA received several hundred comments on the 2006 proposed rule related to how a CAFO operator would decide whether to seek permit coverage under a revised rule that requires CAFOs that discharge or propose to discharge to apply for a permit or submit a Notice of Intent for coverage under a general permit. Several commenters were particularly concerned with the consequences for an unpermitted CAFO that has an ''accidental discharge'' because they understood EPA's proposal to mean that a CAFO that does not apply for a permit and subsequently has a discharge of pollutants to waters of the U.S. would be liable for two violations, one associated with the discharge itself and another violation for failing to apply for a permit for authority to discharge. In response to these comments, in the 2008 supplemental proposal, EPA requested public comment on an option that would allow a CAFO that determines, based on an objective assessment, that it does not discharge or propose to discharge to certify to the permitting authority that it is designed, constructed, operated, and maintained not to discharge. In the unlikely event that a properly certified CAFO discharges (which would constitute a violation of section 301(a) of the CWA), the CAFO would not be liable for failing to apply for a permit prior to the discharge in accordance with the permit application requirements of 40 CFR 122.23(d)(1) and (f).

EPA received many comments on the proposed voluntary certification option. Commenters were divided, with some generally supportive and others generally opposed to the concept of a voluntary certification option for unpermitted CAFOs. Those in favor stated that certification would assist CAFOs that do not discharge or propose to discharge by providing a structured process for CAFOs to notify the permitting authority that they are not required to seek permit coverage. Some commenters opposed to certification believe the Agency's record supports a regulatory presumption that all CAFOs discharge, and, therefore, the no discharge certification process is a further departure from the decision of the *Waterkeeper* court. The majority of State permitting authorities commenting on the 2008 supplemental proposal were opposed to the certification option, as proposed.

In this final rule, EPA has addressed both the decision from the *Waterkeeper* court that CAFOs with only a potential to discharge are not subject to NPDES permitting requirements and the concerns expressed by commenters that some CAFOs may be uncertain as to whether they discharge or propose to discharge. In the NPDES program, the first step is for a point source to decide whether it needs to seek permit coverage. Generally, the question of whether a point source needs permit coverage is easily answered; indeed other point sources are typically designed to discharge to waters of the U.S. After careful consideration of the comments and in light of the unique characteristics of CAFOs among point sources, EPA has concluded that providing a voluntary option for unpermitted CAFOs to certify to the Director that the CAFO does not discharge or propose to discharge based on an objective assessment of the CAFO's design, construction, operation, and maintenance is reasonable and appropriate for CAFOs. However, in response to comments received on the proposed certification option, EPA is clarifying several aspects of the process, eligibility requirements, and effect of certification as discussed below. The Agency is also making several changes to the proposed option to ensure that certification will be properly implemented.

Under this final rule, and as proposed in the 2008 supplemental proposal, a CAFO operator may certify that the CAFO does not discharge or propose to discharge by signing and submitting a certification statement to the Director. The objective assessment necessary for the CAFO to qualify for certification takes into account the CAFO's production area design and construction and its operating and maintenance procedures and practices as described in its nutrient management plan (NMP) in accordance with the eligibility criteria, described in detail below. The certification option established by this rule does not change the requirement that CAFOs that propose to discharge must seek permit coverage when they propose to discharge pursuant to § 122.23(f). It does, however, provide a structured process for CAFOs that wish to certify to establish by objective means that they do not discharge or propose to discharge. EPA believes that such a structured process is helpful to CAFOs as they decide whether to seek permit coverage. A CAFO's no discharge certification is not subject to review by the permitting authority in order for it to become effective and the permitting authority is not required to make the certification available to the public for comment because the certification is not a permit application for which review is required under section 402 of the CWA. EPA wishes to emphasize that submission of a no discharge certification is voluntary and the process for obtaining a certification has been developed with that underlying principle in mind.

As explained in detail above, under § 122.23(d)(1) a CAFO that does not discharge or propose to discharge is not required to apply for an NPDES permit. A certification in accordance with this final rule documents the CAFO operator's basis for making an informed decision not to seek permit coverage because the CAFO does not discharge or propose to discharge. A CAFO that certifies in accordance with the requirements of this final rule, discussed in detail below, is properly certified so long as the CAFO maintains its eligibility. EPA believes that providing a properly certified CAFO assurance that it is not required by § 122.23(d)(1) to seek permit coverage is reasonable and justified. The threshold question regarding which CAFOs are required to seek permit coverage—whether the CAFO discharges or proposes to discharge—is the same for all CAFOs. A CAFO that does not discharge or propose to discharge can choose to certify or not. Certification in accordance with the requirements of 40 CFR 122.23(i) requires a CAFO owner or operator to undertake and document a rigorous analysis of the operation's structure and design, and to be committed to operation and maintenance protocols designed to ensure no discharge, discussed in detail below.

EPA is adding subsection (j) 40 CFR 122.23 to clarify the effect of certification. As provided in new paragraph (j)(1), a CAFO certified in accordance with § 122.23(i) is presumed not to propose to discharge. A CAFO that is ''certified in accordance with

§ 122.23(i)'' has submitted a complete certification that is in effect pursuant to 40 CFR 122.23(i)(4). In the unlikely event that such a CAFO does discharge, it will not be in violation of the requirement that CAFOs that propose to discharge seek permit coverage pursuant to § 122.23(d)(1) and (f), with respect to that discharge, provided the CAFO maintained its certification by continuing to be designed, constructed, operated, and maintained in accordance with the eligibility criteria in 40 CFR 122.23(i)(2). This is because meeting the eligibility criteria at the time of the discharge establishes that the CAFO did not propose to discharge. If a certified CAFO does discharge, and the Director believes that the CAFO's certification was invalid at the time of the discharge (i.e., not in accordance with the eligibility criteria in § 122.23(i)(2)), the presumption means that, in any enforcement action alleging failure to seek permit coverage prior to the discharge, the burden is on the Director to establish that the CAFO ''proposed to discharge'' prior to the discharge. EPA notes that any unpermitted discharge from a properly certified CAFO is still a violation of CWA section 301(a) and terminates the certification pursuant to § 122.23(i)(4). Moreover, if subsequent to the discharge event the CAFO is designed, constructed, operated, or maintained such that a discharge will occur, it must seek permit coverage under § 122.23(d)(1) and (f). For additional discussion of past discharges from unpermitted CAFOs see section III.C.3(a) of this preamble.

To further clarify the effect of voluntary certification, EPA is also including in the final rule a provision specifically related to uncertified CAFOs. As provided in 40 CFR 122.23(j)(2) of this final rule, in any enforcement proceeding for failure to seek permit coverage under § 122.23(d)(1) or (f) that is associated with a discharge from an unpermitted CAFO that has not submitted certification documentation as provided in 40 CFR 122.23(i)(3) or 40 CFR 122.23(i)(6)(iv), the CAFO would have the burden to establish that it did not propose to discharge prior to the discharge. Also, a CAFO that had submitted a certification more than five years prior to the discharge (and not recertified within the past five years) or that had withdrawn its certification pursuant to 40 CFR 122.23(i)(5) prior to the discharge would also have the burden to establish that it did not propose to discharge. EPA's intent is to clarify that when an unpermitted CAFO discharges and the permitting authority does not have a current, signed certification from that CAFO, it is the CAFO's responsibility to show that it was not required to have applied for permit coverage (*i.e.*, did not propose to discharge) prior to the discharge. Section 122.23(j)(2) provides that the CAFO can satisfy this burden by establishing that at the time of the discharge the CAFO's design, construction, operation, and maintenance were all in accordance with the certification eligibility criteria of § 122.23(i)(2).

Unlike the 2003 rule that required all CAFOs to seek permit coverage in order to operate unless they obtained a determination of ''no potential to discharge,'' the certification provision is entirely voluntary. The requirement for a CAFO to apply for a permit is triggered if a CAFO discharges or proposes to discharge, regardless of whether it has certified or not. Any CAFO operator's decision as to whether to seek permit coverage should be made based on an objective assessment of the CAFO's design, construction, operation, and maintenance, in contrast to the 2003 rule, which required the operator either to seek permit coverage or prove to the satisfaction of the Director that the CAFO had no potential to discharge. Therefore, under § 122.23(d)(1) and (i), the operator must evaluate based on such an objective assessment whether it discharges or proposes to discharge. If it does it must seek and obtain permit coverage; if it does not it may operate without a permit and decide either (1) to certify under the provisions at § 122.23(i); or (2) to operate without a permit and without certifying. The purpose of certification is to provide a voluntary mechanism for the CAFO to establish in advance that it does not discharge or propose to discharge. As previously discussed, a CAFO that operates without a permit must be designed, constructed, operated, and maintained such that no discharge will occur, because any discharge (other than agricultural stormwater) is prohibited from unpermitted CAFOs pursuant to CWA section 301(a), while permitted CAFOs are allowed to discharge under specified conditions and may also have defenses for upset and bypass. NPDES permit coverage reduces CAFO operator risk and provides certainty to CAFO operators regarding activities and actions that are necessary to comply with the CWA. In contrast, certified CAFOs are not allowed to discharge under any conditions (other than discharges of agricultural stormwater), and are liable for any unpermitted discharge pursuant to CWA 301(a), but they will not additionally be held liable for a violation of the duty to apply, provided their certification is valid and still in effect at the time of discharge. EPA strongly recommends that all CAFOs that have any doubt about their ability to operate under all circumstances without discharging seek to obtain NPDES permit coverage, and believes it is in their interest to do so. However, in accordance with the *Waterkeeper* decision, EPA is requiring CAFOs to seek permit coverage only if they discharge or propose to discharge.

The final rule provisions for certification eligibility and submission, and conditions for a valid certification are discussed in detail below.

(i) Certification Eligibility Criteria

EPA is establishing specific eligibility criteria for CAFO certification at 40 CFR 122.23(i)(2). Meeting these criteria establishes that the CAFO does not ''discharge or propose to discharge'' for purposes of 40 CFR 122.23(d)(1), for as long as the certification is valid. Eligibility for certification means meeting the criteria described below at the time certification is established and continuing to meet the eligibility criteria throughout the period of certification as new information or situations arise. The three criteria are as follows: (1) An objective evaluation which shows that the CAFO's production area is designed, constructed, operated, and maintained so as not to discharge, (2) development and implementation of an NMP to ensure no discharge (other than agricultural stormwater discharges) that, at a minimum, addresses the elements set forth in 40 CFR 122.42(e)(1) and 40 CFR 412.37(c), including operation and maintenance practices for the production area and land application areas under the control of the CAFO, and (3) maintenance of the documentation required for certification either on site, at a nearby office, or where it can be made readily available to the permitting authority upon request. A statement that describes the basis for the CAFO's certification that it satisfies these eligibility criteria must be submitted to the Director, but there is no requirement for permitting authority review in order for the certification to be valid.

The first two criteria concern the existing physical and operational conditions at the CAFO. In addition, meeting these criteria includes making proper accommodations during the certification period to address changes to the operation. For example, if an increase in animals will cause the CAFO to exceed the existing storage capacity for precipitation, manure and process

wastewater required for no discharge, in order to remain certified, the CAFO must remedy the storage capacity problem prior to bringing the additional animals to the operation. Operation and maintenance practices may need to be modified to accommodate changes to the CAFO. For example, a reduction in fields available for land application would trigger the need to reevaluate the adequacy of manure storage and handling protocols. The third eligibility criterion requires a certified CAFO to maintain records needed to support the basis for the certification throughout the duration of the certification, such as monitoring and inspection records, records of maintenance and repairs, and land application records, including updated documentation to match current conditions and circumstances at the CAFO. Certified CAFOs, like any other permitted or unpermitted CAFO, may be asked to send information to the permitting authority that is relevant to implementation of the CWA, or inspected by EPA or authorized State inspectors. During an inspection the certified CAFO could be required to produce the documentation showing that it meets the eligibility criteria, including that the CAFO has been and is being operated and maintained in accordance with an NMP that has been updated as necessary.

Commenters offered numerous perspectives on the proposed eligibility criteria. Some commenters asserted that the proposed criteria were too extensive, stringent, and complex, and therefore would make it unlikely that self-certifying CAFOs could accurately demonstrate their eligibility. These commenters indicated that, as proposed, the eligibility criteria would be expensive to implement and, thus, would serve as a disincentive for a CAFO to choose to certify. In response to these comments, EPA emphasizes that certification is voluntary, and CAFOs may choose not to certify. As noted above, EPA believes that it is generally in an operator's best interest to obtain permit coverage. However, EPA has provided the certification option for CAFOs that choose not to seek permit coverage but would like to establish up front that they do not discharge or propose to discharge. The final rule contains stringent eligibility criteria because in light of the CWA prohibition against unpermitted discharges, the eligibility criteria for certification must establish that the CAFO does not discharge or propose to discharge. Only CAFOs that establish eligibility and meet all of the certification provisions in 40 CFR 122.23(i)(2)–(3) will receive the benefit of certification, which is that a validly certified CAFO that discharges will not be in violation of the requirement to apply for a permit pursuant to § 122.23(d)(1) and 40 CFR 122.23(f). As EPA is clarifying in 40 CFR 122.23(j), without a certification, an unpermitted CAFO that discharges has the burden of establishing that it did not propose to discharge in an enforcement action arising from a discharge from the CAFO.

In contrast, other commenters indicated that the proposed criteria do not ensure that a certified CAFO will not discharge and, therefore, additional requirements and procedures should be imposed for certification eligibility. In response to these comments, the certification eligibility criteria in this final rule have been modified from the 2008 supplemental proposal in order to clarify what EPA expects of a certified CAFO. The final rule clarifies that the CAFO's NMP must include any operation and maintenance practices that are established by the technical evaluation of production area open storage structures as necessary to ensure no discharge. Also, EPA reminds unpermitted CAFOs considering certification that many site-specific factors, such as location and the facility's discharge history, must be taken into account when demonstrating certification eligibility in accordance with this final rule. A CAFO in close proximity to waters of the U.S. or a conduit to waters of the U.S. may need to take additional protective measures for design, construction, operation and maintenance in order to be able to demonstrate that it will not discharge. A CAFO operator who intends to establish eligibility for certification should be mindful that, as stated above in the discussion of revised § 122.23(d)(1), a CAFO that has discharged in the past would generally be expected to discharge in the future, and therefore be expected to obtain a permit, unless it has modified the design, construction, operation or maintenance in such a way as to prevent any discharges from occurring.

The first eligibility criterion for valid certification covers the design, construction, operation, and maintenance of the CAFO's production area. As proposed, 40 CFR 122.23(i)(2)(i) of this final rule requires the CAFO to demonstrate that the CAFO's production area is designed, constructed, operated, and maintained so as not to discharge. Due to the variations in production area design based on the type of containment system used at the operation, EPA proposed and is finalizing today a rule with two parts for the first eligibility criterion: the first for open manure storage structures and the second for any part of the production area not considered to be open containment.

Consistent with the 2008 supplemental proposal, under the final rule, any CAFO with an open manure storage structure seeking to certify that it does not discharge or propose to discharge is required to perform a technical evaluation under 40 CFR 122.23(i)(2)(i)(A). To demonstrate that the CAFO meets the production area requirement for certification, this evaluation must be conducted in accordance with the elements of the technical evaluation required for open storage new source swine, poultry and veal calf operations seeking to demonstrate no discharge under 40 CFR 412.46(a)(1)(i)–(viii), as revised by this action. EPA clarifies that, although this provision references the new source performance standard (NSPS) for swine, poultry and veal calf operations, this eligibility criterion applies to any unpermitted CAFO with open manure storage seeking to certify that it does not discharge or propose to discharge, not just new sources in the swine, poultry and veal calf sectors with open storage.

Elsewhere in this final rule, EPA is revising the provisions at 40 CFR 412.46(a)(1) to allow such new sources with open containment to meet the no discharge requirement for their NPDES permit using best management practices based in part on a rigorous site-specific technical evaluation that includes use of the most recent versions of the Animal Waste Management (AWM) software, or equivalent software, and the Soil Plant Air Water (SPAW) Hydrology Tool, or an equivalent model. For a discussion of the technical evaluation and the AWM and SPAW modeling tools, see section III.F of this preamble.

Several commenters expressed the need for evaluation criteria specific to beef cattle feedlots, based on their belief that reliance on swine, poultry, and veal calf new source provisions is inappropriate for all animal sectors. As described in more detail in Section III.F of this preamble, AWM software is a planning and design tool for animal feeding operations that can be used to estimate the production of manure, bedding, and process water and determine the size of storage facilities necessary to meet no discharge. AWM (CCE version 2.3.0) currently provides manure characteristics for eight animal types with the ability to modify these characteristics and add animal types as necessary. The field and pond hydrologic analyses conducted with the SPAW model are not specific to any animal species. Therefore beef and dairy

operators can use the AWM and SPAW tools to establish the appropriate design, construction, operation and maintenance of their facility to meet the no discharge requirement of certification.

EPA also received comments seeking clarification regarding how the technical evaluation for new source swine, poultry and veal calf operations can apply to existing facilities given that EPA stated in the preamble to the 2003 CAFO rule that the no discharge performance standard was not economically achievable for existing facilities. While EPA has determined that the no discharge performance standard was not appropriate to require for existing facilities on a national basis (*see* 68 FR 7218), EPA acknowledges that there are existing CAFOs that could meet the standard. Existing CAFOs that feel it is not economically achievable to meet a no-discharge standard always have the option of applying for a permit.

In order to meet the second part of the first eligibility criterion, the final rule requires, in 40 CFR 122.23(i)(2)(i)(B), that any certifying CAFO must demonstrate that all of its production area, as defined at 40 CFR 122.23(b)(8), not just open containment structures, is designed, constructed, operated, and maintained such that there will be no discharge of manure, litter, process wastewater, or raw materials, such as feed, to surface waters. For a CAFO without open containment, this provision requires a demonstration of no discharge from the entire production area. For a CAFO that has an open containment structure, this provision requires a demonstration that the remainder of the production area (other than the open containment structure subject to the demonstration in § 122.23(i)(2)(i)(A)), also will not discharge. Because of the special risk of discharge from open manure storage structures, greater specificity is provided regarding the elements of the demonstration in § 122.23(i)(2)(i)(A); however, the demonstration in § 122.23(i)(2)(i)(B) must be technically sound and must be adequate to demonstrate that the production area is designed, constructed, operated, and maintained for no discharge. This demonstration must be based on an evaluation of site-specific characteristics, including, among others, the amount of manure generated during the storage period, the size of the storage structure, control measures to ensure diversion of clean water, and seasonal restrictions on land application. The preamble to the 2003 rule provides additional information regarding production area design for total containment and closed manure storage systems, such as lagoon covers, underhouse pit storage systems, and stockpile storage sheds. *See* 68 FR 7176, 7219–20. Some CAFOs may have a combination of open manure storage structures and covered structures, while others will house all animals and store all manure, feed and by-products under cover. In either case, all parts of the production area must be included in the demonstrations required under § 122.23(i)(2)(i)(A) and (B).

In addition, as proposed under 40 CFR 122.23(i)(2)(i)(C), this final rule requires any certified unpermitted CAFO to implement the measures set forth in 40 CFR 412.37(a) and (b) for the production area. These additional measures pertain to operation and maintenance and include provisions for visual inspections, depth markers for all open surface liquid impoundments, corrective action, mortality handling and recordkeeping. This final rule also requires these measures for permitted new swine, poultry and veal calf operations to meet a no discharge standard. Since both these permitted new source operations and unpermitted certified CAFOs need to ensure no discharge from the production area under the permit and certification requirements, respectively, it is appropriate to rely, in part, on those provisions to establish eligibility criteria for no discharge certification. The documents that are necessary to satisfy the first eligibility criterion, which addresses the CAFO's design, construction, operation, and maintenance of the entire production area, include design documentation and all recordkeeping and operation and maintenance planning necessary to address the elements of § 122.23(i)(2)(i), which includes the measures set forth in § 412.37(a) and (b).

In the preamble to the 2008 supplemental proposal, EPA requested comment on whether a recordkeeping checklist for use by certified CAFOs would be a useful tool. EPA suggested the possibility of making such a checklist available to all CAFO operators. Commenters generally supported the concept of a recordkeeping checklist that could be used by certified CAFOs, since the checklist could be used to document ''expectations for risk management.'' Commenters added that the checklist should be developed in concert with the States. EPA plans to work with States to develop a checklist and consider whether State-specific checklists would also be appropriate.

The second eligibility criterion requires the CAFO to have developed and be implementing an NMP that addresses, at a minimum, the elements set forth in § 122.42(e)(1) and 40 CFR 412.37(c), and all site-specific operation and maintenance practices necessary to ensure that the CAFO will not discharge. The NMP must include provisions regarding nutrient management in the production area as well as in all land application areas under the control of the CAFO where the CAFO will land-apply manure. Because operation and maintenance practices and procedures are critical to discharge prevention, implementation of an NMP is an essential component of any CAFO's efforts to ensure that it will not discharge from its production or land application areas. Furthermore, in order for any certified CAFO that land applies to ensure that the only discharges from the land application areas are non-point source agricultural stormwater discharges, the CAFO would, at a minimum, need to land apply in accordance with practices that ensure appropriate agricultural utilization of nutrients, including conservation practices and agronomic rates of application. For detailed discussion of unpermitted CAFOs and the agricultural stormwater exemption, see section III.B of this preamble.

EPA received comments indicating that the final rule should establish a link between a facility's open storage structure design and the land application practices outlined in a CAFO's NMP. In the 2008 supplemental proposal, EPA intended that the CAFO's NMP would reflect any operation and maintenance practices related to and assumed in the technical evaluation performed for open containment structures. To clarify this intent, 40 CFR 122.23(i)(2)(ii)(B) of this final rule states that the operation and maintenance practices required to be part of the NMP must include ''any practices or conditions established by a technical evaluation pursuant to paragraph (i)(2)(i)(A),'' the provision applicable to CAFOs with open containment. For example, an existing facility may develop an NMP and then use AWM and the SPAW model to evaluate the adequacy of the designed storage facility and overall water budgets for the operation, respectively, which will rely upon inputs from the CAFO's NMP such as the number and type of animals, soil profiles and planned crop rotations. In such a scenario, the CAFO may learn from the technical evaluation that more frequent lagoon drawdowns are necessary in order to achieve no discharge. To be eligible for certification under the final rule, the CAFO's NMP

would then need to be revised to include the adjusted operation and maintenance practices resulting from the technical evaluation. It is these changed operation and maintenance practices that EPA is referring to in the § 122.23(i)(2)(ii)(B) requirement for the NMP to address ''any practices or conditions established by'' the technical evaluation required for CAFOs with open containment structures under the first eligibility criteria.

Commenters requested that EPA define what criteria can be used to meet the NMP eligibility requirement (*e.g.*, whether a comprehensive nutrient management plan (CNMP) would suffice). As EPA stated in the 2008 supplemental proposal, a CAFO may rely upon a CNMP [2] for purposes of certification eligibility, so long as the minimum NMP requirements of § 122.42(e)(1) and § 412.37(c) are met by the CAFO's plan, including all necessary operation and maintenance protocols.[3]

As discussed below, 40 CFR 122.23(i)(4) requires the certified CAFO to at all times be designed, constructed, operated, and maintained such that it meets the eligibility criteria to establish that the operation does not discharge or propose to discharge. Thus, to maintain a valid certification, a certified CAFO must update its NMP if any of the design specifications, practices, or other NMP provisions change over time. For example, if a certified CAFO operator decides to land-apply manure on a field that is not included in the NMP, the CAFO will need to calculate rates of application in accordance with the protocols for land application consistent with 40 CFR 122.42(e)(1)(viii) and revise the NMP to include the new field and the corresponding application rates and any other land application practices for the field in accordance with the protocols. Furthermore, since the eligibility criteria require the certified CAFO to implement the ''up-to-date'' NMP, the CAFO would then need to land apply in accordance with the application rates and other practices incorporated into the NMP for that field.

In the 2008 supplemental proposal, EPA stated that it would encourage CAFOs seeking certification to consult with qualified third-party professionals, but did not propose to require such consultation. Some commenters supported EPA's position, while others believe that a third-party validation of the certification by an NRCS-certified technical service provider and professional engineer should be a required element of the eligibility criteria. Commenters expressed concerns that many CAFOs do not have the requisite knowledge to make technically sound determinations regarding how to meet the eligibility criteria for certification. EPA continues to believe that it is appropriate that the third-party consultation be recommended but not required because certification is voluntary and it is the CAFO owner or operator who must certify to the operation's eligibility. Because a CAFO's certification will not be approved by the permitting authority, it is up to the CAFO operator to be certain that the certification is valid in order to benefit from the presumption that it does not propose to discharge. Therefore, EPA recommends consultation with a qualified third-party. As stated in the preamble to the 2008 supplemental proposal, any professional consulted by the CAFO should have the requisite training, experience and expertise to conduct and/or substantively review the required analyses, and to advise the owner or operator as to whether the CAFO is, in fact, designed, constructed, operated, and maintained such that it will not discharge.

The third eligibility criterion for certification established by this final rule, 40 CFR 122.23(i)(2)(iii), requires that the CAFO maintain the documentation required by the first two criteria ''either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.'' The 2008 supplemental proposal included a regulatory requirement that the NMP and other documentation of eligibility be maintained by the CAFO ''on site.'' Many commenters expressed the need for the final rule to include regulatory language allowing all documentation of the certification eligibility criteria to be held on-site or made readily available upon request. These commenters were primarily concerned that a requirement to maintain the documentation on site would be unreasonably burdensome on facilities that have multiple production sites with one central office. EPA agrees that the documentation necessary to demonstrate certification eligibility, including the CAFO's site-specific NMP, should be maintained either on site or at a nearby office, or otherwise made readily available to the permitting authority upon request. The final rule established today includes this revision to the proposed language, which is also consistent with the provision established today applicable to the agricultural stormwater discharge exemption for unpermitted CAFOs, discussed in section III.B of this preamble. EPA recommends that operators maintain the necessary documentation on-site to ensure proper implementation of all operation and maintenance procedures.

(ii) Submitting the Certification

Under the certification option promulgated by this action, a CAFO seeking to certify that it does not discharge or propose to discharge is required to submit the certification to the permitting authority. Under 40 CFR 122.23(i)(3), the submission to the Director must include: (1) The CAFO owner or operator's name, address and phone number; (2) information regarding the CAFO's location, including latitude and longitude; (3) a description of the basis for the CAFO's certification that it satisfies the eligibility requirements of 40 CFR 122.23(i)(2); (4) the certification statement set forth in 40 CFR 122.23(i)(3)(iv); and (5) an official signature that meets the signatory requirements of 40 CFR 122.22.

The signed certification makes the CAFO legally responsible for its representations to the Director regarding the design, construction, operation, and maintenance of the CAFO. As EPA noted in the preamble to the 2008 supplemental proposal, the language regarding legal liability for making a false statement under the certification option is consistent with language in 40 CFR 122.26(g) which applies to facilities seeking to obtain a ''no exposure'' exclusion from the requirement for an industrial stormwater discharge permit. EPA clarifies that under the applicable signatory requirements in § 122.22, signing the certification signifies that the signer is certifying that the certification was prepared under his/her direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted and that based on the responsible official's inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the

[2] Technical Guidance for Developing Comprehensive Nutrient Management Plans, USDA Natural Resources Conservation Service (2003), available at *http://policy.nrcs.usda.gov/viewerFS.aspx?id=3073.*

[3] It is common for an operation to have one or more operation and maintenance plans in order to properly implement a number of NRCS conservation practice standards simultaneously. Also, to the extent that the necessary operation and maintenance requirements to implement any provision of the NMP are not included in the NMP itself, those requirements need to be implemented and included in an operation and maintenance plan to be maintained on site or at a nearby location.

information, the information submitted is, to the best of their knowledge and belief, true, accurate and complete.

This final rule makes no changes to the existing regulations concerning how CAFOs may make Confidential Business Information (CBI) claims with respect to information they must submit to the permitting authority and how those claims will be evaluated. A facility may make a claim of confidentiality under the existing regulations at 40 CFR part 2, subpart B.

The third item the Agency is requiring for submission to the Director, as listed above, is a statement describing the basis for the CAFO's certification that it is designed, constructed, operated, and maintained in accordance with the certification eligibility criteria. EPA's expectation for what this description should include is unchanged from the 2008 supplemental proposal. In the preamble to the 2008 supplemental proposal, EPA requested public comment on whether the scope and type of information included in the description of eligibility submitted to the Director should include: (1) The type and number of animals; (2) the type and capacity of manure and wastewater storage and/or containment; (3) storm size used as the basis for containment design; (4) whether the CAFO consulted with a professional engineer or technical service provider (TSP); (5) identification of the documents maintained on site in accordance with the eligibility criteria; and (6) any technical standards, tools (*e.g.* , RUSLE and Phosphorus Index) and formulas used to calculate application rates of manure, litter, and process wastewater.

Commenters expressed differing viewpoints as to what documentation must be provided to the Director for the no discharge certification. Some commenters felt that the 2008 supplemental proposal would have required the submission of too much information, and that CAFOs should only be required to submit a list of the documents created to establish a facility's eligibility. Some of these stated that submission of any facility design or operation specifics is superfluous given that there is no review by the permitting authority. In contrast, other commenters believed that the extent of documentation to be submitted to the Director was insufficient to establish that a facility is designed, operated, and maintained in a way to ensure that it is not discharging. Specifically, these commenters desired that submissions include all documents associated with meeting the eligibility criteria for certification.

After consideration of these comments, EPA believes that the list of information presented in the preamble to the supplemental proposal balances the need of the Director to be informed of critical aspects of the certified CAFO's operation with the fact that the certification is not subject to review by the Director in order to become effective. It is reasonable that the description of the CAFO's basis for certification be submitted as part of the certification, including the type of information listed above, as proposed in the supplemental proposal. EPA also recognizes that depending on site-specific conditions at a particular facility, certain information may not be necessary (*e.g.* , an operation with no land application areas would not need to provide information about application rates of manure, litter, and process wastewater). Furthermore, if the Director is concerned that a CAFO that discharges or proposes to discharge has submitted a certification, the Director has the authority to request additional information from the CAFO, as discussed below.

The authority given to the permitting authority under section 308 of the CWA to conduct inspections at operations is not affected by this rule. Section 308 authorizes, among other things, EPA to require owners or operators of point sources to establish records, conduct monitoring activities and inspections, and make reports, to enable the permitting authority to determine whether there is any violation of any prohibition, or any requirement established under section 308, 402, or 504 of the CWA. Therefore, any CAFO, whether it is certified, permitted, or neither, may be subject to an information gathering request or inspection, at the Director's discretion and for any of the reasons provided by section 308 of the CWA. 33 U.S.C. 1318.

Under this final rule, 40 CFR 122.23(i)(4), a ''certification that meets the requirements of paragraphs (i)(2) and (i)(3) * * * shall become effective on the date it is submitted, unless the Director establishes an effective date of up to 30 days after the date of submission.'' A certification is effective if the CAFO meets the eligibility criteria in § 122.23(i)(2) and submits the signed certification statement and other required information in accordance with § 122.23(i)(3). This rule also requires the use of certified mail or an equivalent method of documentation for identifying the date of submission, consistent with the supplemental proposal, in order to notify the Director that the CAFO has chosen to self-certify.

EPA notes that under the final provision, the Director may, but is not required to, establish that certifications will become effective after a specified number of days, not to exceed 30 days, following submission of the certification if the Director deems such action appropriate, as discussed below. Regardless of whether the permitting authority chooses to establish an effective date in accordance with § 122.23(i)(4), a certification becomes effective (either on the date it is submitted or on the date established by the Director) without acceptance or approval by the permitting authority. A decision by the permitting authority to delay the effective date would allow the permitting authority to become aware of the CAFO's certification prior to it going into effect. A delayed effective date of up to 30 days could provide the opportunity for the permitting authority and the CAFO to have a focused exchange of information before the certification becomes effective. For example, as a result of such an exchange the CAFO may choose to consider making revisions to its certification to be assured it has submitted a certification that meets all the requirements of § 122.23(i)(2) and (3). Also, such an exchange could provide an opportunity for the CAFO to obtain additional information about maintaining a valid certification after it goes into effect. The permitting authority can also request information from an unpermitted CAFO, as provided in section 308 of the CWA, and provide feedback to the CAFO operator if the Director believes that the CAFO has not met the certification requirements.

EPA emphasizes that the final rule does not require Director review of the certification. Therefore, if, for example, the permitting authority establishes that certifications in that State will become effective 30 days after submission, a certification from a CAFO that has met the eligibility and submission requirements in § 122.23(i)(2)–(3) will go into effect on day 30 regardless of any activities that take place during the 30-day period, so long as the CAFO maintains eligibility throughout that period. Similarly, because the certification is not subject to permitting authority review and approval, inaction on the part of the permitting authority at any time during or after the 30 days does not indicate that the CAFO either has or has not met the eligibility and submission requirements. An effective date that is no more than 30 days after submission provides sufficient time for the permitting authority to receive the certification and have an exchange with

the CAFO, but it does not constitute an unreasonable delay for the CAFO to obtain a valid certification. Given these underlying principles, EPA has determined that it is appropriate to allow the Director discretion to establish an effective date that is up to, but not more than, 30 days after submission.

EPA received comments concerning the submission process for no discharge certifications. Numerous commenters expressed concerns with the lack of any explicit requirement for Director review and approval of certifications. Some commenters asserted that the lack of review and public participation under the 2008 supplemental proposal violates the CWA and the *Waterkeeper* decision, and that without such review, certification provides no assurance of ''no discharge'' and creates an impermissible permitting structure based on self-regulation. Other commenters indicated that Director review of key documentation is necessary to ensure that a facility's certification meets applicable criteria. Some commenters requested that the documents necessary to meet the eligibility criteria also be subject to review by the Director and that approval of the no discharge certification be made contingent on such review.

EPA does not agree that the lack of a requirement for Director review is contrary to the CWA or the *Waterkeeper* decision. The voluntary certification option is available only to CAFOs that do not discharge or propose to discharge and, therefore, are not required to seek NPDES permit coverage. Neither the CWA nor the *Waterkeeper* decision requires a permitting authority to review no discharge certifications or to subject such information to public participation. Under the CWA, such requirements apply only to the permitting process. In addition, EPA emphasizes that certification is not a substitute for a permit. Rather, a valid certification simply allows an unpermitted CAFO that is designed, constructed, operated, and maintained not to discharge to establish and document that it does not discharge or propose to discharge, in exchange for the assurance provided by a no discharge certification that it is not subject to the regulatory requirement to seek permit coverage in 40 CFR 122.23(d)(1) and (f). It is the CAFO's choice and responsibility to establish and maintain a valid certification or lose the benefits afforded by the certification. Furthermore, as mentioned above, the final rule allows the permitting authority to establish an effective date for certification of up to 30 days after the date of submission by the CAFO. Allowing States the discretion to delay the effective date of certification addresses some comments from States expressing uncertainty about the role of the permitting authority in the certification process.

(iii) Limitations on Certification

This rule includes several limitations on certification related to the term of a certification, withdrawal of certification, and recertification after a certification becomes invalid.

Consistent with the 2008 supplemental proposal, under this final rule, a no discharge certification will expire five years after the effective date, unless the CAFO voluntarily withdraws the certification or the certification becomes invalid (*i.e.*, the CAFO has either discharged or ceases to be designed, constructed, operated, and maintained in accordance with certification eligibility criteria) during the five-year term. *See* 40 CFR 122.23(i)(4). Some commenters agreed with the proposed five-year term of certification, because the limited term of certification would ensure that the CAFO reevaluates eligibility. Other commenters contended that facilities should recertify on a more frequent basis, either annually or triennially, to ensure more frequent reevaluation of their certification. A number of commenters did not believe that a term of certification should be prescribed; several of these commenters maintained that if a facility remains in compliance with the certification criteria and does not make any significant changes in operation, the certification should remain valid indefinitely.

After considering the comments regarding the appropriate term for certification, EPA has concluded that the proposed five-year term is appropriate. At the end of this term the certification can be renewed, if desired by the CAFO. Since CAFOs commonly alter their operations over time, it is reasonable for the CAFO to periodically reevaluate and update its certification submission. In addition, renewal every five years does not create an undue burden on the CAFO or the permitting authority because CAFOs that have not had major changes in operations may be able to use much of the same documentation as prepared previously, and permitting authorities are not required to review and approve the certification. A shorter term for certification, such as one or three years, is not necessary because a properly certified CAFO needs to evaluate the facility at regular intervals as part of the inspection and recordkeeping requirements. Thus, a five-year term is reasonable.

Under 40 CFR 122.23(i)(5) a CAFO may withdraw its certification at any time by notifying the Director, by certified mail or equivalent method of documentation, that it is withdrawing its certification. The certification is effectively withdrawn on the date the notification is submitted to the Director. If a CAFO's certification becomes invalid as provided in § 122.23(i)(4), discussed below, § 122.23(i)(5) requires the CAFO operator to withdraw its certification within three days of the date on which the CAFO becomes aware that the no discharge certification is invalid. As proposed, this final rule does not require the CAFO operator to notify the Director of the reason for withdrawing the certification because certification is voluntary.

EPA received a number of comments concerning the withdrawal of certification. These comments generally focused on the need for a certified CAFO to provide more information regarding its actions leading to the withdrawal. Some commenters observed that in order to withdraw certification, CAFOs should have to submit the reasons for such withdrawal to the Director. EPA believes it is reasonable for a CAFO to be able to withdrawal its voluntary certification at any time without additional explanation. The decision to certify is voluntary, and thus, it is appropriate to allow a CAFO to decide to withdraw its certification for any reason with no further explanation. However, certain situations require the CAFO to withdraw its certification. This final rule requires that a CAFO withdraw its certification by notifying the Director in the event that the certification is no longer valid, either because of a discharge or because the CAFO ceases to meet the eligibility criteria. *See* § 122.23(i)(4) and (5). Notifying the Director that a CAFO is withdrawing its certification provides the information necessary for the Director to maintain an up-to-date record of certified CAFOs. A CAFO that fails to withdraw its certification within three days of becoming aware that the certification is invalid would be in violation of this regulatory requirement. EPA believes these provisions appropriately balance the voluntary nature of certification with the value to the Director of maintaining accurate records of the universe of certified CAFOs.

This final rule describes in § 122.23(i)(4) the situations that cause a certification to become invalid. First, in the unlikely event of a discharge from a properly certified CAFO, the

certification would cease to be valid and would no longer be in effect. Second, should a CAFO fail to continue to meet any of the eligibility criteria, the CAFO's certification would no longer be valid. Circumstances that could result in the certification becoming invalid include, for example, an increase in animals that exceeds the capacity of the production area for manure storage and handling or a loss of land application areas such that the assumptions in the NMP concerning land application would no longer be appropriate, if the CAFO's operations, NMP and certification documentation were not revised to address these changed circumstances. EPA emphasizes that failure by a certified CAFO to continue to meet the eligibility requirements in 40 CFR 122.23(i)(2) is not, in and of itself, a violation of any regulatory requirement because certification is strictly voluntary. For example, failure to implement the measures set forth in 40 CFR 412.37(a)–(b), which are required for no discharge certification eligibility under 40 CFR 122.23(i)(2)(i), is not a violation of § 412.37(a)–(b) but renders the certification invalid. However, failure to withdraw a certification that has become invalid is a violation of the requirement to do so.

As explained in the 2008 supplemental proposal, once a certification ceases to be valid, the operator cannot rely on it if a subsequent enforcement action is brought for a violation of the duty to apply for a permit that is triggered after the certification becomes invalid. In other words, once a CAFO's certification becomes invalid, the CAFO is in the same position as any other unpermitted and uncertified CAFO. After withdrawing the invalid certification, the operator may be interested in seeking to recertify that the CAFO does not discharge or propose to discharge or, if the CAFO does discharge or propose to discharge, the CAFO is required to seek permit coverage, as stated in 40 CFR 122.23(i)(5)(ii).

In the 2008 supplemental proposal, EPA proposed to allow a previously certified CAFO to recertify by revising its operations to address the deficiency that led to the invalid certification and submitting a new certification statement. Under the proposal, if the certification was rendered invalid by a discharge, in order to recertify a CAFO would have to submit to the Director the information required under 40 CFR 122.23(i)(3) and additional information describing the discharge and the steps taken by the CAFO to permanently address the cause of the discharge. As proposed, such a recertification submission, like the initial submission, would not be subject to review.

Under this final rule, if a CAFO's certification becomes invalid due to a failure to meet the eligibility criteria, as opposed to because of a discharge, and the CAFO wishes to recertify, the owner or operator would need to make the changes necessary to establish eligibility under § 122.23(i)(2). The provisions applicable to the recertification submission and effective date would be the same as for any certification. *See* § 122.23(i)(3) and (4). If the CAFO wishes to recertify after a discharge has occurred, the CAFO would need to meet the additional requirements of 40 CFR 122.23(i)(6), discussed in detail below.

Commenters expressed several viewpoints with regard to the proposed provisions for recertification after a discharge. Some commenters supported the recertification process as proposed. These commenters generally recognized that CAFOs may encounter unusual circumstances that result in a discharge and that it is appropriate to allow for recertification once the conditions that resulted in the discharge are addressed. Certain other commenters argued that subsequent to a discharge any recertification should be reviewed by the permitting authority and open to public comment to ensure a rigorous assessment of whether recertification is appropriate. Some commenters asserted that recertification after a discharge should not be allowed at all under the CAFO regulations. Furthermore, some commenters believe it would be inequitable for unpermitted CAFOs to discharge and recertify if other discharging operators are required to seek permit coverage. Several of these commenters asserted that any CAFO that discharges should be required to obtain an NPDES permit.

EPA emphasizes that it will be highly unlikely for a CAFO that is designed, constructed, operated, and maintained in accordance with the eligibility criteria in § 122.23(i)(2) to discharge. Furthermore, EPA maintains its position, stated in the preamble to the 2008 supplemental proposal, that the Agency generally considers a recurring discharge as evidence that a CAFO is not eligible for certification or recertification and needs to seek permit coverage. However, given the possibility of a discharge from a properly certified CAFO, albeit remote, EPA believes it is necessary for the final rule to include provisions specifically for a CAFO seeking to recertify after a discharge.

In response to comments, EPA has established specific criteria in this final rule that limit a CAFO's ability to recertify after a discharge to those situations where (1) the certification was valid at the time of the discharge, meaning the CAFO continued to be designed, constructed, operated, and maintained for no discharge in accordance with all provisions of the NMP and any operation and maintenance plans included in the certification; (2) the operator has made any necessary changes to the CAFO's design, construction, operation and maintenance to permanently address the cause of the discharge and ensure that no discharge from this cause occurs in the future; and (3) the CAFO has not previously recertified after a discharge from the same cause. The first criterion limits the availability of recertification after a discharge by excluding CAFOs that discharge after allowing the certification to lapse. EPA believes that a CAFO that certifies under penalty of law that it is and will continue to be designed, constructed, operated, and maintained so as not to discharge, that then fails to satisfy this criterion and subsequently discharges, should not be given the opportunity to once again obtain the benefits of a no discharge certification. The second criterion ensures that a CAFO will only recertify after it has carefully evaluated the cause of the discharge and taken whatever action is necessary to ensure that a discharge from the same cause will not occur again. Finally, the third criterion constrains a CAFO from engaging in a cycle of recertifying after multiple discharges from the same cause. The voluntary certification option established in this rule is not intended to be a mechanism for discharging CAFOs to avoid obtaining permit coverage, a concern cited by several commenters who opposed the certification option. On the contrary, EPA is providing the certification option to allow CAFOs that meet the eligibility criteria to establish up front that they do not discharge or propose to discharge.

The final rule provides that the CAFO's recertification will not become effective until 30 days from the date of submission. The operator is also required to submit the following information for review by the Director: A description of the discharge, including the date, time, cause, duration and approximate volume of the discharge, and a detailed explanation of the steps taken by the CAFO to permanently address the cause of the discharge. This 30-day review period provides an opportunity for the Director to consider the circumstances leading to the discharge, any actions taken by the CAFO to permanently address the cause of the discharge, and any other relevant

compliance information regarding the facility. EPA encourages State permitting authorities to take advantage of this opportunity to consider such information. As is true for the general certification process described above, when a CAFO seeks to recertify after a discharge, the Director has the authority to collect additional information from the CAFO, assess whether the criteria in this rule are satisfied, and provide feedback to the CAFO if he/she believes that the CAFO has not met the recertification criteria. For example, the 30-day review period will allow the Director to assess whether or not the CAFO has previously recertified after a discharge from the same cause. However, as with the initial certification, the Director is not required to take any action for a certification to become effective at the end of the 30-day review period and inaction does not indicate that the CAFO has met the recertification criteria. After considering public comments on the 2008 supplemental proposal regarding recertification after a discharge, EPA has determined that this 30-day review period is reasonable and prudent to allow the Director to review situations where a previously certified CAFO has had an actual discharge.

Overall, the limited conditions under which a CAFO can recertify following a discharge, the description of the discharge submitted to the permitting authority, and the required 30-day review period prior to the recertification becoming effective, provide an opportunity for the Director to determine whether the CAFO discharges or proposes to discharge and must seek coverage under an NPDES permit. For example, as provided in 40 CFR 122.28(b)(2)(vi), the Director has the authority to direct that the CAFO be covered under a general permit if one is available.

EPA believes the final rule provisions covering recertification after a discharge provide an appropriate balance of the flexibility offered by voluntary certification and the need for scrutiny of previously certified CAFOs that have discharged. Additionally, under the final rule, any previously certified CAFO that discharges or proposes to discharge is subject to the permit application requirements of 40 CFR 122.23(d)(1) and (f), and therefore must apply when the CAFO proposes to discharge. A CAFO that has permanently addressed the cause of the discharge such that the CAFO does not ''discharge or propose to discharge'' is not required to seek permit coverage regardless of whether it recertifies. For further discussion of the effects of a past discharge on a CAFO's permit application requirements, see the duty to apply discussion at section III.A.3(a) of this preamble.

B. Agricultural Stormwater Exemption

1. Provisions in the 2003 CAFO Rule

The discharge of manure, litter, or process wastewater from a land application area under the control of a CAFO is a discharge subject to NPDES permitting requirements, unless the discharge is an ''agricultural stormwater discharge,'' which is excluded from the meaning of the term ''point source'' under 33 U.S.C. 1362(14). In the 2003 CAFO rule, EPA differentiated between discharges from land application areas under the control of the CAFO that are point source discharges and those that are ''agricultural stormwater discharges'' exempt from NPDES permit requirements.

In the 2003 rule, EPA promulgated a definition of agricultural stormwater for CAFO land application areas that referenced 40 CFR 122.42(e)(1)(vi)–(ix). The referenced regulatory text includes requirements for edge-of-field buffers or equivalent measures, testing of manure and soil, land application at site-specific agronomic rates, and recordkeeping. While not explicitly included in the definition of agricultural stormwater, technical standards established by the Director, in accordance with effluent limitations guidelines (ELGs) in 40 CFR 412.4(c) applied to Large CAFOs' nutrient management plans for land application. These more specific limitations implemented the general requirements at § 122.42(e)(1)(vi)–(ix), and because the 2003 rule required all CAFOs with a potential to discharge to obtain permits, virtually all Large CAFOs were required to comply with them.

2. Summary of the Second Circuit Court Decision

The Second Circuit upheld EPA's definition of agricultural stormwater established by the 2003 rule. In addition, ELG requirements of 40 CFR 412.4(c) concerning land application for Large CAFOs were not challenged. The court did not, however, specifically address the applicability of these requirements to unpermitted Large CAFOs seeking to claim the agricultural stormwater exemption for land application discharges, in light of its vacature of the duty to apply for all Large CAFOs. *Waterkeeper Alliance et al.* v. *EPA*, 399 F.3d 486 (2d Cir. 2005).

3. This Final Rule

As a result of the regulatory revisions being made by this action in response to the *Waterkeeper* decision, which held that EPA does not have authority to require facilities with solely a potential to discharge to obtain permits, Large CAFOs are not required to seek NPDES permit coverage unless they discharge or propose to discharge. For those Large CAFOs that obtain NPDES permit coverage, provisions for determining whether precipitation-related discharges from their land application areas qualify for the agricultural stormwater exemption were promulgated in the 2003 rule and codified at 40 CFR 122.23(e). As explained above, under the 2003 rule, Large CAFO NPDES permits must require the development and implementation of nutrient management plans for land application in accordance with the ELG in 40 CFR part 412. Nutrient management plans for land application in accordance with 40 CFR 412.4(c) include application rates and other practices for manure, litter, and process wastewater developed in compliance with technical standards, as well as other requirements. These land application requirements are then incorporated into the permit pursuant to 40 CFR 122.42(e)(1). Therefore, for permitted Large CAFOs that land apply manure, litter, or process wastewater, ''site-specific nutrient management practices * * * as specified in § 122.42(e)(1)(iv)–(ix)'' in § 122.23(e) include land application rates and other practices determined in compliance with technical standards.

The 2003 rule at § 122.23(e) specifies how Large CAFOs that have NPDES permits qualify for the agricultural stormwater exemption. Specifically, under the existing regulation, the permit must set forth the site-specific nutrient management practices that ensure appropriate agricultural utilization of nutrients as specified in 40 CFR 122.42(e)(1)(vi)–(ix) in order for precipitation-related discharges from such land application areas to be exempt agricultural stormwater discharges. EPA did not propose to amend the existing agricultural stormwater discharge exemption provision in § 122.23(e), nor has EPA otherwise reopened the provision.

In this rule, however, EPA is adopting a new regulatory provision clarifying what constitutes agricultural stormwater for unpermitted Large CAFOs. The *Waterkeeper* court held that Large CAFOs with a mere potential to discharge were not required to obtain permits. Because the existing regulations could be construed as

applying only to Large CAFOs with NPDES permits, EPA explained in the preamble to the 2006 proposed rule that a CAFO with no discharges other than precipitation-related discharges from its land application areas would not be considered to ''discharge'' if it applies manure, litter, or process wastewater to land under its control in accordance with nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater as specified § 122.42(e)(1)(vi)–(ix). The Agency also expressly stated in its 2006 proposal that, for unpermitted Large CAFOs to qualify for the statutory agricultural stormwater exemption, manure, litter, and process wastewater must be applied in compliance with technical standards, noting that technical standards are, in significant part, intended to ensure the appropriate agricultural utilization of the nutrients contained in the manure, litter, or process wastewater. 71 FR 37,750. EPA also requested comment on whether to codify language to require that unpermitted Large CAFOs that land apply manure, litter, or process wastewater must comply with the technical standards established by the Director in order to qualify for the agricultural stormwater discharge exemption for precipitation-related discharges from land application areas under their control.

In the preamble to the 2006 proposed rule, EPA also discussed the reference to the documentation requirement found in 40 CFR 122.42(e)(1)(ix). EPA noted that documentation is a crucial element for determining whether a CAFO is land applying manure, litter, or process wastewater in a manner that ensures the appropriate agricultural utilization of nutrients such that any runoff from land application areas under a CAFO's control consists only of exempt agricultural stormwater discharges. 71 FR 37,750.

The provision established in this rule at § 122.23(e)(1) clarifies that in order for unpermitted Large CAFOs to have their precipitation-related discharges qualify as agricultural stormwater discharges, they must land apply manure, litter, or process wastewater ''in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi)–(ix).'' This interpretation of the statutory agricultural stormwater exemption was upheld by the Second Circuit in the *Waterkeeper* decision. In addition, the new provision established at 40 CFR 122.23(e)(2) requires unpermitted Large CAFOs to have nutrient management planning documentation on site, at a nearby office, or otherwise make it readily available upon request to support assertions that the only discharges from their land application areas are precipitation-related discharges that qualify for the agricultural stormwater exemption. As noted above, EPA has not reopened any aspect of the 2003 CAFO rule applicable to permitted CAFOs. Rather, the new provisions clarify how the agricultural stormwater exemption applies to Large CAFOs that do not have an NPDES permit. This is not a new requirement for unpermitted CAFOs, but rather a clarification of EPA's existing interpretation of the agricultural stormwater exemption in CWA section 502(14).

EPA is modifying the interpretation articulated by EPA in the 2006 proposal of how technical standards apply to unpermitted CAFOs seeking to have their precipitation-related discharges from land application areas qualify for the agricultural stormwater exemption. Under this final rule, a precipitation-related discharge from land application areas under the control of an unpermitted Large CAFO constitutes an agricultural stormwater discharge where the CAFO has land applied manure, litter, or process wastewater in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi)–(ix). Nutrient management practices and rates of application satisfy the requirements of 40 CFR122.42(e)(1)(viii) when they are in accordance with technical standards established by the Director. The form, source, amount, timing, and method of application of nutrients are essential components of the protocols for land application of manure, litter, or process wastewater specified in § 122.42(e)(1)(viii). As explained below, CAFOs that land apply using nutrient management practices based on standards other than the technical standards established by the Director would have to demonstrate that such practices ensure the appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater as specified in § 122.42(e)(1)(viii).

Technical standards established by the Director provide an objective basis for determining when precipitation-related discharges from land application areas are exempt from NPDES permit requirements. Such technical standards are reviewed and determined by the permitting authority to provide a technically sound framework for establishing rates of application that generally would satisfy the requirements of § 122.42(e)(1)(viii). Such technical standards specify the method or methods for determining whether land application rates are to be based on nitrogen or phosphorus, or whether existing nutrient loads in the soil preclude land application, and also address the form, source, amount, timing, and method of application on each field to achieve realistic production goals while minimizing movement of nitrogen and phosphorus to surface waters. Thus, technical standards provide an objective and reliable framework for developing rates of application and other practices for each field, taking into account a range of critical factors. For purposes of § 122.42(e)(1)(viii), rates of application developed using technical standards must encompass and include all of the factors discussed above.

Because the technical standards established by the Director represent the permitting authority's judgment as to practices that ensure appropriate agricultural utilization of nutrients, as discussed above, they provide a sound basis for determining and documenting that a precipitation-related discharge from land application areas will meet the requirements of § 122.42(e)(1)(viii). If a facility chooses to take a different approach and follow other standards, the facility would need to demonstrate not only that its practices accorded with such alternative standards, but also that the standards provided a reliable, technically valid basis for meeting the terms of § 122.42(e)(1)(viii). While technical standards established by the Director would have undergone careful review by the Director to determine their validity for purposes of applying the agricultural stormwater exemption, there may not have been a comparable review in place for alternative standards. Thus, the CAFO may have to demonstrate both the appropriateness of alternative standards and that its practices conformed to them in order for its discharges to qualify for the agricultural stormwater exemption.

EPA recognizes that there may be other standards that are developed besides those established by the Director that may also provide guidance to producers regarding appropriate agronomic nutrient management practices and the development of rates of application. Under this rule, owners and operators of unpermitted CAFOs are not precluded from relying on such other standards. However, while other

standards may provide useful guidance, in the absence of being reviewed and established by the Director, it is the CAFO's responsibility to demonstrate that such alternative standards do, in fact, ''ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater,'' as required by § 122.42(e)(1)(viii).

In determining whether a CAFO's site-specific nutrient management practices do ''ensure appropriate utilization of the nutrients'' in the land applied manure, litter, or process wastewater, EPA will evaluate an unpermitted CAFO's nutrient management practices using the technical standards established by the Director as a baseline and expects the same of authorized States. As discussed, EPA considers the technical standards established by the Director to be a sound measure for determining whether the form, source, amount, timing, and method of application meet the requirements of § 122.42(e)(1)(viii).

As noted above, in order for an unpermitted Large CAFO without an NPDES permit to establish that the only precipitation-related discharges from its land application areas are agricultural stormwater discharges, it must have documentation showing that its nutrient management practices are in accordance with § 122.23(e)(1). This is not a new concept, as one of the requirements specified in § 122.23(e) promulgated in the 2003 rule is to maintain documentation as required by 40 CFR 122.42(e)(1)(ix). Section 122.42(e)(1)(ix) requires specific records to be maintained to document the implementation of the elements of § 122.42(e)(1)(vi)–(viii). As stated in the preamble to the 2006 proposed rule, the necessary documentation includes both the nutrient management planning documents and the additional recordkeeping that demonstrates the actual nutrient management practices that have been implemented. *See* 71 FR 37,750. Such documentation is essential for determining whether precipitation-related discharges from a land application area are agricultural stormwater discharges or point source discharges.

It is reasonable and appropriate that unpermitted CAFOs be required to demonstrate that their nutrient management practices, including rates of application, meet the regulatory definition of agricultural stormwater promulgated in 2003, and to do so means maintaining documentation of their nutrient management practices. Without adequate documentation, it would be difficult, if not impossible, to know whether such precipitation-related discharges are unpermitted point source discharges or are exempt agricultural stormwater discharges.

Because unpermitted CAFOs are not subject to the place and time recordkeeping requirements of § 122.42(e)(2), EPA is in this rule requiring that unpermitted CAFOs that land apply manure, litter, or process wastewater maintain on site or at a nearby office, or otherwise make available upon request documentation showing that precipitation-related discharges from their land application areas are agricultural stormwater discharges. The requirement for documentation is referenced in § 122.42(e)(1)(ix), and is authorized by section 308(a) of the CWA. Section 308(a) gives EPA authority to require any point source to establish and maintain records for determining whether ''any person is in violation'' of a prohibition, including the section 301(a) prohibition against point source discharges unless authorized under an NPDES permit. Section 308(a)(4) authorizes EPA to require records, reports, and other information when required to carry out provisions of the CWA, including sections 301 and 402. The inclusion of this requirement for unpermitted CAFOs to keep the documentation on site or to make it readily available upon request is for the purpose of giving States and EPA a basis for determining whether the CAFO's land application discharges are within the statutory exemption for agricultural stormwater. EPA expects that, in general, CAFOs will maintain their nutrient management plans for land application on site because they set out the protocols that must be followed in practice. Documentation of the site-specific nutrient management practices that is not produceable to an inspector at the time of a permitting authority's inspection would not be considered to be made ''readily available'' and, further, would raise questions as to whether it is actually being properly used by the CAFO.

EPA received comments in support of its position that a facility need not have an NPDES permit in order for precipitation-related discharges from land application areas to be deemed agricultural stormwater discharges. Other commenters disagreed for a variety of reasons. First, commenters asserted that the proposal was inconsistent with the approach EPA established in the 2003 rule. Second, some commenters argued that allowing the CAFO owner or operator to determine whether its nutrient management practices meet the requirements of the rule creates a similar ''impermissible self-regulatory permitting scheme'' as that struck down by the Second Circuit Court of Appeals in the *Waterkeeper* decision. They argued that these nutrient management practices must be subject to review and consideration by the permitting authority and the public.

EPA does not agree that only CAFOs with NPDES permits should be allowed to claim that discharges from their land application areas are agricultural stormwater discharges. The question is whether a precipitation-related discharge from a CAFO's land application area is exempt from permitting requirements as an ''agricultural stormwater discharge'' or whether it is a point source discharge that requires a permit. As the Court of Appeals for the Second Circuit reiterated in the *Waterkeeper* decision, ''a discharge from an area under the control of a CAFO can be considered either a CAFO discharge that is subject to regulation or an agricultural stormwater discharge that is not subject to regulation.'' 399 F.3d 486 at 508 (citing *Concerned Area Residents for the Environment* v. *Southview Farms*, 34 F.3d 114 (2d Cir. 1994)). The assessment of whether a discharge is exempt as agricultural stormwater or a point source discharge subject to permitting requirements is not part of the permitting process, but rather precedes it.

For the same reason, EPA does not agree that a self-regulatory regime is created by allowing unpermitted CAFOs to claim that precipitation-related discharges from their land application areas are exempt if they land apply manure, litter, or process wastewater in accordance with appropriate nutrient management practices as required by § 122.23(e). In the context of the agricultural stormwater discharge exemption, nutrient management practices are not effluent limitations, which can only be established and enforced through NPDES permits. NPDES permits are authorized by section 402 of the CWA for the ''discharge of any pollutant'' under the terms of that section, including compliance with effluent limitations. Section 502(12) defines ''discharge of a pollutant'' and ''discharge of pollutants'' as ''the addition of any pollutant * * * from any point source.'' The definition of ''point source'' in section 502(14) expressly excludes ''agricultural stormwater discharges and return flows from irrigated agriculture.'' Therefore, NPDES permits are necessary for point source discharges, but not for agricultural stormwater discharges. Consequently, the site-specific nutrient

management practices that a CAFO must implement in order for precipitation-related discharges from areas under the CAFO's control to be considered agricultural stormwater discharges are not effluent limitations. Rather, they are preconditions for determining whether the agricultural stormwater exemption applies for discharges from land application areas under the CAFO's control. Because the site-specific nutrient management practices are not effluent limitations, they are not subject to the requirements in section 402 for public review and comment. However, persons who believe that an unpermitted Large CAFO's nutrient management practices are not sufficient to qualify for the agricultural stormwater exemption are free to bring citizen suits under CWA section 505 alleging that the CAFO is discharging without a permit.

The *Waterkeeper* court upheld EPA's construction of the definition of point source as articulated in § 122.23(e) as reasonable. In this rule, EPA has not in any way reopened this provision of the 2003 rule. Nor is EPA changing any aspect of § 122.23(e) with respect to what is required in order for precipitation-related discharges from land under the control of a CAFO where manure, litter, or process wastewater is applied to qualify as ''agricultural stormwater discharges.'' The approach taken in this rule is simply to describe how a CAFO without an NPDES permit may come within the scope of the existing language in § 122.23(e).

C. Nutrient Management Plans

1. Provisions in the 2003 CAFO Rule

Under the 2003 CAFO rule, an NPDES permit issued to a CAFO must include a requirement for the permittee to develop and implement a nutrient management plan (NMP). At a minimum, the NMP is required to include best management practices (BMPs) and procedures necessary to achieve effluent limitations and standards, to the extent applicable, including the minimum requirements of 40 CFR 122.42(e)(1)(i)–(ix). Effluent limitations for Large CAFOs are set forth in the effluent limitations guidelines (ELG) in 40 CFR part 412, which contain specific NMP requirements applicable to both the production area and the land application areas under the control of Large CAFOs in the cattle, swine, poultry, and veal calf subcategories. For small and medium CAFOs, and other operations not subject to 40 CFR part 412 requirements, effluent limitations, including those applicable to land application areas, are established on the basis of the best professional judgment (BPJ) of the permitting authority pursuant to CWA section 402(a)(1)(B) and defined in 40 CFR 125.3(c)(2).

2. Summary of the Second Circuit Court Decision

The U.S. Court of Appeals for the Second Circuit found that the terms of an NMP are effluent limitations and vacated the 2003 CAFO rule insofar as the rule allowed permitting authorities to issue NPDES permits to CAFOs without (1) reviewing the terms of the NMPs; (2) providing for adequate public participation in the development, revision, and enforcement of the nutrient management plans; and (3) including the terms of the NMP in the permit. *Waterkeeper Alliance et al.* v. *EPA*, 399 F.3d 486, 498–504 (2d Cir. 2005). The decision did not affect the substantive requirements for NMPs established at 40 CFR 122.42(e)(1) and 412.4(c) in the 2003 CAFO rule.

3. This Final Rule

To address the court's decision, EPA is revising the 2003 CAFO rule and other provisions of the NPDES regulations to provide for:

- Receipt and review of the NMP by the permitting authority prior to issuing an individual permit or granting coverage under a general permit;
- Adequate public participation prior to issuing an individual permit or granting coverage under a general permit;
- Incorporation of the terms of the NMP into the NPDES permit; and
- The process to address changes to the NMP once permit coverage is granted, for both individual and general permits.

The individual permitting process already allows for review of NMPs by the permitting authority and the public, and incorporation of the terms of the NMP into the individual permit consistent with the CWA. This is not the case, however, for general permits. Given that fact, in promulgating these revisions, EPA is devoting particular attention to the process for issuance of general permits. Furthermore, EPA expects most CAFOs to be covered by general permits.

To effectuate these changes, EPA is revising 40 CFR 122.21, 122.23, 122.28, 122.42, 122.62, and 122.63. As mentioned above, EPA extended the deadlines set in the 2003 CAFO rule for NMP development and implementation, as well as for newly defined CAFOs to seek permit coverage in separate rulemakings. 71 FR 6978 (February 10, 2006); 72 FR 40,245 (July 24, 2007).

The preamble discussion that follows is divided into eight sections to separately address each of the following issues:

- CAFO permit application or notice of intent requirements;
- Procedures for permitting authority review and public participation prior to permit coverage;
- Identification of terms of the NMP;
- Process for incorporating terms of the NMP into a general permit;
- Changes to a permitted CAFO's NMP;
- Process for review of changes to an NMP and for modifying terms of the NMP incorporated into the permit;
- Annual reporting requirements; and
- EPA nutrient management plan template.

(a) CAFO Permit Application or Notice of Intent Requirements for Nutrient Management Plans

EPA is revising 40 CFR 122.21(i)(1)(x) to require the applicant to submit, as part of its permit application or notice of intent (NOI) to be covered by a general permit, an NMP developed in accordance with the provisions of 40 CFR 122.42(e) and, for Large CAFOs subject to subparts C or D of 40 CFR part 412, the requirements of 40 CFR 412.4(c), as applicable. Although this change is codified in the section of the regulations applicable to individual permit applications (40 CFR 122.21(i)(1)), it also applies to NOIs, because the regulation governing NOIs (40 CFR 122.28(b)(2)(ii)) cross-references the requirements of § 122.21(i)(1). EPA revised Application Form 2B to reflect these changes, and the revised form is provided as Appendix A of this notice.

The final rule adopts the approach that EPA proposed. This approach is consistent with the *Waterkeeper* decision, which left undisturbed the substantive requirements for nutrient management plans in the 2003 CAFO rule but held that such plans must be submitted to the permitting authority for public review prior to permit coverage. These revisions do not change the required contents of the NMP, but add a requirement for CAFOs to submit their NMP as part of their application for an individual permit or NOI to be covered under a general permit. This differs from the requirements of the 2003 rule, which required that NMPs be submitted only at the request of the Director.

In the 2006 proposed rule, EPA proposed requiring an applicant to submit, as part of its permit application or NOI, an NMP developed in accordance with the provisions of 40 CFR 122.42(e)(1) and if applicable, 40

CFR 412.4(c)(1). The permitting authority would then make the NMP available for review prior to issuing an individual permit or providing coverage under an NPDES general permit.

Many commenters supported the proposed requirements to submit NMPs with the initial permit application or NOI. One State commented that a CAFO should be allowed to submit the NOI information in batches so that the permitting authority could begin processing the NOI before a facility has completed its NMP to prevent delays in the review and approval process. The commenter added that authorization to discharge under the permit could not be granted until the permitting authority had received, processed, and reviewed all required NOI and NMP information according to the regulations.

Nothing in this rule prohibits permitting authorities from accepting permit application information in batches, provided that the application information and submission process satisfies all applicable requirements. For example, existing NPDES regulations address, in relevant part, the effective date of an application and the processing of a permit. *See* 40 CFR 124.3. EPA recognizes that early communication between the owner or operator of a CAFO and the permitting authority can help facilitate the permitting process, and EPA encourages CAFOs to work closely with their permitting authorities.

EPA received some comments suggesting that the Director issue a general permit that defines the terms of the NMP and details BMP options for a range of possible conditions combined with a requirement for the CAFO to submit a summarized NMP. The summarized NMP would include site-specific facility information needed to apply the management approach prescribed by the general permit. One State recommended that, for general permits, CAFOs submit a ''universal NMP'' with their NOI that contains decision-making tools used by producers to determine application rates, dates, and methods rather than including site-specific information in the permit. This would allow for the public to comment on a generic ''universal NMP'' and would reduce the number of comments that the State regulatory agencies would need to review and consider if comments were provided for each individual NMP submitted for a general permit.

EPA weighed these comments in deciding what information needed to be submitted to the Director for review to comport with the CWA requirements cited by the *Waterkeeper* Court. The final rule requires any CAFO seeking coverage under a general permit to submit with the NOI an NMP that meets the requirements of § 122.42(e) and applicable effluent limitations and standards. EPA did not identify any other specific regulatory alternatives that substantially reduce burden while still providing for meaningful permitting authority and public review of site-specific NMPs prior to permit coverage. Thus, EPA is promulgating an approach that is consistent with the *Waterkeeper* decision and the NPDES CAFO permit program requirements, while continuing to allow for the use of general permits for CAFOs.

EPA also received a comment that production and land application areas should have separate permitting requirements such that a facility that does not land apply would not need to submit an NMP that addresses its land application area. EPA is not revising the NMP requirements established in the 2003 CAFO rule that added land application requirements for permitted CAFOs. Under the NPDES regulations established in the 2003 rule, permits issued to CAFOs apply to the entire facility, including land application areas. Furthermore, the NMP provisions address discharges that can originate either from production areas or from land application areas. Thus, NMPs have been designed to be comprehensive documents required of all permitted CAFOs. The NMP provisions at § 122.42(e)(1) must be included in a CAFO's NMP ''to the extent applicable.'' Thus, if a facility does not land apply manure, litter, or process wastewater, the land application provisions of the regulation would not be applicable. CAFOs should note, however, that even facilities that do not land apply manure, litter, or process wastewater, but transfer all manure, litter, or process wastewater to other persons, are required by 40 CFR 122.42(e)(3) to provide the ''most current nutrient analysis'' to the recipient.

Although EPA is not revising the substantive requirements of paragraph (e)(1) in this rule, EPA is modifying the introductory paragraph to conform to the procedural requirements promulgated in this rule. Because this rule requires an NMP to be submitted as part of the CAFO's permit application or NOI, EPA is removing, from paragraph (e)(1), the permit condition for development of an NMP once permit coverage is granted. EPA is thus revising § 122.42(e)(1) simply to require that any individual or general NPDES permit issued to a CAFO require the implementation of an NMP that contains best management practices (BMPs) as specified in 40 CFR 122.42(e)(1)(i)–(ix) and the applicable effluent limitations and standards. Applicable effluent limitations include, for Large CAFOs, the requirements of 40 CFR part 412, and for other CAFOs BAT requirements set on a best professional judgment (BPJ) basis.

EPA notes that the definition of ''BMPs'' in the NPDES regulations (40 CFR 122.2) is very broad and includes both practices and procedures to be implemented by a permittee. For this reason, EPA is also changing the phrase in the introductory paragraph of § 122.42(e)(1) concerning the contents of an NMP from ''best management practices and procedures'' to simply reference ''best management practices'' without intending any change in the actual scope of what must be included in an NMP.

(b) Procedures for Permitting Authority Review and Public Participation Prior to Permit Coverage

This rule promulgates 40 CFR 122.23(h), which provides new general permit procedures for CAFO general permits. The provisions of § 122.23(h) supplement the general permitting requirements of 40 CFR 122.28 with specific provisions for review and incorporation of CAFO NMPs into general permits for CAFOs. These provisions implement the decision of the *Waterkeeper* courts concerning public review of NMPs and incorporation of the terms of the NMP into CAFO permits, specifically for CAFOs seeking authorization under a general permit.

After the permitting authority receives an application or an NOI from a CAFO, it is the permitting authority's responsibility to review the application or NOI to ensure that it meets the requirements of the regulations, and for general permits, the requirements of the general permit. This includes determining whether the nutrient management plan meets the requirements of 40 CFR 122.42(e)(1) and, for Large CAFOs subject to 40 CFR 412 subpart C or D, the applicable requirements of 40 CFR 412.4(c). As part of that process, the Director must review the NMP for both completeness and sufficiency, as required by the *Waterkeeper* decision. Also, because the *Waterkeeper* decision requires terms of the NMP to be incorporated as permit terms, the Director must provide for adequate public participation in the process of establishing permit terms based on each CAFO's NMP.

The general permit issuance process and the individual permitting process

differ in how a permit is developed and the means by which individual facilities obtain authorization to discharge. A general permit covers multiple facilities, and is made available to facilities seeking permit coverage after it is finalized. When the permitting authority develops a draft general permit, it must provide the public (including potential future permittees) an opportunity to review the permit, submit comments, and request a hearing. After considering comments submitted, the permitting authority then finalizes the general permit. Facilities may then submit an NOI seeking coverage under the final general permit. Typically, the permitting authority may then, without the need for further public notice and comment, either grant coverage under the general permit, require the facility to seek coverage under an individual permit, or deny permit coverage. Existing regulations establish a right for any interested person to petition the Director to require a facility authorized under a general permit to apply for an individual permit. *See* 40 CFR 122.28(b)(3).

For individual permits, the NMP will be submitted and reviewed as part of the permit application. The decision-making procedures in 40 CFR part 124 apply to the Director's review of the application, which includes the NMP. Part 124 requires review of the completeness and sufficiency of the permit application, includes an opportunity for the CAFO to modify the plan or provide additional information to the permitting authority, and requires a final decision by the Director after an opportunity for the public to comment and request a hearing.

Although a review process for data submitted by applicants, including NMPs, is already provided for in existing NPDES regulations that address issuance of individual permits, such a process has not previously been expressly available in the regulations for CAFO general permits. Following the *Waterkeeper* decision, general permits for CAFOs must include the terms of an NMP applicable to each specific CAFO authorized under the permit. Moreover, *Waterkeeper* requires that the public have an opportunity to review each CAFO-specific NMP and comment on terms of the NMP to be incorporated into the permit. Thus, a second round of public notice and comment is necessary when providing coverage for CAFOs under a general permit. To fill these gaps and address the *Waterkeeper* decision, this rule creates new provisions at § 122.23(h) that establish a process for permitting authority and public review of NMPs for CAFO general permits.

(i) Permitting Authority Review of Nutrient Management Plans

As discussed above, the *Waterkeeper* court held that NMPs must be reviewed by the permitting authority before permit coverage is issued to any CAFO. *Waterkeeper*, 399 F.3d at 498–502. The process for permitting authority review of NMPs for CAFOs seeking coverage under a general permit is established by this final rule at 40 CFR 122.23(h)(1). Section 122.23(h) requires the Director to review the NOI submitted by a CAFO owner or operator to ensure that the NOI includes the information required by 40 CFR 122.21(i)(1), including an NMP that meets the requirements of 40 CFR 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. Section 122.23(h)(1) also provides that if, upon review, the permitting authority determines that additional information is necessary to complete the NOI or clarify, modify, or supplement previously submitted material, the Director will notify the CAFO owner or operator and request that the appropriate information be provided. When the NOI is complete, the Director must then proceed with the public notification process required by this rule and discussed below.

In the 2006 proposed rule, EPA proposed a new regulatory provision to establish permitting authority review of NMPs for general permits. This provision would require the Director to review the NMP submitted with the NOI and to take appropriate steps to ensure that the NMP meets the applicable requirements of 40 CFR 122.42(e)(1) and, for Large CAFOs, 40 CFR 412.4(c). Upon review of the NMP, the permitting authority would request from the CAFO owner or operator any additional information needed to complete the NOI or clarify, modify, or supplement the submitted material. The permitting authority would then notify the public of its receipt of a complete NOI and of the terms of the NMP proposed to be incorporated into the general permit. After allowing time for public comment and a public hearing, if needed, the permitting authority would decide whether to authorize coverage under the general permit.

Many commenters disagreed with the proposed modified general permit process that would add permitting authority review of the NMP. The primary concern was that the permitting authorities may have insufficient resources to review all NMPs, which could limit the usefulness of general permits. To address this concern, a number of commenters suggested variations on the proposed process. These suggestions are addressed in more detail below under the corresponding discussion for the respective stage of the general permitting process.

The *Waterkeeper* decision held that permitting authorities must review the permit application and the NMP to ensure that all applicable requirements have been met. The court made no distinction between individual or general permits with regard to this requirement. Because existing regulations do not provide for a review process that addresses the submission and review of NMPs for inclusion in a general permit, and given that EPA expects many CAFOs to be permitted under general permits, EPA is adopting provisions at § 122.23(h) that provide for permitting authority review of the CAFO NOI and NMP, as well as opportunity for the public to comment and request a hearing on the NOI, NMP, and the terms of the NMP to be incorporated into the permit.

The procedure for review and notice of CAFO NOIs and NMPs will impose some increased burden on permitting authorities and will add steps to the process of administering a general permit. However, EPA has worked to adapt these new requirements to a two-stage review process that comports with the *Waterkeeper* decision and the CWA and adds some flexibility to the parallel NPDES permit procedure regulations of 40 CFR part 124.

Commenters stated that EPA should establish a correlation between the timing of the application process and permit coverage. These commenters wanted the regulation to automatically authorize discharges within 60 days from the date of application/NOI submission unless the permitting authority denied permit coverage within that period, even if the public review process was incomplete. They took the view that CAFOs should not be penalized by a review process that could vary in length based on factors out of the control of the CAFO. Similarly, some commenters stated that EPA's final regulation should provide a clearly defined process with a limited length of time for permitting authority review. Suggestions for a time limit ranged from 30 to 60 days.

To provide permitting authorities flexibility to review NMPs of varying complexity, this action does not require a specific timeframe for completion of the permitting authority review process. This approach is consistent with the existing NPDES regulations in part 124 for other industries, which similarly do

not specify a timeframe for automatic authorization to discharge or for the completion of the permitting authority and public review processes.

Commenters expressed concern over the additional workload that reviewing individual NMPs would create, and suggested alternatives to reduce permitting authority workload, including: Submission of a ''universal NMP'' with permit applications for use in determining application rates, timing, and methods rather than including site-specific information in the permit; and combining a detailed, clear general permit with the submission of a summarized NMP for review.

In developing the 2006 proposed rule EPA evaluated alternative approaches for reducing operator and permitting authority workload. For example, EPA considered the use of an NMP template as a voluntary tool to facilitate completion and review of the NMP by CAFO applicants and permitting authorities, respectively. 71 FR 37,752. Such a template could serve as one of many tools available to support CAFO permitting and reduce permitting authority workloads. See preamble section III.C.3(h) for a discussion of the template. EPA also plans to develop additional tools and guidance to reduce the burden on both the CAFO operator and the permitting authority to meet the requirements of the NPDES regulations. For example, EPA is developing a training course that focuses on development and review of NMPs to comport with this final rule. EPA plans to first make the course available to State and federal permitting authorities in 2009.

Another possible approach for minimizing permitting authority resource expenditures is utilizing a third-party for NMP review. A few commenters noted that having permitting authority staff review NMPs that have already been prepared by a State-certified planner is duplicative and unnecessary. Commenters believe that, due to their extensive training, certified planners are in the best position to review and certify NMPs coupled with appropriate public agency oversight. This is one State commenter's established NMP review process. Commenters noted that, in some States, another State agency (typically the State agricultural agency) reviews and approves NMPs. A State commenter asserted that the final rule would meet the intent of the *Waterkeeper* decision if it allowed NMP review by qualified professionals meeting educational and technical training requirements as set forth by the Director. Such professionals should be properly trained and subject to a quality assurance protocol. One commenter asserted that this flexibility is imperative for effective State programs.

The permitting authority is responsible for reviewing NMPs and for ensuring that the terms of the NMP meet the applicable requirements of the NPDES process. There is no reason, however, why a State cannot obtain assistance and advice from technical experts, or tailor its review based on the development or certification of NMPs by State-certified nutrient management planners. However, it is the permitting authorities' responsibility to ensure that comments are properly addressed and the final permit terms are incorporated.

Regarding the increased workload permitting authorities may experience due to review of NMPs, EPA notes that 30 out of the 44 States that regulate CAFOs currently require NMPs to be submitted with a CAFO's request for NPDES permit application coverage. Further, 28 of these States allow for public review of these NMPs. Thus, even though EPA did not specifically require this in the 2003 CAFO rule, such a review process already exists for many State regulatory authorities.

(ii) Public Review of Nutrient Management Plans

In the *Waterkeeper* decision, the Second Circuit held that ''The CAFO rule deprives the public of the opportunity for the sort of participation that the Act guarantees because the Rule effectively shields the nutrient management plans [NMPs] from public scrutiny and comment.'' 399 F.3d at 503. This rule responds to the *Waterkeeper* decision by establishing public participation requirements that ensure adequate opportunity for public review of both a CAFO's NMP and the terms of the NMP to be incorporated into the permit prior to the CAFO obtaining authorization to discharge under the permit.

As previously discussed, procedures for public participation in the issuance of individual permits are already established in the NPDES regulations. *See* 40 CFR part 124. Because this rule requires CAFOs to submit their NMP as part of their permit application (see discussion at section III.C.3(a) of this preamble; 40 CFR 122.21 and 122.23)), the public will have access to the NMP prior to permit issuance and will also have full opportunity to comment on the adequacy of the plan and on the nutrient management terms in the draft NPDES permit developed for the specific CAFO facility. This individual permit process addresses the court's decision in this respect.

To preserve the option of general permits for CAFOs and to conform to the *Waterkeeper* decision which requires the terms of each CAFO's NMP to be incorporated into the CAFO's permit, this rule establishes new provisions, at 40 CFR 122.23(h), that require the permitting authority to allow public review of both the NMP and the terms of the NMP to be included in a general permit.

In § 122.23(h), the rule establishes new general permitting procedures for CAFOs that require permitting authorities to incorporate the terms of site-specific NMPs, which must be submitted with the NOI, into CAFO general permits when authorizing coverage under a general permit. These procedures require the Director to notify the public that the permitting authority is proposing to grant coverage for a facility under the general permit and make available for public review and comment the CAFO's NOI (including its NMP) and the draft terms of the NMP to be incorporated into the permit. The public will also have an opportunity to request a hearing on this information before the CAFO is authorized to discharge under the general permit.

After making a preliminary determination that the NOI meets the requirements of 40 CFR 122.21(i)(1) and 122.42(e), the Director has discretion as to how best to provide the requisite public notification in the general permit context. For example, public notification may be provided on the permitting authority's Web page or through other electronic means. Another alternative is to use the notice or fact sheet for the general permit to establish a procedure allowing any person to request notice by mail or electronically of the receipt of an NOI, the permitting authority's proposed action, and the terms of the NMP proposed to be incorporated into the permit. These are appropriate ways to balance the competing concerns of providing adequate notification to the public, providing flexibility to the permitting authority, and ensuring the practicality of general permits.

Under this rule, the Director also has discretion to establish an appropriate period of time for public review of the NOI and draft terms of the NMP proposed to be incorporated into the permit. Under 40 CFR 122.23(h)(1), the Director may establish by regulation or in the general permit an appropriate period of time for the public to comment and request a hearing. This differs from the specifications in 40 CFR 124.10, which sets a 30-day public notice period for proposed coverage under individual permits. Having the

Director set the time period for public review by regulation or in the general permit process will allow the public and other interested parties an opportunity to comment on the sufficiency of that time period. Factors the permitting authority might consider when establishing an appropriate time period include the number of NOIs being publicly noticed at any one time, the complexity of the material made available for public review, the expected level of public interest based on prior notices of CAFOs seeking coverage, the opportunity for the public to request an extension of the comment period for one or more facilities, and whether individuals can request and receive individual notification of CAFOs seeking authorization to discharge under the permit in a timely fashion.

As mentioned above, the Director must also provide an opportunity for the public to request a hearing. The procedures for requesting and holding a hearing on the terms of the NMP to be incorporated into the general permit are the same as those for draft individual permits, which are provided in 40 CFR 124.11 through 40 CFR 124.13. When granting permit coverage, the Director must respond to all significant comments received during the comment period as provided in 40 CFR 124.17, and if necessary, require the CAFO owner or operator to revise their NMP.

Additionally, under the procedures promulgated in § 122.23(h)(1) of this rule, if after the public notice period and the conclusion of any hearings, the Director decides to authorize discharge under the permit, the permitting authority must notify the CAFO and inform the public. Such notification is necessary to ensure that the applicant and interested individuals are aware of the Director's final decision on granting authorization to discharge under the general permit and incorporating site-specific NMP terms into the general permit. Furthermore, the provision provides notification equivalent to that required when CAFOs are issued coverage under individual permits consistent with this rule revision.

EPA is promulgating 40 CFR 122.23(h)(2), which establishes additional procedures for EPA-issued permits. Paragraph (h)(2) requires the EPA Regional Administrator to notify each person who has submitted written comments on the proposal to grant permit coverage and the draft terms of the NMP of the final permit decision. A person affected by the general permit can either challenge the general permit in court, or apply for an individual permit as authorized in 40 CFR 122.28.

The public notice process described above also includes providing notice to other affected States, as required by the CWA. Section 402(b)(3) of the CWA provides that the Administrator, in approving a State program, shall make sure the State has adequate authority to ensure notice to ''any other State the waters of which may be affected.'' Section 402(b)(5) provides that the Administrator must ensure that any State ''whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State,'' and that if those recommendations are rejected, the permitting State must notify the affected State in writing of the reasons for the rejection. The public notice provisions in this rule provide notification to affected States as well as to the public in general. Additionally, the permitting authority's response to all significant comments will include responses to comments from affected States.

This rule balances several competing concerns regarding public participation procedures for general permitting of CAFOs. First, the final rule maintains the utility of a general permit program as a resource-efficient method by which to authorize multiple CAFOs under an NPDES permit while meeting the Second Circuit's directive to ''provide for adequate public participation'' in the development of site-specific effluent limitations. *Waterkeeper*, 399 F.3d at 524. Second, the final rule provides sufficient flexibility for State permitting authorities to adopt their own procedures while ensuring that they meet the public participation requirements of the CWA. Because of the large number of CAFOs that may seek permit coverage, the Agency considers it appropriate to have procedures that allow and encourage permitting authorities to continue the use of NPDES general permits as a means for applying CWA limitations and standards to CAFOs on a timely basis. Of course, existing regulations give the Director authority to require a facility to apply for an individual permit instead of allowing coverage under a general permit (even after coverage under a general permit has been granted). The Director may thus choose not to issue a general permit for CAFOs, but instead to require all CAFOs seeking permit coverage to obtain coverage under individual permits.

The 2006 proposed rule included procedures for public review of NOIs and draft terms of the NMP substantially the same as the procedures promulgated today in § 122.23(h). EPA solicited comment on the proposal to give the Director discretion regarding the means of public notification and the length of the public notice period, and also on the possibility of fixed minimum time frames for public review. The Agency also specifically sought comment on whether the proposed public participation process achieved an appropriate balance between the competing interests of maintaining the utility of general permits for CAFOs and providing adequate public review of permit terms.

Several commenters expressed concern that public review of the NMP would eliminate the use of general permits, noting that States have limited resources for accommodating a public review process. Several commenters stated that the proposed process provided inadequate opportunity for public input. Some believed that the proposed public participation process is inconsistent with the general permitting approach and that only individual permits are appropriate for CAFOs since the terms of the NMP constitute site-specific effluent guidelines. Others felt that the public participation process needed to begin before the development of the NMP to provide an opportunity for comment on the specific best management practices (BMPs) to be included in the plan.

The procedures for public participation in this final rule preserve the availability of general permits for CAFOs. As discussed above, the changes to the CAFO general permit process made in this rule are necessary to meet the requirements of the *Waterkeeper* decision. In addition, EPA has provided flexibility where it could with regard to how a permitting authority provides public notice and makes key information available. Further, the rule provides permitting authorities with flexibility to establish an appropriate time period for public review. Finally, the rule does not change any of the existing regulations that allow a permitting authority to require an individual permit when appropriate. Overall, the final rule maintains the utility of a CAFO general permit program as a resource-efficient method for authorizing multiple CAFOs under an NPDES permit while meeting the court's directive to ''provide for adequate public participation'' in the development of site-specific effluent limitations.

One commenter stated that public access to the entire NMP will strongly compel operators to risk noncompliance by operating without authorization under a permit. Some commenters were concerned that sensitive information will be made available to the public.

EPA understands the sensitivity of some information that may be contained in a CAFO's NMP. However, public availability and permitting authority review of a CAFO's NMP is not a new practice; rather, it is one that is currently employed in many State NPDES CAFO programs. As stated above, 30 of the 44 States that permit CAFOs request that NMPs be submitted as part of their permit application process. In most of those States the permitting authority conducts a comprehensive technical review of the NMPs prior to granting authorization to discharge under the permit. These NMPs have already been publicly available in these States for some time. Moreover, most of these States provide notice to the public of the availability of these plans and seek public review, with some conducting public meetings as well. Any information submitted to the permitting authority as part of a permit application or NOI must be made available for public review and comment, unless it is confidential business information (CBI). *See* 40 CFR 122.7.

EPA disagrees with commenters who believe that the permitting process provides inadequate opportunity for public input or that such opportunity should arise earlier in the process. The final rule provides ample opportunity for the public to comment on the terms and conditions of the general permit, including for each permitted CAFO, the opportunity to comment on permit coverage and the terms of the NMP. This rule requires that the public have access to the NOI and the NMP when reviewing and commenting on BMPs and other terms of the NMP to be incorporated as enforceable conditions of the permit.

Several commenters supported permitting authority discretion on the method of providing public notice of the opportunity to comment on an NMP or request a hearing. One commenter stated that EPA should allow applications to be processed jointly so that the permitting authority could provide notice to the public of multiple NMPs at the same time. Another commenter supported web-based or other electronic notice. One commenter suggested that the general permit fact sheet be utilized to establish a procedure allowing any person to request notice by mail or electronically of the receipt of an NOI, the permitting authority's proposed action, and the terms of the NMP proposed to be incorporated into the permit. Such an approach would provide flexibility to the permitting authority and reduce the number of notices that must be published.

As stated above, this rule allows the permitting authority discretion as to how best to provide such public notification in the general permit context. For example, public notification may be provided on the permitting authority's Web page or through other electronic means. The final rule does not restrict the ability of a permitting authority to provide notice of multiple NMPs at one time provided the all applicable procedural and substantive permitting requirements are satisfied. However, notice must be adequate, and the opportunity to comment must be meaningful.

Some commenters expressed that EPA should require a minimum of 30 days for public review and that the 2006 proposed rule provided permitting authorities too much discretion. Others stated that the public participation process should be limited, with many suggesting no more than 30 days for an initial submission. In addition, commenters requested that EPA limit the circumstances under which the comment period could be extended. EPA believes that the decision as to how much time should be allowed for public participation is best decided by the Director for reasons discussed above, including that the public will have an opportunity to comment on the length of the public notice period when reviewing either the draft regulations or draft general permit.

EPA also received comments suggesting that EPA specify that each facility would be subject to only one public hearing on a draft permit; that the decision to hold a public hearing on a draft permit and NMP should be based on a finding of a significant degree of public interest and limited to issues germane to permitting; and that public review of a general permit be limited to the terms of the NMP that are incorporated into the permit. Several commenters were concerned that without some limitations, the public review process could be misused. This rule specifies that permitting authorities follow the procedures set forth in § 124.11–124.13. These protocols are well established for NPDES permits and allow the Director to weigh the relevant circumstances in addressing each of the issues raised by commenters.

State commenters were generally supportive of EPA's proposed approach and the flexibility it allows for permitting authorities in the general permit process. In particular, these commenters said that establishing timeframes for public review should be left to the permitting authority.

One State suggested that the public participation aspects of the 2006 proposed rule be limited to only new Large CAFOs and that NMP terms for previously authorized Large CAFOs be made available as part of a modified annual reporting requirement. The public participation requirements in this final rule are applicable to all CAFO NPDES permits. The *Waterkeeper* decision did not distinguish between new facilities seeking permit coverage for the first time and existing facilities seeking permit reissuance for purposes of public participation in reviewing CAFO NMPs. Such a distinction would not make sense given that the Second Circuit found that the terms of NMPs are effluent limits that must be included in the permit and presented for public review and comment. Providing the NMP terms to the public only in an annual report would not address the *Waterkeeper* requirement that the permitting authority must provide for public notice and the opportunity to comment on the NMP terms and that the NMP terms must be enforceable.

EPA regulations applicable to State NPDES programs specify that where notice and opportunity for comment must be provided, a permitting authority must respond to significant public comments (§ 124.17). Several commenters said EPA should specifically narrow what constitutes a significant comment warranting a response by the permitting authority. Their general position was that comments must have a technical or scientific basis, or address errors, omissions, or misrepresentations in order to be considered significant. Some said that comments should be limited only to issues under the purview of the CWA, and generalized grievances about the operation or location should be identified as insignificant and not warrant any response by the permitting authority. Other commenters, namely State agencies, identified the need to provide the permitting authority with flexibility for determining which comments are significant and warrant a response. They also indicated that the permitting authority will have limited resources for responding to all comments on a draft permit and NMP.

EPA intends that this final rule be consistent with existing regulatory provisions addressing public participation in the NPDES program and believes that it provides a reasonable amount of discretion and flexibility for permitting authorities to determine and respond to those comments deemed to be significant.

(c) Identification of Terms of the NMP

In the *Waterkeeper* decision, the Second Circuit held that because the terms of the NMP constitute effluent limitations, the CAFO Rule, ''by failing to require that the terms of the nutrient management plans be included in NPDES permits—violates the CWA and is otherwise arbitrary and capricious in violation of the Administrative Procedure Act.'' 399 F.3d at 502.

To respond to the *Waterkeeper* decision, the Agency is promulgating 40 CFR 122.42(e)(5) in order to specify the minimum terms of the nutrient management plan (NMP) that must be enforceable requirements of a CAFO's NPDES permit. As discussed in the preambles to both the 2006 proposed rule and 2008 supplemental proposal, EPA is not revisiting the decisions the Agency made in 2003 with respect to the contents of the nutrient management plan because the *Waterkeeper* decision did not affect these requirements. This rule requires that, based on the provisions promulgated in 2003 that define nutrient management plans (40 CFR 122.42(e)(1) and 412.4(c)), the ''terms'' of the nutrient management plan become terms and conditions of the permit, as required by the Second Circuit decision.

The *Waterkeeper* court clearly indicated that the terms of the NMP must be included in the permit and that the terms must include ''waste application rates'' developed by Large CAFOs pursuant to their NMPs. 399 F.3d at 502. Paragraph (e)(5) includes two alternative approaches for specifying terms of the NMP with respect to rates of application, which are needed to satisfy the requirement that the NMP include ''protocols to land apply manure, litter, or process wastewater * * * that ensure appropriate agricultural utilization of the nutrients.'' 40 CFR 122.42(e)(1)(viii). For Large CAFOs, use of either of these alternative approaches also satisfies the requirements set forth in 40 CFR 412.4

(i) Background

In the 2006 proposed rule and 2008 supplemental proposal, EPA discussed how the ''terms'' of a CAFO's NMP could be identified so as to address the nine minimum required elements in 40 CFR 122.42(e)(1)(i)–(ix)) and 412.4(c) (for Large CAFOs, as applicable).

The 2006 proposed rule preamble identified a number of factors that are necessary to the development of an NMP and discussed the need to allow a CAFO some flexibility in managing its operation. 71 FR 37,753–55. With respect to portions of the NMP that would be incorporated as permit terms, the Agency also proposed regulatory language for accommodating changes to the NMP that involve changes to the terms during the permit period. 71 FR 37,756.

EPA received many comments on the NMP issues highlighted in the 2006 proposed rule preamble concerning the complexity associated with nutrient management planning, particularly with respect to land application, and seeking clarification of what constitutes the terms of the NMP. In particular, commenters sought clarification for terms regarding rates of application, given the complexity of factors used to determine rates of application and the dynamics associated with such factors.

In light of these concerns, EPA in March 2008, issued a supplemental proposal that proposed what elements of the NMP would be terms of the NMP that would be required to be included as enforceable terms of a CAFO's NPDES permit. EPA received many comments on the supplemental proposal that identified the need for some further revisions to EPA's proposed approach concerning the terms of the NMP.

(ii) Terms of the NMP To Be Included in the Permit

In this final rule, EPA is promulgating 40 CFR 122.42(e)(5) to identify the minimum terms of an NMP to be included in a CAFO's NPDES permit as enforceable requirements of the permit. Paragraph (e)(5) establishes that any permit issued to a CAFO must require the CAFO to comply with the terms of the CAFO's site-specific nutrient management plan.

Paragraph (e)(5) states that the terms of the NMP ''are the information, protocols, best management practices, and other conditions'' identified in a CAFO's nutrient management plan and determined by the permitting authority to be necessary to meet the requirements of 40 CFR 122.42(e)(1). For Large CAFOs subject to the land application requirements of the effluent limitations guideline, the terms would include the best management practices necessary to meet the requirements of 40 CFR 412.4(c) in addition to the requirements of 40 CFR part 122. This requirement is thus broadly applicable to all of the measures required to be included in a CAFO's NMP. EPA believes that this clarification should address the concerns of some commenters that the proposed terms of the NMP were limited to land application requirements only.

The ''information, protocols, best management practices, and other conditions'' that constitute the terms of a CAFO's NMP include what the CAFO operator would be required to do to properly implement its NMP and determinative conditions upon which such actions are based. For example, both the structural design capacity necessary to satisfy the storage requirement of 40 CFR 122.42(e)(1)(i) and the associated operational and maintenance conditions necessary to ensure adequate storage, would be considered terms of the NMP. Likewise, the terms of the NMP would need to ensure, for example, proper management of mortalities and diversion of clean water. However, the number of animals confined would not necessarily need to be a term of the NMP because a CAFO operator would be required to properly operate and maintain the CAFO's storage facilities regardless of the number of animals or the volume of manure, litter, or process wastewater generated.

Some commenters asserted that the entire NMP should be included in or expressly referenced by the permit and that all the elements of a CAFO's NMP must be included in a CAFO's NPDES permit so as to ensure that the permit requires the CAFO to comply with every discharge reduction or prevention measure in its NMP. These commenters disagreed with EPA's interpretation of *Waterkeeper* and felt that the 2006 proposed rule put forth a more narrow meaning of the word ''terms'' than intended by the court. They also felt that the proposed rule provided the permitting authority too much discretion for determining what constitutes the ''terms'' of the NMP.

The Agency agrees that the enforceable terms of the NMP must be clear so as to provide notice, both to the operator and to the public, about what is enforceable and to ensure compliance with the discharge reduction and prevention measures in the NMP. However, EPA does not agree that the all of the information in the NMP constitutes enforceable terms. By establishing the information, protocols, best management practices, and other conditions or activities necessary to meet the requirements of 40 CFR part 122 and part 412, this rule ensures that effluent limitations in the permit will be fully implemented, consistent with the NPDES regulations, the effluent guidelines, and the *Waterkeeper* decision. In addition, this approach preserves NMPs as comprehensive management tools used to guide a wide range of practices regarding nutrient production, storage, and use. Regarding the degree of discretion afforded to the Director, the requirements of this final

rule concerning terms of the NMP and the opportunity for public review of the full NMP together with the draft terms of the NMP to be incorporated into the permit provides a check on the exercise of that discretion.

Moreover, whether the NMP has been properly developed, whether the information in the NMP is accurate, and whether calculations are correct and consistent with applicable requirements are issues which are properly addressed when the NMP is reviewed by the Director and by the public. This is analogous to the types of calculations and data submitted in a permit application and found in the fact sheet that accompanies a draft NPDES permit for other types of permitted point sources.

Other commenters observed that NMPs do not fit well in this regulatory context due to their design and the way in which they have been used by CAFO operators. Rather, they asserted that NMPs are developed to guide management decisions regarding nutrients and, by necessity, must remain flexible to address the many conditions that affect nutrient generation and management.

The final rule allows for the incorporation of the key NMP terms in a regulatory context without overburdening the permitting process or completely recasting the NMP itself. As discussed above, the terms of the NMP include whatever is contained in the NMP that is necessary to ensure compliance with § 122.42(e)(1) and, for Large CAFOs, 40 CFR 412.4. Additional content of the NMP that is beyond the scope of compliance with those regulatory requirements would not be a term of the NMP.

Some commenters on the 2006 proposed rule urged EPA to provide greater clarity, guidance, and certainty in the final rule on the meaning and significance of the distinction between the NMP and the ''terms'' of the NMP. As proposed in the 2008 supplemental proposal, the final rule establishes more specific requirements for terms of the NMP applicable to CAFOs that land apply manure, litter, and process wastewater than were included in the proposed rule. For such CAFOs, paragraph (e)(5) includes as terms the fields available for land application, field-specific rates of application, and timing limitations for land application.

As stated above, with respect to land application, the terms of every NMP must include the fields the CAFO plans to use for land application. The site-specific elements of the NMP can only be properly represented in the NMP by the inclusion of field-specific information that must be made available for review by the Director and for public review in determining, for example, the appropriate conservation practices and rates of application to be included in the plan and, ultimately, in the permit. Compliance with the permit during the period of coverage would require any new fields (*i.e.*, fields not addressed specifically in the terms of the permit) to first be added to the NMP and the permit, in accordance with the requirements of 40 CFR 122.42(e)(6), discussed below, before they could be used by the CAFO for land application. Similarly, as discussed in greater detail below, field-specific, crop-specific application rates would be terms of the NMP, as would certain factors needed to determine the rates. However, background information that is fixed and unchangeable, such as actual historic yields used in the development of an NMP, while important for determining rates of application, would not need to be terms of the NMP. Such information is also relevant and important for public review of the draft permit, in order to ascertain that the terms relating to rates of application are correct and enforceable. In other words, this is an example of information necessary for the development of the NMP, but is not relevant for compliance or enforcement purposes.

Finally, the terms of the NMP must include any timing limitations in the NMP that would make fields unavailable for land application at certain times or under certain conditions.[4] Insofar as the NMP includes such limitations, the resulting limitations are terms of the NMP and thus enforceable.

(iii) Rates of Application

40 CFR 122.42(e)(1)(viii) requires the nutrient management plan to include ''protocols to land apply manure, litter, or process wastewater in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater.'' As EPA noted in the 2006 proposed rule, the *Waterkeeper* court focused on rates of application as perhaps the most important term of the NMP, in particular the provisions of the effluent limitations guidelines in 40 CFR 412.4(c), and emphasized their site-specific nature. 71 FR 37,753. In the 2008 supplemental notice, the Agency proposed regulatory requirements to ensure that legally-enforceable field- and crop-specific application rates are included in the permit as part of the protocols for land application required to be in the NMP under § 122.42(e)(1)(viii).

This rule promulgates two alternative approaches for expressing the terms of the nutrient management plan with respect to rates of application. 40 CFR 122.42(2)(5)(i)–(ii). Each approach provides a means by which a CAFO may articulate in its NMP annual maximum rates of application of manure, litter, and process wastewater by field and crop for each year of permit coverage and identify the minimum required terms of the NMP specific to that approach. One approach expresses field-specific maximum rates of application in terms of the amount of nitrogen and phosphorus from manure, litter, and process wastewater allowed to be applied. This is called the ''linear approach.'' The other approach expresses the field-specific rate of application as a narrative rate prescribing how to calculate the amount of manure, litter, and process wastewater allowed to be applied. This is called the ''narrative rate approach.''

Each of the approaches requires the CAFO operator to develop an NMP that projects for each field and for each year of permit coverage the crops to be planted, crop rotation, crop nutrient needs, expected yield, amount of nitrogen and phosphorus to be land applied, and projected amounts of manure, litter, and process wastewater to be applied. However, each approach is different in identifying which of these projections would be required to be ''terms of the NMP.'' In neither approach is the projected amount of manure, litter, and process wastewater to be land applied a term of the permit because these projected amounts must be adjusted at least once a year.

Several commenters suggested that the NMP and permitting authority review of the NMP should focus on how agronomic rates are developed in the NMP rather than the specific rate determined in the NMP, based on the difficulty of developing accurate application rates for a five-year term and because agency review of specific application rates for each field would be too burdensome. As discussed above and in the 2006 proposed rule, the *Waterkeeper* court focused on rates of application as perhaps the most important term of the NMP and emphasized their site-specific nature.

[4] There are two types of ''timing'' referred to in this rule regarding land application. One type relates specifically to rates of application, *i.e.*, the availability of nutrients for crop uptake based on the timing (and method) of application. There are also timing limitations, such as restrictions on applying under certain conditions, such as on saturated or frozen fields, or at certain times of the year. The latter types of timing restrictions are the subject of this paragraph.

To comply with the decision of the *Waterkeeper* court with regard to the terms of the NMP and to allow flexibility both for CAFO operators to develop NMPs in a manner appropriate for a particular operation as well as for States to develop regionally-appropriate program requirements that meet the needs of a particular agency, EPA in this final rule is providing two alternatives for expressing rates and determining the associated terms of the NMP.

Rates of application are field-specific and are designed to ensure that crops receive sufficient nutrients to meet yield goals, while minimizing the amounts of nutrients that could be transported from the field. The discussion that follows summarizes the basic process for establishing rates of application in an NMP, in light of the comments received in the 2008 supplemental proposal, as an introduction to the specific discussion of the two approaches promulgated in this final rule.

To develop appropriate land application rates for each field where land application will occur, CAFOs must identify the crops to be planted and the planned crop rotations, or other uses, and the nitrogen and phosphorus needs of these crops or other uses. The NMP also must identify the realistic yield expected from the crop or crops planted in the field, in order to calculate the proper amount of nutrients to apply. A crop's nutrient needs are generally determined in accordance with the nutrient recommendations for a given crop (or other planting, such as forage or pasture) and the per acre realistic yield goal for that crop. The State land grant university typically provides these values or the formulas for calculating these values. The realistic yield goal can also be based on historic field-specific yield data.

Because a CAFO operator could plant more than one crop on a field in a given year, the plant available amount of nitrogen and phosphorus needs to be calculated with reference to the nutrient needs of all the crops to be planted on such field in a given year in order to be accurate. This includes accounting for other field uses, such as pasture and cover crops.

A properly developed NMP must also evaluate the condition of the fields to be used for land application. A field-specific assessment based on soil test nutrient levels and other factors required by the technical standards established by the Director provides information needed to determine whether land application of manure is appropriate for a site. The capacity of the field for manure, litter, or process wastewater application generally depends on the capacity of the soil to retain phosphorus. The phrase ''outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field,'' as used in this rule, reflects the terminology typically associated with the use of the phosphorus index, which is one of three field-specific risk assessment methods discussed in NRCS conservation practice standard 590. However, in this final rule, EPA is using this phrase to reflect the results of whichever method is required by the technical standards established by the Director, including the soil test phosphorus method and the phosphorus threshold method.

One commenter suggested that, for some States, it may be appropriate to require that the field-specific assessment of the potential for nitrogen and phosphorus transport be conducted on an annual basis. EPA recognizes that some States require, for example, use of a phosphorus index that factors into the calculated risk rating the amount of manure applied to the field in the previous year. EPA agrees that, for these States, it would be appropriate to require recalculation of the phosphorus index on an annual basis and anticipates that such States would include the appropriate requirements in technical standards, permits, or other requirements applicable to CAFOs. Furthermore, EPA encourages CAFO operators to reevaluate field-specific assessments of the potential for nitrogen and phosphorus transport as frequently as necessary to ensure minimization of nutrient transport from each field.

Ultimately, the purpose of the field-specific assessment of the potential for nitrogen and phosphorus transport is to determine the appropriate limiting nutrient for developing land application rates, *i.e.*, whether phosphorus or nitrogen limits the amount of manure, litter, or process wastewater that can be applied and the degree to which the limiting nutrient restricts land application, or whether land application is to be avoided altogether. State technical standards typically allow nitrogen-based application rates on fields with a low phosphorus risk rating. For fields that have a moderate to very high phosphorus risk rating, State technical standards generally limit the amount of phosphorus that may be added to a field.

In determining rates of application where phosphorus is the limiting nutrient, the amount of phosphorus that may be land applied is based on the annual phosphorus removal rate for each crop or other field use. In deciding how much manure may be land applied, the amount of plant available phosphorus already in the field is not deducted because State technical standards identify the rate of application based on the crop removal rate. Because soil levels tend to change incrementally, depending on the buffering capacity of the soil, and because a phosphorus-based application rate doesn't reduce the amount of phosphorus already in soil, phosphorus-based rates of application may remain relatively constant for a period of several years or longer, so long as the outcome of the assessment of phosphorus transport does not change during that time. However, any multi-year phosphorus application must be done in accordance with State technical standards.

In determining rates of application where nitrogen is the limiting nutrient, the NMP must consider the total amount of plant available nitrogen for each crop from residual nitrogen already in the field and the nitrogen added for a particular field. Residual nitrogen is the nitrogen that remains from prior applications of manure, litter, process wastewater, or chemical fertilizer, or from other sources such as crop residues and nitrogen fixing legumes. The addition of nitrogen to a field includes application of chemical fertilizer as well as application of manure, litter, or process wastewater and other materials such as biosolids.

Crediting for all residual nitrogen in the field that will be plant available, as a result of prior additions (*e.g.*, crop residue, legume credits, and previous manure applications), should be done in accordance with the directions provided in the technical standards established by the Director (required for all permitted Large CAFOs). Since organic forms of nitrogen typically become plant available when they are converted to inorganic forms, such as nitrate and ammonium, crediting generally identifies the amount of organic nitrogen likely to be converted to inorganic forms that will be plant available. Credits are calculated using soil test results included in the NMP and projected applications of nitrogen from manure, litter, and process wastewater during intervening years, as well as other additions, including from crops (*e.g.*, where crops are plowed under or residues are left on the field or where nitrogen-fixing legumes are grown), and other sources of nitrogen remaining on the field that would be plant available during the next growing season.

EPA expects a complete NMP also to account for any other additions of plant available nutrients during the crop year,

such as chemical fertilizer, irrigation water (groundwater may have measurable concentrations of nutrients), and biosolids, where applied.

The forms of nitrogen and phosphorus to be factored into calculations for rates of application are generally identified in the technical standards established by the Director or in other documentation referenced in the State's technical standards. Typically, the amount of plant available phosphorus is determined based on the amount of various forms of phosphate added to or present in the soil and the amount of organic phosphorus that will mineralize during the growing season. The amount of plant available nitrogen is based on the amount of inorganic nitrogen (*e.g.*, nitrate and ammonium-nitrogen) added to or present in the soil and the amount of organic nitrogen that will mineralize during the growing season. The amount of plant available nitrogen also depends on losses due to volatilization, which is calculated using the nitrogen volatilization rate associated with the source of nutrients and the timing and method of land application. As previously discussed, it is the forms of nitrogen and phosphorus that will be available to a given crop that are most relevant in determining rates of application. In this final rule, the appropriate forms of nitrogen and phosphorus to be factored into these calculations must be expressed in chemical forms determined to be acceptable by the Director, such as in the permit or in the technical standards established by the Director.

As discussed above, the NMP must include calculations projecting for the length of the permit term the amount of manure, litter, or process wastewater, in tons or gallons, to be land applied in order to meet, but not exceed, crop nutrient needs (after considering residual nutrients and other additions of nutrients and results of the most recent manure test) based on the outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport, *i.e.*, whether application rates will be limited by nitrogen or phosphorus. These calculations must also take into account, with respect to each crop to be grown or other agricultural use, the source and form of nutrients to be land applied; the method of application of manure, litter, and process wastewater; and the timing of when application will occur. Although a properly developed NMP addresses all of these factors, some operators may have multiple sources of manure, litter, or process wastewater and may need to make the determination as to which source to draw from for land application to a particular field in a given year at some point in time after the NMP has been developed. The method of application depends on the source and form of manure, litter, or process wastewater; the location of a particular field and the equipment available for such field; the soil nutrient status; and the crop to be planted. For example, wastewater could be spray-irrigated, otherwise surface applied, or injected, whereas poultry litter is most likely to be surface applied by a manure spreader.

Whereas one CAFO operator may wish to follow the planned sequence of steps for planting crops and applying manure, litter, and process wastewater described in the NMP submitted to the Director, another operator may want or need to vary from that linear sequence of events, due to choices made in the course of normal operations, or in response to events or circumstances beyond the CAFO's control, such as weather, crop failure, or market conditions. EPA has addressed this concern in this final rule by including two alternative approaches for determining the terms of an NMP, as discussed below.

As indicated above, EPA is promulgating two approaches for defining the terms of an NMP for rates of application, rather than the three approaches that were proposed in the 2008 supplemental notice. While a number of commenters encouraged EPA to include all three proposed approaches in the final rule to allow operators the greatest number of alternative options, many commenters were critical of the matrix approach. Some commenters suggested EPA should finalize only the narrative rate approach because they felt that the linear and matrix approaches were too inflexible to be useful. Others suggested that the inclusion of three approaches would create a program that is too complicated for permittees, permitting authorities, and the public. One commenter stated that the matrix approach fails to fully address the complexity of the decision-making process facing the CAFO operator. Several industry commenters found the matrix approach to be less flexible than necessary and overly burdensome. Environmental group commenters found the matrix approach to be too rigid to ensure protection of water quality and not inclusive of critical information. In reviewing the comments, EPA agrees that the matrix approach does not adequately address the complexity of the nutrient management decisions to be made by the CAFO operator and that it could result in over-application of manure, litter, or process wastewater. In addition, EPA agrees that having three approaches to identifying terms of the NMP with respect to application rates is unduly complicated and would be unnecessarily burdensome. Moreover, EPA believes that the improvements and clarifications to the linear and narrative rate approaches promulgated in this final rule make inclusion of the matrix approach unnecessary. In considering comments that criticized the inability of the matrix approach, as proposed, to more directly address the complex dynamics relating application rates to crop needs, EPA would have needed to make adjustments that would have made the matrix approach either more like the linear approach or more like the narrative rate approach. As a result, and in consideration of comments stating that including three approaches is unnecessary and burdensome, EPA has decided to eliminate the matrix approach as an option for identifying the terms of the NMP for rates of application.

Some industry commenters indicated that CAFOs should be allowed to choose from either approach as long as they maintain the same approach for the five-year permit term while another industry commenter stated that CAFOs should be allowed to switch approaches during the permit term. This final rule does not address the possibility of switching approaches during a permit term. It is up to the discretion of the Director whether such a change would be allowed. However, because each approach differs in what are the terms of the permit, switching approaches during the permit term would require a permit modification to include the terms of the NMP associated with the selected approach into the permit.

Under both of the approaches, the terms of the NMP are required to include specific factors used for the development of rates of application. These include:

- The outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field;
- The crop or crops to be planted in each field or any other uses such as pasture or fallow fields;
- The realistic yield goal for each crop or use identified for each field; and
- The nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field.

Both of the approaches account for other information necessary for determining the amount of manure, litter, and process wastewater to be land applied. This information relates to: (1)

Credits for residual nitrogen available in each successive year during the five year term of the permit; (2) consideration of any multi-year phosphorus application; (3) accounting for additions of commercial fertilizer and other additions of nitrogen and phosphorus during each successive year; (4) the form (liquid, solid) and source (*e.g.*, lagoon, compost, process wastewater) of the material to be land applied; (5) nitrogen and phosphorus content of the manure, litter, or process wastewater; (6) timing of application; and (7) method of application (*e.g.*, spreading, spray, injection). However, the two approaches differ in the way they incorporate this information in expressing the rates of application as terms of the NMP. The following sections of the preamble describe the two approaches and how each approach accounts for this information.

(A) Linear Approach—Rates Expressed in Pounds of Nitrogen and Phosphorus From Manure, Litter, and Process Wastewater

The first approach (*see* 40 CFR 122.42(e)(5)(i)) allows the CAFO to express rates of application as pounds of nitrogen and phosphorus from manure or litter, and process wastewater. The terms of the NMP include maximum application rates for each year of permit coverage, for each crop identified in the NMP, in pounds per acre, per year, for each field to be used for land application. In addition, the terms of the NMP include the following factors:

- The outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field;
- The crop or crops to be planted in each field or any other uses such as pasture or fallow fields;
- The realistic yield goal for each crop or use identified for each field;
- The nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field;
- Credits for all nitrogen in the field that will be plant available;
- Consideration of multi-year phosphorus application;
- Accounting for all other additions of plant available nitrogen and phosphorus to the field;
- The form and source of manure, litter, and process wastewater to be land applied; and
- The timing and method of land application.

The terms also include the methodology by which the NMP accounts for the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

This approach is considered a ''linear'' approach because it is based on the use of only those crops included in the planned crop rotations in the NMP; the amounts of nitrogen and phosphorus from manure, litter, and process wastewater to be land applied according to the planned schedule for land application (including source and method and timing of application); and the projected values for plant available nitrogen and phosphorus from other sources. Under this approach, a single set of field-specific rates of application would be established, based on the predicted sequence of activities the CAFO plans to follow in implementing its NMP, and a CAFO would be required to follow the sequence identified in the NMP for each field-specific crop rotation and each planned step for land application of manure, litter, or process wastewater.

Under this linear approach, a CAFO must land apply manure, litter, and process wastewater in amounts that will result in application of no more than the amounts of nitrogen and phosphorus from manure, litter, and process wastewater specified for each field in the NMP, following the schedule and the methods of application described in the NMP. When applying manure, litter, and process wastewater, CAFOs will need to take into account manure test results, including for Large CAFOs the annual manure test results required by the 2003 final rule, so as to not exceed the nutrient needs of the crops. Medium and small CAFOs must apply manure, litter, and process wastewater consistent with Best Professional Judgment (BPJ)-based requirements established in the permit for accounting for the nutrient content of the manure. Large CAFOs using the linear approach must calculate the maximum amount of manure, litter, and process wastewater to be land applied at least once each year using the results of the most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application.

The methodology used for translating the amounts of nutrients in pounds into the amount of manure, litter, and process wastewater to be land applied, in tons or gallons, is a term in the linear approach. This includes incorporation of manure test results in determining such rates.

The final rule differs from the proposed linear approach with respect to the expression of the rates of application. EPA proposed that application rates in the linear approach be expressed in terms of tons or gallons of manure, litter, and process wastewater. Several commenters stated that the application rate under the linear approach should be expressed in terms of pounds of nitrogen and phosphorus rather than tons and gallons of manure and wastewater. The commenters felt that this approach would more accurately account for the actual nutrient content of the manure and wastewater being applied. EPA agrees with the commenters and has changed the linear approach accordingly to address this concern. The key advantage of this change is that it ensures that the results of manure testing, which for Large CAFOs is required to be done annually, are used in determining the actual amount of manure, litter, and process wastewater to be applied. EPA believes that expressing the rate in terms of pounds of nitrogen and phosphorus from manure, litter, and process wastewater provides greater environmental protection by requiring operators to adjust the actual amount of manure, litter, and process wastewater applied based on the most current manure nutrient test results.

The utility of this approach, nevertheless, hinges on the CAFO making accurate predictions in the NMP that are not disrupted by changes to the CAFO's operation or by circumstances beyond the control of the CAFO operator. Any changes to the terms of the NMP would constitute a change to the terms of the permit, which would require a permit modification. See discussion in section III.C.3(e) of this preamble, ''Changes to a Permitted CAFO's Nutrient Management Plan.'' For example, any change to the planned crop sequence, such as the addition of a second crop to a field, requires a permit modification.

On the other hand, the advantage of this approach is its relative simplicity for CAFOs with predictable crops and land application. The linear approach would be particularly suitable for operations that consistently plant one crop or two crops in rotation on the same fields, using the same source and form of manure, litter, or process wastewater, and that land apply on a regular annual schedule using the same application method(s).

EPA notes that even under the linear approach, operators may provide themselves some flexibility by specifying more than one field-specific crop rotation plan in the NMP, with application rates of nitrogen or phosphorus specified for each alternative plan for inclusion in the permit. This might be practical for operators who are reasonably confident

that they will follow one of two or three potential crop rotations. EPA is promulgating the other approach for operators seeking a greater degree of flexibility.

(B) Narrative Rate Approach—Rates Derived From Total Amounts of Plant Available Nitrogen and Phosphorus

This final rule includes a second approach that would allow rates of application to be expressed as a narrative rate that includes the total amount of plant available nutrients from all sources combined with a specific, quantitative method for calculating the amount, in tons or gallons, of manure, litter, and process wastewater allowed to be land applied. (*See* 40 CFR 122.42(e)(5)(ii).) Unlike the linear approach, in this quantitative narrative rate approach, the terms of the NMP include the maximum amounts of nitrogen and phosphorus from all sources of nutrients for each crop or other field use identified in the NMP, in chemical forms determined to be acceptable to the Director, in pounds per acre, for each field.

As required at 40 CFR 122.42(e)(5)(ii)(A), the narrative rate approach also includes as terms the following four factors:

- The outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field;
- The crop or crops to be planted in each field or any other uses such as pasture or fallow fields;
- The realistic yield goal for each crop or use identified for each field; and
- The nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field.

In addition, this narrative rate approach includes as a term of the NMP the methodology by which the NMP accounts for certain factors when calculating the amounts of manure, litter, and process wastewater to be land applied. A CAFO using the narrative rate approach is required to apply in accordance with the resulting calculations. This final rule requires the methodology in NMPs developed using this approach to account for the following factors:

- Results of soil tests conducted in accordance with protocols identified in the nutrient management plan, as required by 40 CFR 122.42 (e)(1)(vii);
- Credits for all nitrogen in the field that will be plant available;
- The amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied;
- Consideration of multi-year phosphorus application;
- All other additions of plant available nitrogen and phosphorus to the field;
- The form and source of manure, litter, and process wastewater;
- The timing and method of land application; and
- Volatilization of nitrogen and mineralization of organic nitrogen.

The factors listed above are not themselves required to be terms in the narrative rate approach, but the methodology used to account for them in the CAFO's permit is a term. Thus, the CAFO operator will be bound by the methodology and the way in which these factors must be accounted for in calculating the actual amount of manure, litter, or process wastewater allowed to be applied to the field. The terms of the NMP under this approach do not include the amount of nitrogen and phosphorus in the manure, litter, or process wastewater allowed to be land-applied as set forth in the NMP, but they do include the methodology prescribed in the NMP for calculating these amounts. And while the terms of the NMP do not include the predicted source, form, timing, and method of application of manure, litter, or process wastewater set forth in the NMP, they include the methodology that accounts for these factors in determining the amount of manure, litter, or process wastewater allowed to be applied. This allows the actual inputs and results for these factors to be something other than what was projected in the NMP during the period of permit coverage, using the methodology, while ensuring that the CAFO meets the requirements of 40 CFR 122.42(e)(1) and, for Large CAFOs, 40 CFR 412.4, by applying in accordance with the methodology and other terms of the NMP.

This approach requires that the CAFO apply manure, litter, or process wastewater according to the results of this calculated amount. For example, if the NMP projected an amount of manure to be applied based on incorporation of solid manure, the operator could apply process wastewater from the lagoon by spraying the field instead. In this example, the methodology must account for factors of form, source, and method of application such that these inputs and results can be other than what was projected in the NMP and the amount of manure allowed to be applied will be predictably and accurately calculated. In other words, the methodology and requirement that application be in accordance with the rate calculated using that methodology are enforceable term that must be complied with at the time of determining how much, from which source, in what form is allowed to be applied to the field using which method of application.

40 CFR 122.42(e)(5)(ii)(C) clarifies that the amount of manure, litter, and process wastewater to be applied as projected in the NMP submitted with the permit application or NOI is not a term of the NMP under the narrative rate approach. As explained above, the amount of manure, litter, and process wastewater is to be calculated using the methodology included in the NMP and based on actual amounts of plant available nitrogen and phosphorus from all sources at the time of land application. Other projections that must be included in the NMP but are not terms are the CAFO's planned crop rotations for each field; credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; accounting for all other additions of plant available nitrogen and phosphorus to the field; the predicted form, source, and method of application of manure, litter, and process wastewater for each crop; and the timing of application for each field, insofar as it concerns the calculation of rates of application (permitting authorities may establish in permits or technical standards for nutrient management land application timing restrictions, such as prohibitions on land application to frozen or saturated ground, that would be permit terms).[5]

As specified at 40 CFR 122.42(e)(5)(ii)(B), NMPs for which terms are identified using the narrative rate approach may also include alternative crops not included in the planned rotation in the NMP, so long as the NMP includes for each crop realistic yield goals, nitrogen and phosphorus recommendations from sources specified by the Director, and maximum amounts of nitrogen and phosphorus from all sources. The terms and factors associated with alternative crops would be the same as the terms and factors required for the crops included in the planned rotation in the NMP.

EPA received several comments on the proposed terms and factors for the narrative rate approach. Commenters requested that EPA refer only to ''plant available'' nutrients in the narrative rate approach. Some confusion may have been caused by EPA's reference in the preamble to the 2008 supplemental proposal to the ''maximum amount of total nitrogen and phosphorus'' with regard to expression of the application rate under the narrative approach. This

[5] See footnote 4.

language was intended to refer to the total amounts of nitrogen and phosphorus, rather than referring to a specific chemical form (''total nitrogen'' or ''total phosphorus''). This has been corrected in this final rule and preamble by removing the word ''total.'' The final rule refers to plant available forms of nutrients with regard to determining credits for nitrogen in the field and accounting for all other additions of plant available nitrogen and phosphorus to the field. Otherwise, the rule requires expression of application rates in chemical forms determined to be acceptable to the Director, such as indicated in the technical standards established by the Director, or in the permit.

One commenter suggested that crop yields be included as a factor under the narrative rate approach and that yield goals should be adjusted for operations that consistently fail to meet them. This final rule includes realistic yield goals as a term under both approaches. Realistic yield goals will be included in the NMP and, therefore, will be subject to review by the permitting authority and the public. In addition, States may establish in their technical standards criteria for deriving realistic yield goals including criteria for adjusting yield goals based on actual crop yields. EPA believes that this is sufficient to ensure that the yield goals used to calculate application rates in NMPs are appropriate. Upon subsequent permit issuance, the public will have the opportunity to review yield goals in light of actual yields reported by the CAFO in its annual reports (see 40 CFR 122.42(e)(4)(viii)).

The narrative rate approach would eliminate certain issues associated with a five-year planning cycle previously discussed in connection with the linear approach presented above. A key difference of the narrative rate approach, is that it would require application rates for manure, litter, and process wastewater to be recalculated at least annually using the methodology specified in the NMP (40 CFR 122.42(e)(5)(ii)(D)). Unlike the linear approach, the narrative rate approach allows CAFOs that may need to adjust their rates of application of manure, litter, and process wastewater due to changes in soil levels of nitrogen and phosphorus to do so without requiring the permit to be modified. Therefore, it is important to ensure that the actual changes in soil levels of plant available nitrogen and phosphorus are taken into account, rather than relying on five-year projections of fluctuations provided in the NMP.

The narrative rate approach requires an annual determination of soil levels of nitrogen and phosphorus. For nitrogen, the annual determination must include a concurrent calculation of nitrogen that will be plant available consistent with the methodology specified in the NMP. As described above, this methodology must account for the factors that would affect soil nitrogen levels on an annual basis such as the form and timing of previous land application(s); the actual amount of nitrogen in the manure, litter, and process wastewater previously applied; and volatilization and mineralization rates for nitrogen. For phosphorus, the annual determination must include the results of the most recent soil test conducted in accordance with sampling requirements approved by the Director. As in the case of other technical determinations to be made by the Director as part of this final rule, the Director's determination concerning sampling requirements may be made in the technical standards established by the Director, in the permit, or by an equivalent determination made elsewhere. Many States require sampling to be done every two or three years, for most conditions. Some require more frequent sampling generally, and others require more frequent sampling at higher concentrations of soil test phosphorus. If sampling is conducted more frequently than required by the Director, then the determination must be based on the results of the most recent test.

EPA proposed that CAFOs using the narrative rate approach would be required to test soils annually for nutrient content and that these data be used in recalculating the amount of manure, litter, and process wastewater to apply annually. Many commenters opposed annual soil testing for phosphorus. These commenters stated that annual testing is inconsistent with State land grant university guidance, is unnecessary because phosphorus levels in the soil do not change significantly from year to year and that such testing would be cost-prohibitive for many operations. A number of commenters suggested alternative testing frequencies ranging from three to five years. Several commenters suggested that annual phosphorus testing be required only where the soil phosphorus level is already high or previous applications have exceeded the crop phosphorus removal rate (such as where manure is applied at a nitrogen-based rate). A few commenters asked EPA to clarify that annual soil testing only applies to fields that will receive manure in the year the testing is performed. One commenter indicated that, under certain circumstances, manure nutrient testing should be required more frequently than annually. Although the supplemental proposal did not specifically propose to require annual soil nitrogen testing, several commenters indicated that such testing should not be required, citing limitations in accuracy and effectiveness of the testing methods currently available. EPA agrees with commenters that, in a number of States, annual soil testing for phosphorus has been determined to be unnecessary. EPA recognizes that soil test requirements vary from State to State, and may include testing for nitrogen as well as phosphorus. Based on these responses from a range of commenters and the various suggested alternatives, EPA has replaced the proposed annual soil testing requirement for the narrative rate approach with the requirement that an annual determination of soil nutrient levels be based on current data and calculations as described above to support ''real time'' calculation of appropriate application rates. This final rule does not specify a minimum frequency for soil phosphorus testing, but instead requires CAFOs to include the results of the most recent soil tests for phosphorus conducted in accordance with soil testing requirements approved by the Director.

The annual recalculation of the amount of manure, litter, and process wastewater allowed to be applied must also rely on the results of the most recent representative manure, litter, and process wastewater tests taken within 12 months of the date of land application. These data along with the annual determination of soil levels of nitrogen and phosphorus must be used to calculate, in real time, the amount of manure, litter, and process wastewater to be applied to supply the remaining nitrogen and phosphorus needed for the actual crop being planted on the field. Commenters requested that the narrative rate approach express application rates in terms of pounds of nutrients rather than tons of manure to allow appropriate utilization of nutrients in manure whose nutrient content varies over time. In practice, the narrative rate approach requires that amounts of manure, litter, and process wastewater to be land applied be calculated first in pounds of nutrients and then translated into tons or gallons of manure, litter, and process wastewater using current manure nutrient analyses. The information presented to the public in the CAFO's NMP will include the projected amounts for the planned crop rotation, in tons or gallons of manure,

litter, or process wastewater, since this is the endpoint of the calculation of the amount to be applied. As discussed above, these projected amounts are not themselves terms, since they will need to be recalculated each year based on updated information.

One commenter suggested that EPA specify that manure tests and plant tissue tests also be used in the annual rate recalculation. As described above, this final rule does require consideration of recent manure test results in annual application rate recalculations. Plant tissue testing may be an effective tool for determining nitrogen deficiencies (and the need for supplemental nitrogen application), as well as for determining excess nitrogen. However, plant tissue tests are typically taken after manure applications have been made on a field and thus are unavailable at the time the operator is determining rates of application. A CAFO's NMP may include plant tissue testing as part of the CAFO's methodology so long as it is done consistently with State technical standards.

In addition to accounting for the crop and field information, the methodology for the annual recalculation of the amount of manure, litter, and process wastewater to apply must account for a number of other variables, including the form and source of the manure, litter, and process wastewater and the timing and method of application, as described above. The operator may not apply more than the maximum amount of nitrogen and phosphorus calculated using the methodology.

Under this approach, the NMP will include planned crop rotations for each field and corresponding projected amounts, in tons or gallons, of manure, litter, and process wastewater to be applied, including all of the calculations for determining such projected amounts, for the period of permit coverage. This will give the permitting authority and the public an opportunity to review, prior to permit issuance, the adequacy of the CAFO's methodology and the way the CAFO uses the methodology to calculate the appropriate amount of manure, litter, and process wastewater to be applied, based on the operator's planned crop rotation at the time of permit issuance. Again, these planned crop rotations and projected amounts are not terms, as they will need to be recalculated each year based on updated information; however these projections will allow the public to see how the methodology (which is a term) is applied to a projected set of facts to calculate the amounts to be land applied.

Several commenters expressed concerns about the enforceability of the narrative rate approach, citing the lack of an objective rate and public availability of supporting information used to calculate the rate. The narrative rate approach requires the CAFO to recalculate the amount projected in the NMP of manure, litter, and process wastewater to be land applied, using the methodology in the NMP, at least once a year, throughout the period of permit coverage. In recalculating these amounts, a CAFO will be required to use concurrent calculations of credits for all plant available nitrogen in the field and the results of the most recent soil tests for phosphorus in the field. The CAFO will then calculate the maximum amount of nitrogen and phosphorus from manure, litter, and process wastewater allowed to be applied, as a portion of the total amount of nitrogen and phosphorus from all sources, using the methodology in the NMP. Under the narrative rate approach, the CAFO must use the methodology specified in the NMP (which is a term) to account for the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied when calculating the maximum amount of manure, litter, and process wastewater allowed to be applied. To ensure that such recalculations are made available to the Director and the public, the recalculations and the new data from which they are derived are required to be reported in the CAFO's annual report for the previous twelve months. In other words, the rate of application would be an objective, enforceable rate, because the permit will specify the methodology required for calculating the amount of manure, litter, and process wastewater allowed to be applied, certain values or sources of information required to be used in the methodology, and will limit the total amount of nitrogen and phosphorus from all sources for each crop. Failure to comply with the rate established under the permit would be a violation of the permit, and the Director and the public will be able to determine whether the rate was complied with from the annual report.

Most commenters who commented on the narrative rate approach were supportive of the approach in terms of its degree of flexibility. Some commenters suggested that it should be the only approach adopted in the final rule. EPA believes that the flexibility of the narrative rate approach will reduce the burden on permitting authorities and CAFO operators by decreasing the number of substantial changes to the permit which require public notice and comment, arising from changes to the CAFO's crop rotations, while ensuring that all effluent limitations applicable to a permitted CAFO are incorporated as terms of the permit, as required by the Waterkeeper decision.

As many commenters on the 2006 proposed rule pointed out and EPA recognizes, there may be changes in field conditions or practices at a CAFO, including, for example, those that alter the projected levels of plant available nitrogen and phosphorus in the soil or in the manure over the period of permit coverage. Such changes introduce some uncertainty in setting application rates for five years as enforceable terms of the permit. The narrative rate approach is designed to accommodate these concerns by allowing a CAFO to compensate for changes in soil levels of plant available nutrients, in manure nutrient content, or in the timing and method of application, by adjusting the application rates accordingly without the need for a permit modification. However, the operator will be limited to the total crop-specific amount of nitrogen and phosphorus from all sources and will have to adhere to a methodology that establishes the way in which such rates are to be calculated. Thus, in the second and later years of the permit term, this approach will provide an accurate and verifiable means of achieving realistic production goals while minimizing transport of phosphorus and nitrogen from the field. This will help CAFOs avoid the possibility of over-application of nitrogen or phosphorus because of increased levels of nutrients in the soil, compared to what was projected at the time of permit issuance, and, conversely, the possibility of failing to meet crop agronomic needs due to under-application of nitrogen or phosphorus.

(d) Process for Incorporating Terms of the Nutrient Management Plan Into a General Permit

The Agency is also promulgating procedural requirements for incorporating the terms of the NMP into an NPDES general permit, in new paragraph 40 CFR 122.23(h)(1).

Once the processes for publicly reviewing the NMP and the terms of the NMP have been completed, the Director must address all significant comments raised and make a final decision whether to grant coverage under a general permit. As necessary, the Director will require a CAFO owner or operator to revise their NMP to address issues raised during the review process. Once the Director determines that the

process for the development of a CAFO's NMP is complete, the Director must make the final decision whether to grant permit coverage to the CAFO under the general permit. If coverage is granted, the Director must incorporate the relevant terms of the NMP into the general permit (as described later) and inform the CAFO owner or operator and the public that coverage has been authorized and of the applicable terms and conditions of the permit. Once a CAFO obtains authorization to discharge under an NPDES permit, the CAFO must implement the terms and conditions of the nutrient management plan as incorporated into the permit, as of the date of permit coverage authorization.

The preamble to the 2006 proposed rule discussed and requested comment on approaches for the Director to identify the terms of the NMP to be incorporated into the permit. These options ranged from attaching the entire NMP to the permit to identifying specific elements to be included in the permit as terms. Based on comments received on the proposed rule, EPA is specifying certain elements of NMPs with respect to land application as ''terms of the NMP'' that must be incorporated into the permit. EPA is not, however, requiring a single approach whereby the terms are made part of the permit, leaving to the Director the discretion to decide whether, for example, to attach the entire NMP to the permit and require compliance with the terms of the NMP or to specify the terms of the NMP and specifically identify each of them in the permit. Under this final rule, incorporation of the terms of a particular CAFO's NMP into a general permit is not a permit modification subject to 40 CFR 122.62. Rather, it is an extension of the CAFO general permitting process itself. As discussed above, EPA intends the process proposed in 40 CFR 122.23(h) to generally parallel the procedures in 40 CFR part 124.

Commenters supported an approach allowing a permitting authority to incorporate the entire NMP as a condition of the permit without distinguishing between the NMP and the ''terms'' of the NMP. Some supported attaching an NMP to the permit or general permit and requiring that the CAFO implement that NMP as a permit condition. As discussed above, this rule requires that a permit include the terms of a site-specific NMP. However, EPA is not prescribing the manner in which this incorporation takes place. The permitting authority may satisfy this requirement by incorporating a CAFO's NMP by reference into the permit or as described in the preamble to the 2006 proposed rule, the permitting authority may extract the terms of the NMP and attach them to the permit. Either way, the terms of the NMP are enforceable terms of the NPDES permit.

Other commenters sought greater State discretion in implementing NMP requirements as permit conditions. These commenters recognized the importance of implementing the NMP provisions but did not want this rule to interfere with effective existing State approaches. In addition, these commenters wanted to preserve the administrative advantages of using general permits.

This rule provides some State discretion by allowing permitting authorities to determine which NMP provisions to include as terms of the permit. The rule specifies what must be included at a minimum in the permit as terms of the NMP. However, States have the authority to adopt additional or more stringent requirements, under CWA section 510.

(e) Changes to a Permitted CAFO's Nutrient Management Plan

It is well understood that agricultural operations modify their nutrient management and farming practices during the normal course of their operations. Such alterations may require changes to a permitted CAFO's NMP during the period of permit coverage.

As discussed in the preamble to the 2006 proposed rule, the permit does not need to be modified for all operating changes. Because of the way NMPs are developed and the flexibility provided by the two options for developing the terms of the nutrient management plan at 40 CFR 122.42(e)(5), most routine changes at a facility should not require changes to the NMP itself. For example, a CAFO using the narrative rate approach would not ordinarily need to change its NMP when it makes changes to factors that are not themselves terms but are accounted for in the methodology. To minimize the need for revision, nutrient management plans should anticipate and accommodate routine variations inherent in agricultural operations such as anticipated changes in crop rotation, as well as changes in numbers of animals and volume of manure, litter, or process wastewater resulting from normal fluctuations or a facility's planned expansion. Typically, an NMP is developed to accommodate, for example, normal fluctuations in herd or flock size, capacity for manure, litter, and process wastewater storage, the fields available for land application and their capacity for nutrient applications. Moreover, as discussed in this preamble, EPA would encourage operators to develop an NMP that includes reasonably predictable alternatives that a CAFO may implement during the period of permit coverage. However, unanticipated changes to a nutrient management plan may nevertheless be necessary.

The final rule includes 40 CFR 122.42(e)(6), which requires a CAFO to notify the Director of changes to the CAFO's NMP. Section 122.42(e)(6) excludes the results of calculations made in accordance with 40 CFR 122.42(e)(5)(i)(B) and 122.42(e)(5)(ii)(D) from the requirements of paragraph (e)(6). The results of these calculations, which are required of Large CAFOs using the linear approach and all CAFOs using the narrative rate approach, must be reported in the CAFO's annual report. Thus, there is no need to provide this information pursuant to the requirements of paragraph (e)(6).

In the 2006 proposed rule, EPA proposed a process that CAFOs and the permitting authority would need to follow when a CAFO makes changes to its NMP. The proposal also included criteria for determining when a change to a CAFO's NMP should be considered a substantial change. In the 2008 supplemental notice, the Agency solicited comment on several modifications to the 2006 proposal including a list of changes to the NMP that would constitute a substantial change.

In this final rule, EPA is including a list of changes to the NMP that would constitute a substantial change to the terms of a facility's NMP, thus triggering public notice and permit modification. Substantial changes include: (1) Addition of new land application areas not previously included in the CAFO's NMP; (2) any changes to the maximum field-specific annual rates of application or to the maximum amounts of nitrogen and phosphorus derived from all sources for each crop, as expressed in accordance with, respectively, the linear approach or the narrative rate approach; (3) addition of any crop not included in the terms of the CAFO's NMP and corresponding field-specific rates of application; and (4) changes to field-specific components of the CAFO's NMP, where such changes are likely to increase the risk of nitrogen and phosphorus transport from the field to waters of the U.S.

This final rule also makes one exception to the first type of substantial change (a land application area being

added to the nutrient management plan), where such additional land is already included in the terms of another existing NMP incorporated into an existing NPDES permit. If, under the revised NMP, the CAFO owner or operator applies manure, litter, or process wastewater on such land application area in accordance with the existing field-specific terms of the existing permit, such addition of new land would not be a substantial change to the terms of the CAFO owner or operator's NMP.

EPA received a number of comments on the list of substantial changes in the 2006 proposed rule and 2008 supplemental proposal. One commenter encouraged EPA to state that substantial changes under the narrative rate approach only occur when the CAFO changes the system used to determine maximum allowable application rates. EPA agrees that changes in the methodology may be substantial changes to the terms of the NMP if they result in changes to the maximum rates of application or maximum amounts of nitrogen and phosphorus derived from all sources for each crop or if they result in changes likely to increase the risk of nutrient transport to waters of the U.S. However, EPA does not agree that there are no other changes that are substantial changes under the narrative rate approach. EPA believes that the four substantial changes identified in this final rule are appropriate for both of the approaches for determining rates of application. For example, proper implementation of the narrative rate approach depends on identification of the fields to be used for land application, so use of a new field for land application that had not been previously covered in the facility's (or another facility's) permit terms would constitute a substantial change. In addition, under the narrative rate approach a change to the field-specific maximum amounts of nitrogen and phosphorus derived from all sources is a substantial change to the NMP, because it defines the upper bounds on nutrient additions.

Some commenters suggested that EPA expand the list of substantial changes to include changes such as the maximum number of animals allowed for the CAFO site; production area changes that alter the volume and composition of waste; using soil, manure, plant tissue test results to refine the NMP; and changes in the status of the receiving waterbodies. With regard to the number of animals confined and the volume of waste generated, EPA has stated that the number of animals confined at a CAFO would not necessarily be a term of the NMP because a CAFO operator is required to properly operate and maintain the CAFO's storage facilities regardless of the number of animals or the volume of manure, litter, or process wastewater generated. For the same reasons, EPA believes that changes to these factors will not necessarily trigger substantial change to a CAFO's permit, although accommodating an increase in the number of animals or volume of manure could lead to changes to the NMP that would constitute substantial changes to terms of the NMP (and the permit). With regard to the use of soil and manure tests, both approaches discussed above for expressing land application rates in NMPs and associated terms allow for consideration of manure testing on an annual basis; and the narrative rate approach also requires consideration of the most recent soil test results. Finally, NPDES permits for all types of dischargers, including CAFOs, typically include reopener provisions under which the Director may revise the permit during the permit term based on factors such as changes to the status of the receiving water body. EPA believes that such standard NPDES provisions are sufficient to allow permit revisions necessary to support the criteria and standards established for receiving waters.

The Agency believes that the list of substantial changes included in this final rule address changes that most directly affect fundamental components of the NMP that relate to the land application of manure, litter, and process wastewater, which was a primary focus of the *Waterkeeper* decision. First, by identifying the addition of new land application areas not originally included in the terms of the NMP as a substantial change, the Agency makes clear that the fields to be used for land application must be permit terms, as all permitted CAFOs that land apply manure, litter, and process wastewater are required to do so at field-specific agronomic rates. The identification of land application areas in the NMP is essential for determining the effluent limitations applicable to a particular CAFO, which the *Waterkeeper* decision required be made available for public review and comment and incorporated into the permit. Thus, the public must have an opportunity to comment on the fields planned for land application during both the initial permit issuance phase and any subsequent permit modification phase. The exception for the addition of new fields already covered by an existing NPDES permit is consistent with the *Waterkeeper* decision because the rates of application for those land application areas will have already been publicly reviewed, approved, and incorporated into a permit as required by *Waterkeeper*.

Some commenters supported the addition of new land application areas as a substantial change. They also commented that adding or reducing land application areas would require a recalculation of the application rate. Some commenters were concerned that the addition of new land application areas as a substantial change is counterproductive, severely limits flexibility for producers to plan, does not add water quality benefit, discourages producers from adding land to their NMP and will hinder a CAFO's ability to quickly add more fields to the NMP. These commenters suggested the addition of land application areas can be addressed by requiring producers to submit this information with their annual reports. Some commenters also suggested granting States the flexibility to define when and what types of land application area additions would be considered a substantial change. Some commenters suggested that only the loss of land application areas should be treated as a major modification which requires public participation. As discussed above, under *Waterkeeper*, the public must have opportunity to review the fields planned for land application during both the initial permit issuance phase and any subsequent permit modification phase in order to determine whether field-specific rates of application have been properly developed. For this reason, the addition of new land application areas not already addressed under an existing NMP and permit must be considered a substantial change and made available for public review.

The second substantial change is any change to the field-specific maximum rates of application. The *Waterkeeper* decision makes clear the importance of these rates as terms of the NMP. Some commenters indicated this change should not apply to NMPs developed using the narrative approach, since the appropriate application rate should be calculated using the approved methodology. This final rule clarifies that, for the narrative rate approach, a substantial change is triggered by a change in the field-specific maximum amount of nitrogen and phosphorus derived from all sources.

The third substantial change is the addition to the NMP of crops or other uses not previously included in the CAFO's NMP, together with the corresponding maximum field-specific

rates of application for those crops or other uses. Because rates of application are based on the yield goals for each specific crop, any crops or other uses newly added to the plan will require corresponding newly calculated rates of application. In addition, because the maximum rates of application must be made available to the public for review prior to incorporation as terms of the permit, consistent with *Waterkeeper*, the addition of new crops or other uses and their corresponding rates of application is considered a substantial change.

Finally, any change to site-specific components of the CAFO's nutrient management plan that is likely to increase the risk of nitrogen and phosphorus transport to waters of the U.S. is a substantial change. The Agency recognizes a number of changes as potentially triggering this requirement, including the following examples: (1) Alternate timing of land application that would diminish the potential for plant nutrient uptake; (2) methods of land application not provided for in the NMP calculation of amount of manure, litter, and process wastewater to be applied; (3) changes to conservation practices; and (4) changes in the CAFO's procedures for handling, storage, or treatment of manure, litter, and process wastewater. The actual crop planted, timing and method of land application, crop uptake, and conservation practices utilized with respect to the land application areas are all key factors that affect nitrogen and phosphorus runoff from the land application area. Changes to any of the planning considerations listed above can directly (and measurably) alter the outcome of the decisions made in an NMP and the efficacy of that plan in ensuring appropriate agricultural utilization of those nutrients that are land applied.

An advantage of the narrative rate approach is that it reduces the likelihood that changes to a CAFO's operation would result in a substantial change to the terms of the CAFO's NMP. For example, a change to the method or timing of application would be a substantial change to the terms of the NMP for CAFOs using the linear approach if the Director determines that it is likely to increase the risk of nutrient transport to surface waters. For a CAFO using the narrative rate approach, a change in the method or timing of application would not be a change to the terms of the NMP, and therefore not a substantial change, so long as the methodology in the NMP (itself a permit term) accounts for the change in method or timing.

Because changes to the NMP could result in a change to a permit term, the 2006 proposed rule provided that whenever a CAFO makes any change to its NMP, the owner or operator would be required to provide the Director with the revised NMP and identify the changes from the previous version submitted. Of course, any change to the CAFO's implementation of its NMP that does not constitute a change to the NMP itself would not be submitted to the Director. For example, for CAFOs following the narrative rate approach, any change in crop rotation or substitution of crops in a given rotation with alternative crops identified in the NMP for a given field would not be a change and thus would not need to be submitted to the Director prior to implementation.

Some commenters felt that substantial changes could be addressed by making those changes part of the annual report. For example, some commenters recommended that CAFOs using the narrative rate approach be required to include information associated with the addition of new crops in their annual reports. The annual report does not provide sufficient public notice for making changes to the terms of the NPDES permit. Those procedures are detailed below.

(f) Process for Review of Changes to an NMP and for Modifying Terms of the NMP Incorporated Into the Permit

When a permitted CAFO operator revises its NMP, this rule requires the CAFO operator to submit the revised NMP to the permitting authority for review and for the permitting authority to incorporate any revised terms of the NMP into the permit. This rule includes provisions that enable the Director to determine whether revisions to the CAFO's NMP necessitate revisions to the terms of the NMP incorporated into the permit, and if so, whether such changes are substantial or non-substantial. This rule identifies several specific types of changes that must be considered substantial changes to the NMP, and this preamble provides further guidance for distinguishing between substantial and non-substantial changes. This final rule also establishes a streamlined process for formal public notice and comment that the permitting authority must follow for permit modification when a CAFO is seeking to make substantial changes to the terms of its NMP. Non-substantial changes to the terms of the NMP are not subject to public notice and comment before the permit is revised. Finally, this rule establishes provisions for incorporating both substantial and non-substantial revisions to terms of the NMP into the permit as a minor permit modification. These procedures apply to all permitted CAFOs, regardless of whether they are covered under an individual permit or under a general permit. These procedures are discussed in greater detail, below.

As mentioned above, this final rule requires that whenever a CAFO makes any change to its NMP (see discussion in section III.C.3(e) of this preamble, ''Changes to a Permitted CAFO's Nutrient Management Plan''), the owner or operator must provide the Director with the revised NMP and identify the changes from the previous version submitted to the permitting authority. *See* 40 CFR 122.42(e)(6)(i). 40 CFR 122.24(e)(6)(ii) requires the Director to then review the revised plan to ensure that it still meets the requirements of 40 CFR 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. This rule also requires the Director to determine whether the changes necessitate revision to the terms of the NMP that were incorporated into the permit issued to the CAFO. If not, the Director must notify the CAFO that the permit does not need to be modified. Upon such notification the CAFO may implement the revised nutrient management plan.

If, on the other hand, the Director determines that the changes to the NMP do require that the terms of the NMP that were incorporated into the permit be revised, the Director must next decide whether or not the change is substantial. The Director will evaluate the change based on the provisions in § 122.42(e)(6)(iii) discussed above. Pursuant to 40 CFR 122.42(e)(6)(ii)(A), for non-substantial changes, the Director must make the revised nutrient management plan publicly available and include it in the permit record, revise the terms of the nutrient management plan incorporated into the permit, and notify the owner or operator and inform the public of any changes to the terms of the nutrient management plan that are incorporated into the permit. Upon such notification the CAFO may implement the revised nutrient management plan.

If the changes to the terms of the NMP are substantial, the Director will also modify the permit as necessary by incorporating revised terms of the NMP, but only after the public has had the opportunity to review and comment on the NMP changes pursuant to the requirements of 40 CFR 122.24(e)(6)(ii)(B). The process for public comments, hearing requests, and the hearing process if a hearing is

granted must follow the procedures for draft permits set forth in 40 CFR 124.11–13. The Director must respond to all significant comments received during the comment period as provided in 40 CFR 124.17, and require the CAFO owner or operator to further revise the nutrient management plan if necessary. Once the Director incorporates the revised terms of the nutrient management plan into the permit, the Director must notify the owner or operator and inform the public. A permit modification to revise the terms of the NMP incorporated into the permit may be appealed in the same manner as the initial final permit decision.

The Director may establish by regulation, or in the general permit for CAFOs authorized under a general permit, an appropriate period of time for the public to comment and request a hearing on the proposed substantial changes to the terms of the nutrient management plan incorporated into the permit that differs from the time period specified in 40 CFR 124.10. EPA is providing this discretion to the Director to allow CAFOs to implement revised nutrient management practices in accordance with growing seasons and other time sensitive circumstances. As is stated above in section III.C.3(b) of this preamble regarding public review of NMPs during the general permit process, the public will have an opportunity to comment on the sufficiency of the time period when the Director proposes it, either in the regulations or general permit.

Because the process in § 122.42(e)(6)(ii) allows for public review of substantial changes to the terms of nutrient management plans and the underlying data and calculations, the incorporation of changes to the permit through this process will be treated as a minor permit modification, under 40 CFR 122.63(h), and not require additional review. EPA considered requiring that any change to the NMP be considered a permit modification subject to procedures under 40 CFR 122.62, but rejected this interpretation as it would significantly limit permitting authorities and CAFO operators' ability to make necessary and timely minor changes to NMPs as discussed above.

Commenters identified several issues associated with the proposed process for making substantial changes to NMPs. Several commenters indicated that the need for the permitting authority to review, provide public notice and comment, and approve substantial changes to NMPs will likely result in significant delays which will impact the operational ability of many CAFOs to make timely nutrient management decisions. Some commenters suggested that the process for making such changes be streamlined or time-limited. Other commenters requested that EPA provide flexibility to accommodate existing State criteria and procedures for determining and addressing substantial changes. Some State commenters indicated that they already have effective procedures in place. Some commenters simply asserted that the State Director should have discretion whether or not to require a permit modification.

The NPDES regulations at § 122.62 specifically require that any change to permit terms and conditions requires permit modification to be subject to public review and comment procedures, unless it falls under a minor modification listed at 40 CFR 122.63. In this rule, EPA has accounted for the frequent operational changes unique to CAFOs which are not typical for other NPDES-regulated industries. This tailoring is an effort to balance environmental protection with the burden to CAFOs and permitting authorities as well as the need to allow other operational changes that would not trigger the substantial modification requirements.

The process in this rule for making changes to NMPs and incorporating such changes in permits is necessary as a result of the *Waterkeeper* decision, which held that terms of the NMP are effluent limitations and that the CWA requires that the terms of each NMP be incorporated into a corresponding permit and be subject to public notice and comment and permitting authority review. Within this context, EPA has worked to streamline the process to the extent possible. This includes promulgating a process for revising NMPs that delineates what are substantial changes to the terms of the NMP and allows non-substantial changes to proceed in an expedited manner. It also includes provisions that allow a CAFO to develop NMPs with operational contingencies to minimize the number of substantial changes that must be made. As explained herein, the process and criteria in 40 CFR 122.42(e)(6) are reasonable and necessary to provide permitting authorities an effective mechanism to maintain linkage between the NMP and the permit in a manner consistent with the *Waterkeeper* decision.

Commenters suggested changes to the process in the 2006 proposed rule. Several commenters requested that EPA approve certain substantial changes as long as the CAFO continues to comply with all applicable technical requirements. Such substantial changes could include adding a new and substantially different field or increasing the animal headcount so as to exceed the previously identified ''maximum'' amount of manure in the NMP. In addition, one commenter recommended that the permitting authority inspect the CAFO before allowing any substantial changes to the NMP.

The final rule does not expressly provide that a permitting authority can pre-approve certain substantial changes, unless they are specified in an NMP that encompasses normal fluctuations or variations, because the *Waterkeeper* decision dictates that NMPs must be subject to permitting authority review and the terms of the NMP available for public comment. In addition, EPA does not believe an inspection is needed prior to allowing any substantial change to an NMP. Apart from the burden this would entail, EPA expects that self-reported information is credible and notes that there are significant penalties for submitting false or misleading information.

Many commenters supported the proposal that non-substantial changes would require only that the CAFO submit a revised NMP and that the permitting authority would notify the public of the change without allowing for public comment. Commenters encouraged EPA to clarify that, upon submission, the CAFO may proceed to implement such changes if the CAFO believes they are non-substantial. Many commenters stated that there is a need to ensure that CAFOs can quickly make changes to NMPs. One commenter recommended that EPA allow CAFOs to accumulate minor changes and submit them as a group when renewing their permit. Another commenter suggested that any changes incurred during a given year be reported in an annual NMP update form. EPA decided that, because the terms of the NMP are enforceable terms and conditions of the permit, CAFOs must submit changes to the NMP to the permitting authority and receive approval before a change is made, not annually or at the beginning of each new permit cycle.

Commenters were generally unsupportive of the proposed 180-day temporary approval period for implementation of certain substantial changes. Numerous commenters stated that this would not be helpful to CAFO owners because they would be hesitant to invest significant amounts of money to make substantial changes based only on a temporary approval, since final approval would remain subject to an uncertain regulatory status. Others

requested clarification regarding what happens if a change is implemented and then not approved. Some of these commenters suggested as an alternative that EPA require the permitting authority to process the applications in fewer than 45 days, and then allow seven days of public review.

Another commenter stated that the temporary approval period is inadequate because 180 days is longer than the crop growing season. This commenter observed that the temporary approval would allow CAFOs to change their entire land application patterns for an entire crop season without having public comment and review by the permitting agency. This commenter suggested that CAFOs plan in advance for any substantial changes and that only if the substantial changes are the result of unforeseen circumstances outside the control of the CAFO, should it be allowed temporary approval.

Based on comments, EPA reevaluated the usefulness of the 180-day temporary approval. In light of the comments, EPA recognizes that such an approach may be problematic for both industry and permitting authorities. Some industry commenters stated that the 180-day grace period would be meaningless because no operator would employ expensive changes without knowing if they would be approved. States commented that any permit modification must be approved before it is implemented. There is no requirement precluding operators from purchasing new land; rather, practices on the land cannot be employed until approved by the permitting authority. Further, EPA encourages operators to take advantage of the exception for substantial changes relating to the addition of new land application areas provided in § 122.42(e)(6)(iii)(A). Thus, EPA has not included the proposed 180-day temporary approval period in the final rule.

Under this final rule, when a CAFO submits changes to an NMP to the permitting authority, the Director must determine whether the changes affect the terms of the NMP incorporated into the permit, and if so, whether such changes are substantial. Depending on this determination, the process and timing of modifying a permit will vary. A CAFO owner or operator must remain in compliance with his or her permit and, thus, should work closely with the permitting authority and should initiate this coordination as early as possible. EPA believes that permitting authorities will be sensitive to the needs of CAFOs to make a range of changes to NMPs from time to time and, as a result, will be diligent in reviewing and making determinations regarding such changes.

(g) Annual Reporting Requirements

In the 2006 proposed rule, EPA discussed the use of annual reports to balance greater flexibility for CAFO operators in making cropping decisions with ensuring appropriate permitting authority and public oversight of permit compliance. The preamble solicited comment as to whether the annual report requirements should be modified to require all permitted CAFOs to submit information in their annual reports indicating how the CAFO achieved substantive compliance with the terms of the NMP as set forth in the permit. In the 2008 supplemental proposal, the Agency proposed additional annual reporting requirements for CAFOs that relate to the proposed provisions regarding the terms of the NMP.

In this action, the Agency is establishing additional annual report requirements, in 40 CFR 122.42(e)(4)(viii), mandating all permitted CAFOs to include in their annual reports the actual crop(s) planted and actual yield(s) for each field, the actual nitrogen and phosphorus content of the manure, litter, and process wastewater, and the amount of manure, litter, or process wastewater applied to each field during the previous 12 months. The Agency believes that it is important for the permitting authority to obtain this information on an annual basis in order to ensure that the CAFO has been operating in compliance with the terms of its permit. The annual report will inform the Director and the public how the CAFO has operated, given the flexibility for the terms of the NMP incorporated into the permit.

The Agency is also requiring CAFOs that follow the second (''narrative rate'') approach for describing rates of application in the NMP to submit as part of their annual report the results of all soil testing and concurrent calculations to account for residual nitrogen and phosphorus in the soil, all recalculations, and the new data from which they are derived. The CAFO is required to report the amounts of manure, litter, process wastewater and the amount of chemical fertilizer applied to each field during the preceding 12 months. Together with the total amount of plant available nitrogen and phosphorus from all sources, the information that is required to be included in the annual report provides the information necessary to determine that the CAFO was adhering to the terms of its permit when calculating amounts of manure, litter, and process wastewater to apply.

Many commenters supported the use of additional annual reporting requirements to address either non-substantial changes or all changes to the NMP. States also generally supported such an approach and sought flexibility regarding the content and use of the process to address other changes to the NMP. Another commenter noted that if CAFOs are allowed to provide alternative management scenarios in the original NMP, the CAFO must be required to submit documentation to the Director to specify which practices it is using from the ''menu'' of combinations in its NMP. This would allow the permitting authority and the public to know what practices the CAFO is actually implementing at any given time.

Although EPA recognizes that NMPs may change throughout the period of permit coverage, as discussed above in section III.C.3(e), the annual report requirements are only appropriate for use in addressing implementation of existing NMP provisions and changes to the NMP contemplated through flexibilities built into the NMP during the initial planning process or subsequent modifications in accordance with 40 CFR 122.42(e)(6). Because this rule requires the terms of the NMP to be incorporated as enforceable terms and conditions of the permit, an outcome of the *Waterkeeper* decision, changes to the terms of the NMP constitute changes to the permit and therefore must be processed according to § 122.42(e)(6), as discussed above in section III.C.3(e).

Some commenters expressed concern that CAFOs would be unable to complete more detailed reports and provide the information necessary to document changes to the NMP, and that some of the reporting requirements would be redundant. Some commenters also believed that reporting crop yields would be overly intrusive and would not be representative of the NMP effectiveness. In this rule, EPA has modified the content of the annual report to supplement the existing annual report requirements promulgated in 2003 so as to allow the public and the permitting authority to review whether the CAFO has implemented the NMP in accordance with the terms and conditions of its permit. This approach balances the recognized need to provide additional flexibility and the need for CAFOs to provide information concerning actual rates of application. The additional information required in this final rule is a limited burden on both the CAFO and the permitting authority that will provide public access

to information about NMP implementation throughout the period of permit coverage. For example, crop yield goals are a critical factor in developing rates of application. Other commenters expressed concern that facilities might overstate crop yields goals. As previously mentioned, by making information about actual crop yields public, both the Director and the public will have better information when evaluating NMPs for subsequent permit coverage.

(h) EPA Nutrient Management Plan Template

As described in the 2006 proposed rule, EPA developed a draft template, made available in the rulemaking public record for public comments, which could be used as a voluntary tool to facilitate completion of the NMP by CAFO permit applicants, as well as to facilitate review by the permitting authority. As discussed in the proposed rule, EPA believed that such a template would help to systematically organize the information necessary to satisfy the NMP requirements in the regulation. Some commenters supported the concept of a voluntary NMP template and considered the draft template an excellent user-friendly model. Other commenters disagreed, stating that the detailed information required in the draft template would be quickly outdated. Other comments received on the NMP template include the following:

- A ''one size fits all'' template does not lend itself well to the different climates and terrains across the country, and use of the template should not be required by the regulation;
- The draft template lacked specific information to ensure that CAFOs are meeting technical standards and the ELGs;
- The draft template was too long and appeared to be more of an inspection checklist than a basic guideline;
- A concern that some States may actually adopt the template, once completed, as the required NMP format;
- The template could be a valuable tool to clearly differentiate between the terms of the NMP, for purposes of incorporation into the permit, and the background information;
- The template would be more beneficial if it is standardized through the use of a computer program which allows ease and flexibility in making changes to the NMP; and
- The template could be useful to an unpermitted CAFO to identify land application practices needed to qualify for the agricultural stormwater exemption.

States generally agreed with the concept of using a consistent, stable template but wanted assurance that it is strictly a voluntary tool and can be modified to better address specific State requirements. Additionally, commenters stated that the draft template failed to address all of the regulatory requirements and should be modified accordingly by including additional technical portions. Other commenters suggested that a template would unnecessarily micromanage the structure or content of NMPs and that States should have the responsibility to define effective nutrient management strategies. Other commenters mentioned the need to keep the template flexible because NMPs are dynamic documents that change rapidly, and a plan that is too detailed will bind the producer to practices that, if altered, would require costly revisions and reviews. A few commenters also indicated that the format and sequence for providing information within the draft template was disjointed and inconsistent with the nutrient management planning process. Other State commenters did offer, however, that the template may be adequate for most public participation processes.

After considering public comments, EPA, in coordination with USDA, has decided not to utilize the draft template. Instead, the two agencies have worked on the development of a planning tool that would generate a single document that meets the objectives of both agencies. The one document would include the required elements of an NMP as well as the elements of a voluntary comprehensive nutrient management plan (CNMP) developed in accordance with USDA technical guidance. A CNMP is a plan much like the NMP required by EPA's CAFO regulations. There are some minor differences between the scope of the two documents, such as a CNMP option to include feed management plans (which are not required for the NMP) and an NMP requirement to include chemical handling plans (which are not part of a CNMP). However, the EPA and USDA agree that there is no reason why one document could not suffice for both the CNMP and NMP by accommodating both agencies' requirements. To that end, EPA, in partnership with USDA, is in the process of coordinating the information necessary to complete an NMP as well as a CNMP and developing a software program that could integrate both sets of planning requirements, known as Manure Management Planner (MMP). Of course, even though both agencies would promote the use of a single tool, it would remain the CAFO operator's responsibility to provide that information to the Director in order to meet the requirements of this rule, inasmuch as USDA does not make facility-specific information available to other agencies or the public. EPA will encourage the use of the MMP to facilitate the development and review of NMPs under the NPDES permit program.

The MMP software, under development by a grant from EPA and USDA to Purdue University, is a computer program that would provide permitting authorities and producers with a mix of programs, not currently available elsewhere, to assist in CNMP and/or NMP development. The objective of this effort is to accelerate the CNMP and NMP development process by integrating other software programs used to calculate manure application rates. Among these technologies are RUSLE II, the Phosphorus Index (PI), and other State-specific risk assessment tools used in CNMP and NMP development. In the longer term it is planned that additional integration will be achieved with planning, recordkeeping technologies and connectivity to the USDA Customer Service Toolkit. The MMP program incorporates field-specific data tables that allow the producer to list the type of crops planned, crop rotation by planting season, nutrients available for each crop based on previous manure applications, and the rate of application per crop. These data tables could provide permitting authorities with specific information that could be extracted as terms of the NMP that would be inserted into a permit. It also provides producers the flexibility to comply with the optional approach of calculating application rates as pounds of nutrients by developing tables with expanded crop contingency plans and related application rates. See section III.C.3(c) for detailed discussion of nutrient management plan terms.

EPA and USDA anticipate that the MMP software can eventually be tailored to all individual State technical standards, requirements and circumstances. At present, the program has been tailored to approximately 34 States, and is available and ready for use in those States. EPA and USDA plan on updating and improving the MMP software and tailoring it to other States.

When completed, the MMP software will be a user-friendly program available without charge. It is strictly a voluntary tool. There may be some situations at a livestock operation, such as varying terrains and unusual cropping sequences, which the MMP cannot

accommodate; thus the program may not, at present, be a good fit for all operators. Permitting authorities and producers may still choose to use an established State NMP software program or other technical standards methods to develop and implement their NMP. More information on MMP can be found at the Purdue University Web site, *http://www.agry.purdue.edu/mmp/*.

EPA and USDA are also developing a national nutrient management planning course that will cover how to develop, review, and implement an NMP and how to use the MMP software program.

D. Compliance Dates

Following issuance of this rule, authorized States have up to one year to revise, as necessary, their NPDES regulations to adopt the requirements of this rule, or two years if statutory changes are needed, as provided in 40 CFR 123.62. States are not required to adopt the provisions for no discharge certification in this time period.

As discussed above in section II.E, EPA has twice extended certain compliance dates originally established in the 2003 CAFO rule. Following the Second Circuit Court's decision in *Waterkeeper Alliance et al.* v. *EPA*, 399 F.3d 486 (2d Cir. 2005), the Agency extended dates for newly defined CAFOs to seek permit coverage and for all permitted CAFOs to develop and implement NMPs to July 31, 2007. 71 FR 6978 (February 10, 2006) (hereinafter the ''2006 date change rule'').

The 2006 proposed rule did not anticipate a need to revise the July 31, 2007, compliance dates established by the 2006 date change rule. However, as a result of an array of public comment on the issues raised by the *Waterkeeper* decision, EPA was unable to complete this final rule prior to July 31, 2007. EPA published a second revision of the compliance dates on July 24, 2007, extending the dates from July 31, 2007, to February 27, 2009. 72 FR 40,245 (July 24, 2007) (hereinafter the ''2007 date change rule''). The 2007 date change rule does not affect the applicable time for seeking permit coverage for existing facilities defined as CAFOs prior to the 2003 CAFO rule, nor does it apply to newly constructed CAFOs not subject to new source performance standards (NSPS) or to new source CAFOs subject to NSPS that discharge or propose to discharge. The February 27, 2009, compliance dates also do not affect the approximately 9,000 CAFOs currently covered under existing permits. Furthermore, for Large CAFOs that are new sources (*i.e.*, those commencing construction after the effective date of the 2003 CAFO rule) and are required to seek permit coverage under the revised duty to apply provision in this rule (40 CFR 122.23(d)(1)), the land application requirements at 40 CFR 412.4(c) apply immediately because new sources are subject to the NSPS under 40 CFR 412.35 and 412.46, which do not include a delayed date for new sources to come into compliance with § 412.4(c). The 2003 rule did not delay compliance with the land application requirements for new sources. *See* CWA section 306(e).

EPA received comments on the 2006 proposed rule related to the July 31, 2007, compliance dates in place at that time. The comments received generally focused on two issues: (1) That the permit application date did not allow enough time for States to revise their permitting programs, and (2) that the date did not allow CAFO operators sufficient time to develop permit applications and NMPs. Many commenters stated that it would not be possible for CAFOs to seek coverage under an NPDES permit by July 31, 2007, and that the deadline should be extended. A number of extension periods were suggested ranging from several months to up to two years after promulgation of the final rule. Rationales for extending the dates included the need to allow States to revise their programs to fully reflect CAFO regulations (which, in turn, allows CAFOs to know what requirements apply to them), limited technical assistance, and the need for adequate time to develop an NMP in the period between rule promulgation and the deadline for seeking permit coverage. Commenters asserted that CAFO owners and operators cannot know the precise requirements for NMPs, or the associated documentation and public participation requirements, until the rule is final. EPA promulgated the 2007 date change rule with these comments in mind.

In the 2008 supplemental proposal (73 FR 12,336) EPA solicited comments on its intention to not extend the compliance deadlines beyond February 27, 2009. Some commenters stated that the deadline should be extended in order to allow States to adapt their existing programs. Others noted that more time would be needed for CAFO owners and operators to implement such complex rules and come into compliance. A number of extension periods were suggested ranging from several months to up to two years after promulgation of the final rule. Commenters were opposed to an extension of the deadlines; did not want to further delay the environmental benefits; and noted that an extension would provide a comparative advantage to those CAFOs that have not made capital improvements and promote interstate discrepancies that undermine the integrity of State CAFO programs.

In this final rule, EPA is not extending the February 27, 2009, compliance deadlines. EPA believes that the time between publication of this final rule and February 27, 2009, is adequate for unpermitted CAFOs that discharge or propose to discharge to develop an NMP and seek permit coverage. EPA notes that most of the technical provisions of the 2003 CAFO rule (*e.g.*, the substantive NMP requirements) were unaffected by the *Waterkeeper* decision, and therefore CAFOs have already had the information they need to develop NMPs and have not needed to wait for further EPA action before doing so. In States where general permits have been issued and have not expired, eligible CAFOs may seek permit coverage under applicable existing general permits. Where general permits are not available, CAFOs may seek permit coverage by submitting an individual permit application. As mentioned above, 40 CFR 123.62(e) provides that States will have one year from the promulgation date of this final rule, or two years if statutory changes are needed, to adopt the requirements of this final rule. During this interim period, EPA expects States to issue permits that comply with all technical requirements of the 2003 rule that were unaffected by the *Waterkeeper* decision and, absent regulatory or statutory barriers, to provide for NMP submission, public review of NMPs, and incorporation of the NMP terms into the permit. EPA is committed to working with States to implement CAFO permitting requirements.

The CWA does not allow any CAFO to discharge without a permit, regardless of whether a permit application has been submitted. EPA and States have a range of tools to help regulated entities come into compliance with new rules including outreach, compliance assistance, compliance incentives and compliance monitoring. For new rules EPA generally focuses on outreach initially. Where EPA becomes aware of particular instances of noncompliance, EPA may pursue appropriate enforcement. Since 2005, EPA has designated unpermitted CAFOs subject to the 1976 rule as an enforcement priority and continues to focus its efforts on those facilities. With respect to CAFOs subject to permitting as of February 27, 2009, EPA would take into consideration whether a permit application has been submitted and whether the entity is operating in

accordance with its NMP and all other applicable requirements of the 2003 CAFO rule and this final rule.

E. Water Quality-Based Effluent Limitations

Water quality-based effluent limitations (WQBELs) are one of two fundamental types of limitations imposed in NPDES permits. The other is technology-based effluent limitations. NPDES permits are required to contain technology-based limitations and, if the technology-based limitations are insufficient to meet applicable water quality standards, more stringent water quality-based effluent limitations (WQBELs). CWA section 301(b)(1)(C), 33 U.S.C. 1311(b)(1)(C); and 40 CFR 122.44(d). While technology-based limitations are calculated taking into account the availability or effectiveness of treatment technologies and/or their associated costs, WQBELs are established without consideration of availability or effectiveness of treatment technologies or the costs that discharges would incur to meet such limits. *Arkansas* v. *Oklahoma*, 503 U.S. 91 (1992); *Westvaco* v. *EPA*, 899 F.2d 1383 (4th Cir. 1990).

The environmental petitioners challenged the 2003 rule as violating both the CWA and the Administrative Procedure Act by failing to promulgate WQBELs for CAFO discharges and by being ambiguous as to whether States may promulgate WQBELs for CAFO discharges. As explained in II.C.3 above, the *Waterkeeper* Court agreed in part with petitioners, and remanded the rule for clarification regarding the applicability of WQBELs for CAFO discharges that are not exempt as agricultural stormwater, to explain why EPA justified its decision not to promulgate WQBELs for discharges other than agricultural stormwater, and to clarify whether the CAFO rule bars States from requiring WQBELs for such discharges. *Waterkeeper Alliance et al.* v. *EPA*, 399 F.3d 486, 522–524 (2d Cir. 2005).

As EPA stated in the preamble to the 2006 proposed rule, the only issue that EPA addressed in the 2003 rule with respect to WQBELs was their applicability to agricultural stormwater discharges. EPA had explained in 2003 that, because agricultural stormwater discharges are not point source discharges, agricultural stormwater discharges cannot be subject to NPDES permit requirements, including either technology-based limitations or WQBELs if technology-based limitations are insufficient to meet applicable water quality standards. The Second Circuit Court of Appeals agreed with EPA. However, the court seemed troubled by certain statements in the 2003 preamble that it thought might address how WQBELs apply to other CAFO discharges. The court therefore remanded the question of whether or not, and why, WQBELs are needed to assure attainment or maintenance of water quality standards as provided in section 302(a) of the CWA.

In the preamble to the 2006 proposed rule, EPA responded to the remand by clarifying that discharges from CAFOs that are not exempt from CWA permitting requirements as agricultural stormwater discharges are subject to NPDES requirements, including WQBELs. EPA clarified the applicability of WQBELs both with respect to land application areas under the control of a CAFO and with respect to discharges from a CAFO's production area.

1. Discharges From Land Application Areas

As explained in section III.B. above, under the 2003 rule, the agricultural stormwater discharge exemption applies only to precipitation-related discharges from land application areas under the control of the CAFO where application of manure, litter, or process wastewater is in accordance with appropriate nutrient management practices as specified in 40 CFR 122.42(e)(1)(vi)–(ix). Any other discharge from land application areas under the control of a CAFO is a point source discharge from the CAFO. 40 CFR 122.23(e). These point source discharges from land application areas are subject to NPDES permitting requirements, including WQBELs where necessary to meet applicable water quality standards.

In most instances, a CAFO that meets technology-based permit limits requiring manure to be applied at appropriate agronomic rates will eliminate all or most dry weather discharges. If such discharges remain, the permit writer will determine the need for additional WQBELs to meet applicable water quality standards based on the circumstances of each particular case.

Although EPA, in the 2003 rule preamble, encouraged States to address water quality protection issues in setting technical standards for appropriate land application practices (*see Waterkeeper*, 399 F.3d at 523, citing 68 FR 7198), EPA did not intend to change the basic regulatory scheme of the NPDES program. With respect to wet weather discharges, under 40 CFR 122.42(e)(1), the permit must already include effluent limitations defining the ''site-specific nutrient management practices'' required to be implemented under § 122.23(e) in order for the remaining wet weather (''precipitation-related'') discharges to be ''agricultural stormwater discharges.'' As previously explained, agricultural stormwater discharges are exempt from the definition of ''point source'' of section 502 of the CWA and are therefore not subject to permitting requirements under the CWA, including WQBELS. Thus, any precipitation-related discharge from land application areas remaining after compliance with the technology-based effluent limitations and permit conditions required pursuant to § 122.42(e)(1)(vi)–(ix) are exempt from CWA permitting requirements as agricultural stormwater, and these technology-based effluent limitations constitute the entirety of the federal NPDES permit requirements with respect to land application of manure, litter, and process wastewater. However, it is possible that a State may have additional requirements under its own State regulatory authorities that would go beyond the scope of the federal NPDES program. Thus, such agricultural stormwater discharges, though not subject to federal NPDES regulation, could be subject to additional State requirements, including additional requirements related to water quality. 33 U.S.C. 1370 and 40 CFR 123.1 and 123.25. These requirements, however, would not be viewed as WQBELs as that term is used under the CWA. Nor would these State-law requirements be federally enforceable. 40 CFR 123.1(i)(2).

2. Production Area Discharges

EPA also explained in the preamble to the 2006 proposed rule that permit writers may require WQBELs in appropriate cases to further limit discharges from CAFO production areas. As EPA stated in the 2003 rule, the exclusion for agricultural stormwater does not apply to discharges from the CAFO production area. 40 CFR 122.23(e) and 68 FR 7198. Because the ELGs allow occasional overflow discharges from properly designed, operated, and maintained lagoons and storage ponds, the technology-based limitations in the ELGs may not be as stringent as necessary to meet applicable water quality standards. In that case, a WQBEL would be appropriate. 40 CFR 122.44(d). For example, a facility subject to ELGs in 40 CFR part 412, subpart C is allowed to discharge from the production area, provided the production area is designed, constructed, operated, and maintained to contain all process wastewater plus any stormwater runoff resulting from the 25-year, 24-hour

storm. Thus, WQBELs would be necessary in a particular permit to further limit such discharges beyond the levels that are required under the CAFO ELGs, if necessary for the discharge to meet applicable water quality standards.

In the preamble to the 2006 proposed rule, EPA indicated that for CAFOs in the swine and poultry sectors subject to New Source Performance Standards (NSPS) in part 412, subpart D, permits could not require WQBELs for production areas, because the NSPS already prohibit all production area discharges from these new sources. 71 FR 37,744, citing 40 CFR 412.46(a). Some commenters, however, urged EPA to reconsider its position given a possibility of a discharge even from CAFOs subject to a no discharge standard. Nothing in this rule limits the Director's authority to include any more stringent limitation than the NSPS in a CAFO's permit when necessary to meet applicable water quality standards pursuant to CWA section 301(b)(1)(C). Nonetheless, EPA continues to believe that WQBELs would not be needed for swine and poultry CAFOs subject to the no discharge NSPS. The provisions for implementing the NSPS BMP-based effluent limitation, based on advanced modeling, are meant to improve implementation of this provision by promoting up-front design, construction, operation, and maintenance to ensure that predictable discharges do not occur. Permitting authorities have full authority and responsibility to determine if the facility's demonstration is adequate. Therefore, as a practical matter, EPA finds it difficult to imagine circumstances in which such a limitation would be necessary for permitted CAFOs subject to this NSPS no discharge standard.

F. New Source Performance Standards for Subpart D Facilities

This action responds to the Second Circuit's remand of certain aspects of the 2003 New Source Performance Standards (NSPS). First, EPA has deleted the remanded provisions that authorized two alternatives for compliance with the NSPS requirement for no discharge of manure, litter, or process wastewater into waters of the U.S. from the production area. Second, EPA is promulgating a new provision that would allow a CAFO using an open surface manure storage structure to request the NDPES permitting authority to establish site-specific effluent limitations for its NPDES permit that incorporate the NSPS no discharge requirement. These best management practices effluent limitations include design specifications and operational parameters and must be based on a technical evaluation of the adequacy of the CAFO's storage structure for achieving no discharge of manure, litter, or process wastewater into waters of the U.S. The new provision prescribes in detail the elements of that technical evaluation. A facility designed, constructed, operated, and maintained in accordance with these effluent limitations will meet the NSPS requirement for no discharge.

This provision will have several positive ancillary effects. Some CAFOs may be reluctant to use innovative technologies that incorporate open storage as part of their manure management system in view of the no discharge requirements of Subpart D. This provision creates an incentive for the use of innovative technologies to meet the no discharge requirement by providing an up-front determination that the CAFO will meet the no discharge requirement prior to potentially expensive construction. Second, in the case of new source Subpart D CAFOs that do apply for a permit, this provision provides for an up-front determination subject to public participation as part of the permitting proceeding, that the CAFO will meet the no discharge requirement. Finally, because facilities subject to no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. may choose not to obtain a permit, and therefore are not eligible for upset and bypass defenses, the protection afforded by this provision provides an incentive for CAFOs to obtain a permit.

1. Background

The 2003 CAFO rule established NSPS for swine, poultry, and veal calf CAFOs as ''no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area.'' The rule provided two compliance alternatives that allowed a CAFO in these categories to meet this requirement by showing that either (1) its production area was designed, constructed, operated, and maintained to contain all manure, litter, or process wastewater, and precipitation from the 100-year, 24-hour storm, or (2) it would comply with ''voluntary superior environmental performance standards'' based on innovative technologies. The ''voluntary superior environmental performance standards'' provision would allow a discharge from the production area if the discharge was accompanied by an equivalent or greater reduction in the quantity of pollutants released to other media (*e.g.*, air emissions).

The Second Circuit Court of Appeals remanded aspects of the NSPS to the Agency, holding that there was not adequate support in the record for the alternative standards. Specifically, the court directed EPA to clarify the statutory and evidentiary basis for allowing CAFOs to comply with a no discharge NSPS through either a production area containment structure or an alternate performance standard. With respect to the 100-year storm standard, the court noted that while certain studies showed that production area BMPs would have substantially prevented the production area discharges documented in the record, substantially preventing discharges is not the same as no discharge. With respect to the alternative performance standards, the court held that EPA had not justified its decision to allow compliance with the no discharge standard through an alternative standard that permits production area discharges so long as the aggregate pollution to all media is equivalent to or lower than that resulting from the baseline standards. The court further held that EPA did not provide adequate notice for either of these provisions under the CWA's public participation requirements. *See* 33 U.S.C. 1251(e) (public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States).

2. This Final Rule

This final rule makes the following changes to the 2003 NSPS in subpart D. First, EPA is deleting 40 CFR 412.46(a)(1) that allowed subpart D CAFOs subject to NSPS to meet the no discharge standard through the use of a 100-year, 24-hour rain event containment structure. In a conforming change, EPA is also modifying 40 CFR 412.37(a)(2) to remove the reference to such structures from § 412.37(a)(2). EPA is, however, retaining the requirement in § 412.37(a)(2) that all open surface liquid impoundments have a depth marker. The land application requirements for new sources remain unchanged.

The record for the 2003 NSPS showed that new facilities routinely include systems and employ practices that result in no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production areas. Based on this information, EPA determined that a no discharge standard represented the best available

demonstrated control technology for new sources. EPA now recognizes that a system that is properly designed, constructed, operated, and maintained to contain precipitation from the 100-year, 24-hour event may still discharge as a result of multiple unusual and severe precipitation events. Given the record information, EPA now agrees that a system designed, constructed, operated, and maintained to contain precipitation from the 100-year, 24-hour storm event is not necessarily equivalent to no discharge and has consequently deleted this provision.

Second, EPA is deleting 40 CFR 412.46(d) to remove the alternative voluntary superior performance NSPS for new swine, poultry, and veal calf sources in light of the Second Circuit Court of Appeals ruling.

Third, EPA is promulgating a new provision that authorizes the permitting authority to develop a site-specific, no discharge NSPS for new CAFO's using open storage containment structures. Thus, this rule provides that the NPDES Program Director may establish no discharge best management practice effluent limitations based upon a site-specific evaluation for an individual CAFO. CAFOs may request permit writers to establish no discharge best management practice effluent limitations on a case-by-case basis when the facility demonstrates through a rigorous modeling analysis that it has designed a containment system that will comply with the no discharge requirement. After such site-specific standards are established, a facility will be in compliance with the no discharge requirement if its containment system has complied with all of the specified site-specific design, construction, operation, and maintenance components of such a system demonstrated to meet the no discharge requirement.

3. EPA's Decision To Authorize Site-Specific, No Discharge Effluent Limitations

In its 2006 proposal, EPA proposed an alternative no discharge requirement that would authorize the NPDES Program Director to establish no discharge, BMP effluent limitations based upon a site-specific evaluation for an individual CAFO. A complete discussion of the proposal may be found at 71 FR 37,760–62. Such limitations would provide an alternate approach for CAFOs to meet the no discharge requirement through limitations designed to ensure no discharge of manure, litter, or process wastewater pollutants into waters of the U.S.

Specifically, EPA proposed to authorize permit writers, upon request by a CAFO, to establish no discharge BMP effluent limitations on a case-by-case basis when a facility demonstrated through a rigorous modeling analysis that it could design, construct, operate, and maintain an open containment system that would comply with the no discharge requirement. When a facility complied with all of the site-specific design, construction, operation, and maintenance components of such a system—all of which are conditions of its permit—the CAFO would be deemed to be in compliance with the no discharge requirement even in the event of an unanticipated discharge. EPA is promulgating the provision in essentially the same form as it was proposed.

Commenters raised a number of concerns with this provision. Commenters asserted that the alternative provision creates an exception to the no discharge requirement. Some commenters viewed the modeling exercise as an ineffective substitute for meeting effluent limitations. Commenters also questioned the enforceability of the alternative provision if a new source would have a discharge.

A number of reasons support EPA's decision to promulgate this provision and should allay commenters' concerns. First, the alternative provision requires a CAFO to demonstrate to the satisfaction of the permitting authority, after public notice and comment on the demonstration, that its open storage system is a no discharge system. In order for a new CAFO employing an open storage system to obtain no discharge BMP effluent limitations, the CAFO must demonstrate that the entirety of its operation including its production area, site-specific NMP and other best management practices are designed to ensure no discharge from the entire CAFO. Because this demonstration must be based on the use of a prescribed model and precipitation data for 100 years, any showing of no discharge will necessarily account for a wide range of circumstances. Given the stringency of the required modeling exercise, described more fully below, a successful no discharge demonstration means that the site-specific limitations, in fact, are equivalent to a no discharge requirement. Moreover, because this demonstration will be subject to public participation requirements that apply to any permitting proceeding, commenters are assured that there will be an opportunity for public review of the assumptions used to support the no discharge conclusion. Further, the final determination will also be subject to judicial review as would be the case with any other final permit decision.

Second, the argument that site-specific no discharge limitations are not true no discharge limitations reflects a fundamental misunderstanding on commenters' part. Commenters fail to recognize that the provision allowing site-specific, no discharge effluent limitations essentially places a CAFO with such limitations in the same position as a CAFO without such limitations. Commenters have apparently forgotten that, even in the absence of a provision like that promulgated today, permitted facilities that are subject to no discharge effluent limitations may discharge and not be subject to an enforcement action (or have a defense to any enforcement action) in certain uncontrollable and unforeseeable circumstances. The 2003 CAFO rule specifically provided for the availability of an upset/bypass defense from an enforcement action. *See* 40 CFR 412.47(a)(3) (''Provisions for upset/bypass as provided in 40 CFR 122.41(m)–(n) apply to a new source subject to this provision.'').

Thus, EPA NPDES regulations currently would provide a defense to an enforcement action, albeit in severely restricted circumstances, for discharges from any permitted new source CAFO. Under the 2003 rule, ''no discharge'' for those facilities, in fact, means no discharge except in certain narrowly prescribed circumstances. The demonstration required under this rule to support the establishment of alternative site-specific no discharge limitations is designed to show that there will be no discharge from the CAFO except in exactly the circumstances provided in EPA's upset/bypass regulations and described under the 2003 rule.

Under EPA's regulations, an ''upset'' is defined as ''an unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee.'' 40 CFR 122.41(n). Under the regulations, the upset defense to an enforcement action would not be available to the extent that the noncompliance with permit conditions was due to operational error, an improperly designed treatment system, inadequate treatment system, improper maintenance or careless and improper operation. 40 CFR 122.41(n)(1).

This rule adopts requirements for an upfront demonstration that parallel the conditions under which an upset/bypass defense would be available in the event of a discharge from a no

discharge facility. It provides that, before a permit writer may establish site-specific limitations, the permittee must demonstrate through a rigorous modeling exercise that its open containment system would not discharge. Given the requirement for evaluation of the system's adequacy (size, operational practices, maintenance conditions and other factors) using precipitation data for 100 years, such an assessment would support the conclusion that any discharge that might occur results from ''factors beyond the reasonable control of the permittee,'' the conditions under which the upset/bypass defense would be available. Moreover, as noted, all of the design, construction, operation, and maintenance components evaluated for the site-specific permit become permit conditions. This similarly mirrors the provisions of the upset regulations which do provide for a defense only in the limited circumstances outlined in § 122.41(n)(1), *e.g.*, no operational error, improper design, or other factors as described above. As a consequence, this alternative NSPS provision requires an upfront determination that the CAFO would only discharge in circumstances that would parallel those for which an upset/bypass defense would be available.

This final rule's new NSPS provision allowing site-specific BMP effluent limitations gives the CAFO complying with its permit conditions more certainty that its operations meet its CWA requirements. The permitting process has already established that the discharge is unintentional and beyond the reasonable control of the permittee. Therefore, in the extremely unlikely event of a discharge from a new source that is complying with a permit containing these site-specific no discharge effluent limitations, the CAFO would already have established in the permitting process an affirmative defense with respect to any discharge, and would not need to rely on § 122.41(n).

Establishment of these no discharge, BMP effluent limitations represents a determination by the permit writer that the CAFO will not discharge. The only time a CAFO under this provision could potentially discharge would be in an extreme, rare event not reasonably foreseeable or under the reasonable control of CAFO as demonstrated in the permitting process and explained above.

Fourth, while site-specific BMP effluent limitations provide greater certainty to CAFOs, they also provide the permitting authority and citizens more specific measures of compliance than is the case for CAFOs without such permit conditions. Unlike a CAFO that does not discharge or propose to discharge and therefore chooses not to seek permit coverage, a CAFO relying on site-specific BMP effluent limitations would have a permit and permit terms that include the design, construction, operation, and maintenance measures that formed the basis for the permitting authority's determination that the CAFO will meet no discharge. Because the elements demonstrating no discharge are permit conditions established in a process that provides for public participation and on-going oversight, use of this alternative should further ensure compliance with the no discharge requirements.

So long as the facility complies with its BMP effluent limitations (and other terms of the permit such as monitoring or recordkeeping requirements), the CAFO will not be subject to enforcement action. EPA underscores for the regulated community that the protections afforded by this provision are only available through permits issued to new source CAFOs. EPA further wishes to emphasize that the more general upset and bypass regulations are only available to permitted CAFOs, and are otherwise unaffected by this NSPS provision.

Finally, policy considerations support the Agency's adoption of an alternative no discharge approach. EPA encourages CAFOs to implement anaerobic digesters, multi-cell treatment lagoons, and nitrification/denitrification technologies. In addition, EPA wants to encourage the development of innovative technologies for meeting the no discharge requirement. To do this, CAFOs want certainty that the technologies they develop and implement will comply with the CWA. EPA recognizes that the upset and bypass provisions do not provide certainty to the operator that any discharge will be excused. In particular, CAFOs operating innovative or advanced technologies may be reluctant to rely on the standard upset and bypass provisions. Under the regulation adopted here, an operator must demonstrate to the permitting authority's satisfaction, after public comment, that an innovative approach that includes an open storage system will be designed, constructed, operated, and maintained to achieve no discharge. This demonstration would mean that this CAFO would not discharge, except during an event beyond the CAFO's reasonable control; an event that could be excused under the normal upset provisions. Once this demonstration has been made, it makes sense to provide the CAFO with the certainty that would eliminate the need for the CAFO to go through the upset/bypass process in most circumstances.

In addition, this approach is consistent with CWA section 101(f), requiring EPA to use efficient procedures for decision-making. Because of this provision, in the rare occurrence of a catastrophic event, this provision would relieve permitting authorities and CAFOs from the typical procedures necessary to meet the upset/bypass requirements.

4. Discussion of the New Provisions

The CAFO NSPS provisions adopted today require an evaluation of the adequacy of the designed storage facility using the AWM (Animal Waste Management) tool and an evaluation of overall water budgets using SPAW (Soil Plant Air Water) Field and Pond Hydrology Tool, or equivalent analytic tools. EPA has concluded that 100 years of climate data is an ample time frame for simulation purposes and will support a reasonable finding that the system will not discharge. However, EPA is aware that 100 years of continuous rainfall data may not be available for all CAFOs. Models can be run using actual rainfall data where available, and then simulated with a confidence interval analysis over a period of 100 years.[6]

AWM is a planning and design tool for animal feeding operations that can be used to estimate the production of manure, bedding, and process water, and thus determine the size of needed storage facilities. AWM accounts for wastewater, flush water, precipitation, runoff, and other additions to the waste stream. AWM can estimate storage facility sizes using either a defined storage period or by drawdown dates specified by the user. A monthly water and waste budget for each storage component is generated, in most cases allowing the CAFO to demonstrate no discharge from the entire production area. The procedures and calculations used in AWM are based on the USDA–NRCS Agricultural Waste Management Field Handbook.

The SPAW model consists of two linked routines. The first routine develops field hydrologic budgets based upon daily climatic data, crop data, and hydraulic characteristics of the soil profile. The second routine utilizes the

[6] Some commenters confused the 100-year simulation analysis with the requirement in the 2003 final CAFO rule for a system designed to contain the precipitation associated with the 100-year, 24-hour storm design event. Neither the proposed revisions nor these final requirements for new sources subject to subpart D refer to the 100-year storm event.

climatic and hydrologic outputs of one or more farm fields as the input to hydrologic budgets for downstream ponds. These daily pond water budgets can be used to evaluate the performance, operation or reliability for many types of ponds such as liquid waste storage facilities. Water budget processes may be evaluated by making daily adjustments to crop canopy cover and antecedent soil moisture. For each user-specified soil profile and crop rotation, SPAW simulates possible runoff from fields as well as the irrigation water needs of fields receiving the manure storage effluent. Hydrologic groups are used by the model to rate soils for the potential to release excess water down grade.

AWM tracks gross nutrients, but does not track the mass or concentration of nutrients. Further, the storage period or drawdown schedule is usually determined by the individual CAFO. Therefore, the CAFO's NMP must be used as an input to confirm both a water balance and a nutrient balance has been achieved by the CAFO. The NSPS provisions require that each CAFO use the SPAW tool to assess daily hydrologic budgets for each field. The complete modeling demonstration shows not only that the storage facility does not discharge, but also that there is no runoff of process wastewater from fields during land application activities consistent with the CAFO's NMP, which is necessary to ensure that the open containment system is operated in a way to meet the land application requirements of the rule. In EPA's view, the requirement to use the SPAW model (or an equivalent approved by the permitting authority) ensures CAFOs will rely on appropriate operational measures to achieve no discharge standards.

The CAFO NSPS provisions require certain specified information regarding design, construction, operation, and maintenance of the system to be included in the CAFO's NMP under 40 CFR 122.42(e)(1). This includes the key user-defined inputs and model system parameters. CAFOs must submit a site-specific analysis to the Director. See 40 CFR 412.46(a)(1). These site-specific design, construction, operation, and maintenance measures are enforceable requirements in the CAFO's permit. As long as the CAFO complies with these requirements, the CAFO presumptively meets the no discharge requirement. EPA has determined that the final rule revisions provide a clear and enforceable standard for the CAFO to achieve as well as providing assurance to the public that the proposed system complies with the no discharge requirement.

Under these final amendments to the NSPS, the Director has the discretion to require additional information from a new source subpart D CAFO owner or operator to support site-specific BMP effluent limitations. The burden is on the CAFO to demonstrate that any proposed system it employs, including an open system, meets the new source standard. EPA expects CAFOs will utilize the most current version of AWM and SPAW when submitting their demonstration to the permitting authority. However, EPA is aware that other peer-reviewed models and programs have been or may be developed that could be determined to be equivalent to AWM and SPAW. Therefore the rule gives the Director the discretion to approve design software or procedures equivalent to AWM and SPAW. Once approved by the Director, the public still would have the opportunity to comment on the CAFO's submitted modeling and demonstration as discussed earlier.

The information, design, and evaluation process required of all CAFOs wishing to avail themselves of this alternative is intended to allow CAFOs the flexibility to demonstrate compliance with the no discharge requirements for any type of open storage facility. As a practical consideration, EPA expects most CAFOs selecting this compliance alternative will submit designs for open manure storage structures accompanied by a narrow range of acceptable operation and management practices. However, for a given type of storage facility design (for example, an integrator with several company-owned CAFOs each designed and constructed in an essentially identical manner within the same county), EPA believes it is possible to conduct a series of assessments that together fully encompass the range of operational and management measures that would be used across multiple CAFOs with the specified storage facility design. In this case, SPAW could be run to validate a wide range of NMP and storage pond management scenarios (to continue the above example, the CAFOs all have the same sets of crops, soil types, land application equipment, etc.). This alternative does not change the requirement for a CAFO to develop a site-specific NMP. These final amendments authorize the permitting authority to determine that any CAFO using the specified facility type and submitting an NMP that falls within the pre-approved range of operational and management practices would not need to conduct an individualized assessment step (*i.e.*, the validation using SPAW).

The availability and use of such a geographical and categorical approach will require that the permit writer determine that a number of conditions are met. First, the assessment must fully account for all pertinent factors relevant to determination of the potential for discharge from an open storage system. The assessment must also include all parameters necessary to mirror properly the range of soil, plant, climatic, and hydrological conditions within the geographical area for which the assessment is intended to be representative. Second, the permittee must establish that the parameters reflected in the general assessment used to establish no discharge are, in fact, representative of those parameters for each CAFO. Finally, the assessment must reflect the operational and management practices to be employed by each CAFO at each individual site. As with the individual assessment, each CAFO must have a site-specific NMP that includes the operational and management measures utilized in the geographical assessment.

EPA is eliminating the requirement to indicate the capacity for a 100-year, 24-hour storm for new sources. EPA is maintaining the requirement to have a depth marker for all open storage structures. In EPA's view, a marker indicating the storage pond or containment depth can be an excellent means of displaying how much storage a CAFO has, whether it is time to pump down levels in the lagoon, pond, or other storage structure, or whether alternative management steps must be taken to prevent a full storage structure and potential overflow. Existing sources and new sources subject to subpart C continue to have the requirement for a depth marker that indicates the 25-year, 24-hour storm event. New sources subject to subpart D and using an open storage structure must use the depth marker to indicate the maximum volume of manure and process wastewater the structure is designed to contain.

While one component of preventing discharge from an open system is to provide adequate storage of manure and wastewater during critical periods, ensuring adequate physical capacity is not sufficient. Rather, determining whether there is adequate storage is based on a site-specific evaluation of the CAFO's entire waste handling system. Adequate storage has to be based on climate-specific variables that define the appropriate storage volume, but of equal importance are the nutrient management plan and other

management decisions that specify when and how the storage can be emptied. The link between adequate storage and land application practices is one of the most critical considerations in developing and implementing a site-specific nutrient management plan. For example, the amount of land available for application, the hydraulic limitations (ability of the land to handle additional water without the occurrence of runoff), geology, and soil properties of the available land base can play an important role. See Chapter 2 of EPA's technical guidance for CAFOs ''Managing Manure Nutrients at Concentrated Animal Feeding Operations'' (EPA–821–B–04–00) for more information. EPA expects these criteria preclude a CAFO from withdrawing manure and process wastewater from liquid storage structures and subsequently land applying process wastewater at inappropriate times. Given these considerations, EPA is establishing procedures for approval of site-specific management practices for open containment systems with the expectation that a system can be designed and operated to meet the no discharge standard. EPA has concluded that the design, construction, operation, and maintenance elements and the comprehensive analytical assessment are sufficient to achieve this objective.

G. BCT Limitations for Fecal Coliform

In response to the Second Circuit remand, EPA is today affirmatively finding that the best conventional pollutant control technology (BCT) limitations it adopted in 2003 do, in fact, represent the best conventional control technology limitations for fecal coliform. After assessing various conventional pollutant removal technologies, EPA has determined that there are no available and economically achievable technologies that are cost reasonable that would result in greater removal of fecal coliform than the technologies on which EPA based the 2003 best practicable control technology currently available (BPT) and BCT effluent limitations guidelines (ELG).

As EPA has explained, establishing BCT limitations begins by identifying technology options that provide additional conventional pollutant control beyond the level of control provided by BPT effluent limitations. Any such candidate technologies are then evaluated to determine if they meet the threshold CWA requirements of ''availability'' and ''economic achievability.'' 51 FR 24,974, 24,976; July 9, 1986. A technology is economically achievable if its costs may be ''reasonably borne'' by the CAFOs. *Waterkeeper Alliance et al.* v. *EPA,* 399 F.3d 486, 516 (2d Cir. 2005). The Clean Water Act adds an additional evaluation step to the effluent limitations development process for conventional pollutants. ''In addition to the Clean Water Act requirement that effluent limitations be economically achievable, the cost associated with the BCT effluent limitations must also be 'reasonable' in relation to the effluent pollutant reductions.'' 51 FR 24,974. In determining this, the statute requires that EPA look at a number of factors including a comparison of the cost of effluent reductions for POTWs to that for direct dischargers using candidate BCT technologies. Thus, the statute requires that, not only must the costs of additional control be costs that CAFOs may reasonably bear (economically achievable), but the costs must also be reasonable relative to the costs for POTWs to achieve such conventional pollutant reductions.

EPA evaluated 41 BCT candidate technologies for this rule and determined that all but two of them were either not available (technically feasible for all CAFOs in a subcategory) or not economically achievable. For the remaining two technologies, while their costs are high and EPA believes it likely that they are also not economically achievable, EPA was unable to conduct its traditional tests for economic achievability and thus has not determined in this rule whether or not they are economically achievable. However, EPA has determined that these two technologies, even if economically achievable, would not be cost reasonable, and has therefore rejected them as BCT technologies.

As a result of this assessment, EPA has concluded that there are no available and economically achievable technologies that are cost reasonable that would provide greater fecal coliform removal than the BPT technology. How EPA performed this assessment and the results of that assessment supporting EPA's finding that the 2003 BPT/BCT limitations represent BCT technology for controlling fecal coliform is described in detail below.

1. The *Waterkeeper* Decision

As previously noted, the *Waterkeeper* court remanded the 2003 CAFO rule's BCT standard for further clarification and analysis with regard to the appropriate BCT standard for pathogens.[7] EPA's 2003 rule established non-numeric effluent limitations based on BPT and the best available technology economically achievable (BAT) as well as BCT limitations. In the 2003 CAFO rule, EPA established BPT effluent limitations guidelines for Large beef, dairy, and veal calf (Subpart C), swine and poultry (Subpart D) CAFOs.

At that time, EPA concluded that there were no available BCT technologies on which to base limits for conventional pollutants that were more stringent than the BPT limitations, and EPA therefore established BCT requirements equal to BPT limitations. EPA based this determination in part on the combined pollutant reductions (Table 7.2 of 68 FR 7239), and in particular its evaluation of the reductions in discharges of the conventional pollutants (TSS, BOD, and fecal coliform) associated with the various technology options it considered. 71 FR 37,763. EPA noted difficulties in quantifying the loadings and reductions in discharges of these pollutants—in particular, in assessing fecal coliform—and relied primarily on reductions in sediment discharges as a surrogate for reductions in TSS in reaching its BCT determination. EPA concluded that there were no technologically feasible candidate BCT technologies that would achieve greater TSS removals than the BPT requirements for either Subpart C or Subpart D facilities, and no economically achievable technologies for Subpart C facilities that would reduce discharges of BOD. Consequently, EPA found that there were no BCT technologies for establishing limits on conventional pollutants that would achieve greater removal than the BPT technology and established BCT requirements that were equal to BPT. 68 FR 7224.

While EPA's assessment of the effectiveness of various control options did attempt to measure pathogen reductions for the final rule, EPA did not establish any specific BPT or BCT limitations to control fecal coliform, a conventional pollutant and pathogen. The *Waterkeeper* court remanded the 2003 CAFO rule's BCT standard for further clarification and analysis because EPA had failed to make an affirmative finding that the BCT limitations it had adopted in fact represented the best conventional

[7] As the Second Circuit recognized, the CWA lists only one pathogen, fecal coliform, as a conventional pollutant for which BCT limitations are required. *Waterkeeper,* 399 F.3d at 518. Section 304(a)(4) of the CWA provides that EPA may identify additional pollutants as conventional pollutants. EPA has identified only one additional pollutant, oil and grease as a conventional pollutant. Thus, the only pathogen subject to the Second Circuit remand is fecal coliform.

pollutant control technology for reducing pathogens—specifically, fecal coliform. 399 F.3d at 519. EPA's final rule issued today responds to the court's remand.

As EPA proposed, in this final rule EPA is affirmatively concluding that the current BCT limitations for conventional pollutants represent the best conventional control technology for fecal coliform and is establishing BCT limitations for fecal coliform that are equal to the current BPT/BCT limitations. These limitations prohibit the discharge of manure, litter, or process wastewater into waters of the U.S. from the production areas of CAFO except in limited circumstances. A discharge is allowed only if an existing, permitted CAFO has a properly designed, constructed, and operated storage structure with the capacity to contain all manure, litter, and process wastewater associated with the facility as well as the runoff and direct precipitation from a 25-year, 24-hour rainfall event. *See* 40 CFR 412.31(a). The current rules also provide that a Large CAFO that land applies manure, litter, or process wastewater must do so in accordance with several BMPs: A nutrient management plan that includes the determination of application rates for manure, litter, and process wastewater; a field-specific assessment of the potential for nitrogen and phosphorus transport from the field to surface waters; manure and soil sampling; and setback requirements. *See* 40 CFR 412.4. EPA is not promulgating more stringent BCT limitations for fecal coliform because there is no available, achievable, and cost reasonable technology on which to base such limitations.

2. Background

The CWA requires point sources to achieve effluent pollutant levels established by EPA that are attainable through progressively more stringent pollutant control technology. The CWA calls for technology-based control in two stages. As originally enacted in 1972, the Act required existing point sources to comply in the first stage with EPA-established limitations that are achievable by application of the ''best practicable control technology currently available'' or ''BPT.'' These limitations control conventional, toxic, and nonconventional pollutants. EPA has typically based BPT limitations on the average pollutant removal performance of the best facilities examined by EPA. The 1972 Act also required existing point sources to comply in the second stage with EPA-established limitations that are achievable by the application of ''best available technology economically achievable,'' or ''BAT.'' In 1972, these limitations also controlled conventional, toxic and non-conventional pollutants.

The 1977 amendments to the CWA replaced BAT for conventional pollutants with limitations that represent ''best conventional pollutant control technology'' or ''BCT.'' Section 304(a)(4) designates the following as conventional pollutants: Biochemical oxygen demand (BOD), total suspended solids (TSS), fecal coliform (FC), pH, and any additional pollutants defined by the Administrator as conventional. The Administrator designated oil and grease as an additional conventional pollutant, on July 30, 1979 (44 FR 44,501), but has listed no other pollutants for regulation as conventional pollutants.

The decision to amend section 304(a) of the CWA to require achievement of BCT, rather than BAT, for control of conventional pollutants reflected two factors. The first was Congressional desire not to require ''treatment for treatment's sake'' and the second, Congress's view that BAT control of conventional pollutants might not be necessary to achieve the water quality goals of the Act. S.Rep. No. 370 at 43, 1st Sess. 43 (1977), *reprinted in* Comm. on Env. and Public Works, 95th Cong., 2d Sess., *A Legislative History of the Clean Water Act of 1977* at 676–77 (hereinafter *''Legislative History''*).

The CWA Amendments of 1977 that require EPA to determine BCT limitations also specify the factors to be taken into account in this determination of BCT. Section 304(b)(4)(B) provides that the factors to be assessed:

> [S]hall include consideration of the reasonableness of the relationship between costs of obtaining a reduction in effluents and the effluent reductions benefits derived, and a comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources. * * * 33 U.S.C. 1314(b)(4)(B).[8]

In the words of Senator Muskie, the Senate Floor Manager and leading sponsor of the amendments:

> The Administrator must determine whether or not the cost of achieving reductions of conventional effluent bears a reasonable relationship to the amount of effluent reduction achieved. In making this determination, the Administrator is to compare the costs of industrial effluent reduction to the cost of municipal waste treatment. Legislative History at 458.

Accordingly, EPA developed a ''BCT Methodology'' to answer the question of whether it is ''cost-reasonable'' for industry to control two conventional pollutants, BOD (or oil and grease in the case of certain metals industries) and TSS, at a level more stringent than already required by BPT effluent limitations. EPA first explained its BCT methodology when it promulgated BCT effluent guidelines for 41 industry subcategories (44 FR 50,732; August 29, 1979).[9] The crux of the methodology was a comparison of the costs of removing the conventional pollutants BOD (or oil and grease) and TSS for a candidate BCT technology within a particular industry segment, to the costs of removal for an average-sized POTW.

A number of industries and industry associations challenged the regulation, and, in 1981, the U.S. Court of Appeals for the Fourth Circuit remanded it to the Agency, directing EPA to include an assessment of the cost-effectiveness of industry conventional pollutant removal in addition to the POTW test in its evaluation of cost reasonableness. *American Paper Inst.* v. *EPA,* 660 F. 2d 954 (4th Cir. 1981). EPA proposed a revised BCT methodology in 1982 (47 FR 49,176) that addressed the industry cost-effectiveness test (the ''second'' test), again limited to the conventional pollutants BOD and TSS. EPA proposed to base the POTW benchmark on model plant costs in a 1984 notice (49 FR 37,046). The final BCT methodology, promulgated as a rule in 1986 (51 FR 24,974), maintained the basic approach of the 1982 proposed BCT methodology while also updating POTW removal cost with new POTW data. EPA again specifically noted that it had developed

[8] As the Conference Report to the 1977 amendments explained:

> The cost test for conventional pollutants is a new test. It is expected to result in a determination of reasonableness which could be somewhat more than best practicable technology or could be somewhat less than best available technology for other conventional pollutants. The result of the cost test could be a 1984 requirement which is no more than that which would result from best practicable technology but also could result in effluent reductions equal to that required in the application of best available technology. Joint Explanatory Statement of the Committee of Conference, 95th Cong. 1st Sess., H.R. No. 95–830 at 85, *Legislative History* at 269.

[9] As noted above, the 1977 amendments established a second level of technology-based controls for conventional pollutants-BCT limitations. Accordingly, in 1979, pursuant to Congressional direction, EPA completed its review of then-existing BAT limitations for conventional pollutants to determine if they were more stringent than would be required by BCT technology. EPA limited its review to limitations for, and correspondingly developed its BCT methodology to address, only two categories of conventional pollutants: BOD (or oil and grease) and TSS. 44 FR 50,732–33. Noting the industries under consideration do not have fecal coliform discharges, EPA performed no analysis for fecal coliform.

its BCT methodology to evaluate more stringent BOD or TSS limits.

3. EPA's BCT Determination in the 2003 Rule

As previously explained, EPA established BCT requirements equal to BPT in the 2003 CAFO rule (*see* 40 CFR 412.33 and 412.44). For its assessment of BCT limitations, EPA first considered whether there were any technically feasible technologies that would achieve greater conventional pollutants removals than the BPT limitations. Because of the difficulties in quantifying reductions of conventional pollutant discharges,[10] EPA relied primarily on sediment discharges (as a surrogate for TSS) in evaluating potential BCT requirements. EPA identified no BCT technology option that achieves significantly greater TSS removals than the BPT requirements eventually promulgated in 2003 with one exception. This option would have prohibited any discharge from swine and poultry CAFOs. Because this option was not an economically achievable one, EPA therefore concluded that there were no BCT technologies on which to base limits for conventional pollutants that were more stringent than BPT. EPA did note that if it had identified available and economically achievable technology options that achieve greater reductions of conventional pollutants than are achieved by BPT, then EPA would have evaluated these technologies applying EPA's two-part BCT cost test. 68 FR 7224.

EPA also evaluated pathogen reductions associated with the 2003 BPT limitations. The BPT limitations prohibit dry weather discharges from land application areas, and the BPT land application requirements (including technical standards for timing, form, and rate of application, as well as the required vegetated buffer, setback, or equivalent practices) already minimize discharges from land application areas. The BPT production area requirements prohibit discharges, except for overflows from liquid storage structures that meet certain design and operational criteria. EPA used fecal coliform and fecal streptococcus as surrogates to estimate the pathogen reductions achieved by the CAFO rule requirements. EPA concluded that the BPT limitations would reduce these two pathogens by 2.7 x 10^{22} colony forming units (CFU), or a 46 percent reduction over baseline pollutant loadings. See Chapter 12 of ''Development Document for the Final Revisions to the NPDES and the Effluent Guidelines for CAFOs'' EPA–821–R–03–001. Other pathogens would likely be reduced by a similar degree. EPA projected $0.3 to $3.4 million in improved shellfish harvests associated with reduced pathogen discharges from Large CAFOs. 68 FR 7240.

4. This Rule

As noted, EPA has determined that there are no technically feasible and economically achievable candidate technologies for fecal coliform removal that are cost reasonable and would achieve greater removals than the 2003 BPT limitations. The following discussion summarizes the basis for this final determination.

(a) EPA's Approach To Establishing BCT Limitations for Fecal Coliform

As previously explained, the first step to establishing BCT limitations is to identify technology options that provide additional conventional pollutant control beyond the level of control provided by the application of BPT limitations and to evaluate these technologies for ''availability'' (including technical feasibility) and ''economic achievability.'' *See* 33 U.S.C. 1311(b)(2)(E). Out of 41 candidate technologies, EPA has identified no technologies that are both available and achievable for Subpart D facilities, and has identified only two available technologies that might be [11] economically achievable for Subpart C facilities.

The next step in determining BCT is to evaluate any candidate technology that is both technically feasible and economically achievable for cost reasonableness. Traditionally, EPA has evaluated candidate BCT technologies for cost-reasonableness using a two-part BCT cost test it developed for two conventional pollutants, BOD and TSS. The test is intended to assess whether there are cost-reasonable technologies that will achieve greater BOD and TSS removals than required by the BPT technology for an industry category by comparing the incremental cost-effectiveness of candidate BCT technologies with the incremental cost-effectiveness of BOD and TSS removals at POTWs through advanced secondary treatment as compared to secondary treatment. This test makes sense for BOD and TSS because advanced secondary treatment is specifically designed to remove additional BOD and TSS. However, it is not designed for additional fecal coliform removal, so the incremental cost-effectiveness of advanced secondary treatment in removing fecal coliform is not a good benchmark for use in evaluating candidate BCT technologies for fecal coliform removal.

The methodology is appropriate for BOD and TSS because advanced secondary treatment is specific to the removal of BOD and TSS. Costs associated with upgrading a POTW from secondary to advanced secondary treatment were based on polymer addition to the activated sludge basin. The purpose of the polymer addition was to enhance removal of BOD and TSS in the secondary clarifier, and achieve final effluent concentrations of 20 mg/L BOD5 and 20 mg/L TSS. Therefore, the cost increment between secondary and advanced secondary treatment represents the incremental cost of removal of additional BOD and TSS at POTWs. 51 FR 24,981.

Unlike BOD and TSS, advanced secondary treatment is not designed to remove additional increments of fecal coliform beyond secondary treatment. When both secondary and advanced secondary treatment systems include disinfection, the total fecal coliform removal is nearly the same, over 99 percent. Secondary treatment by itself (without disinfection) also removes significant amounts of fecal coliform, although almost all POTWs include disinfection at some point in their treatment train. The polymer addition in advanced secondary treatment is not intended for additional fecal coliform removal since both secondary and advanced secondary POTWs use disinfection treatments to prevent fecal coliform releases to surface water. Therefore, because the object of the BCT cost test is to ensure that the costs of additional removals of conventional pollutants associated with BCT limitations do not exceed POTW conventional removal costs, distinguishing fecal coliform removals between advanced secondary treatment and secondary treatment is not relevant. Because advance secondary treatment is not intended to be more effective than secondary treatment at removing fecal coliform (and is not added for this purpose), it is not appropriate to apply

[10] For example, EPA could not easily assess fecal coliform loadings because they vary greatly depending on site characteristics. Further, quantifying discharges of other conventional pollutants is complicated by the challenge of distinguishing between CAFO and non-CAFO sources. 71 FR 37,763.

[11] For Subpart C (beef cattle, heifer, and dairy) facilities, in the 2003 final CAFO rule, EPA rejected more stringent BAT options on availability, not economic achievability grounds. Thus, for this final rule, EPA had no comparison technology that it had already determined to be not economically achievable. Thus, while the two available technologies have high costs relative to BPT and are likely not economically achievable, EPA was not able to determine this using its traditional methodology or the analysis from the 2003 rule.

the same POTW cost test used for evaluating BOD and TSS BCT limitations to the evaluation of fecal coliform limitations.

Given these circumstances, EPA recognized that if it were to use a similar numeric BCT cost test to evaluate fecal coliform removal for BCT, EPA would have to modify the traditional BCT cost test to address the issue that advanced secondary treatment at POTWs is not designed to remove fecal coliform. When the Agency promulgated the BCT methodology (including descriptions of how to apply the cost test), EPA envisioned the need for adjustments to the BCT cost test methodology in future rulemakings to account for lack of comparable data or other industry-specific factors. 51 FR 24,974, 24,976. Moreover, section 304(b)(4)(B) authorizes EPA to consider other appropriate factors in establishing BCT.

Accordingly, for the proposal, EPA suggested a modified BCT cost test. However, based on comments, EPA has identified a number of problems with the proposed test. These problems are discussed briefly here and described more fully in the Response to Comments Document prepared for this rule. First, although the revised test used a different cost-effectiveness calculation from the traditional test, it still relied indirectly on a comparison of the cost-effectiveness of BCT candidate technologies to the cost-effectiveness of advanced secondary treatment, even though, as just noted, advanced secondary treatment is not designed to remove fecal coliform. Second, the revised test did not compare the incremental cost-effectiveness of the candidate technologies to the incremental cost-effectiveness of fecal coliform removals at POTWs and therefore did not allow a comparison of ''the cost and level of reduction of [fecal coliform] from the discharge from publicly owned treatment works to the cost and level of reduction of [fecal coliform] from * * * industry sources * * *'' as required by the statute. As a result, EPA has now determined that it cannot use the revised test to evaluate cost reasonableness.

For this final rule, EPA also considered other possible approaches for evaluating cost reasonableness. One approach would have been to identify a technology that is used at POTWs specifically for fecal coliform removal and develop a test similar to the traditional cost test but based on this technology. EPA considered disinfection as one possible benchmark technology for fecal coliform removal, but determined that there is significant variability in the manner in which disinfection is used in combination with other technologies at different POTWs and it would thus be extremely difficult, both theoretically and logistically, to develop a revised benchmark based on this technology.

Consequently, for the final rule, EPA has applied a simplified cost reasonableness test designed to specifically address fecal coliform. This approach is consistent with section 304(b)(4) of the CWA and is one EPA has used in the past. While the traditional cost test compares reductions from BCT candidate technologies to those of POTWs, EPA has, on occasion, rejected BCT technologies without comparing them to POTW performance, even for BOD and TSS. Thus, for example, where EPA lacked sufficient data to quantitatively evaluate BOD and TSS reductions under the traditional test, EPA rejected more stringent BCT limitations solely on the basis of an evaluation of the incremental costs of further reductions. *See* 51 FR 24,974, 24,991.

(b) EPA's Evaluation of Candidate Technologies for Technical Feasibility and Economic Achievability

Based on its consideration of information submitted by commenters and its own analysis, EPA has determined that there are only two of 41 candidate technologies that are technically feasible and may be economically achievable that provide greater removals of fecal coliform than the technologies selected as the basis for BPT limitations in the 2003 rule. The discussion below provides the basis for this conclusion.

In its evaluation of candidate BCT technologies, EPA reviewed data on different types of CAFO manure management systems. These systems employed treatment technologies, best management practices (BMPs) for pollution prevention, and management practices for the handling, storage, treatment, and land application of wastes. Sources of information included available technical literature, over 11,000 comments submitted by industry and other public commenters, and insights gained from conducting over 116 site visits to CAFOs.

In its search for candidate technologies, EPA initially reexamined the technology options it had considered for the 2003 rule because the Agency concluded that these might provide more fecal coliform reductions than the option selected for BPT limitations. EPA looked at technology Options 3, 5, 6 and 7 described in the proposal at 71 FR 37,763 and the Technical Development Document. Options 3, 5, 6, and 7 represented additional controls beyond the controls (*e.g.*, nutrient-based land application rates and production area discharges only under specified conditions). Option 3 would have required a reduction of discharges to ground water beneath the production area. Option 5 would require total containment of all manure and process wastewater by swine and poultry operations. Option 6 would require anaerobic digesters at swine and dairy facilities. Option 7 would require a national prohibition of manure application to frozen, snow-covered, or saturated ground.

In addition to the four technologies reviewed for the 2003 final rule, EPA looked at an additional 37 technologies and systems identified either by EPA or commenters as candidate fecal coliform BCT technologies. At the outset of assessment for this rule, EPA rejected all of these technologies as the basis for BCT limitations for fecal coliform for Subpart D CAFOs because they were either not technically feasible for all Subpart D CAFOs, or were not economically achievable. Many of the rejected technologies were costlier than Option 5 which EPA in the 2003 final CAFO rule had earlier determined was not economically achievable for Subpart D (*i.e.*, swine, poultry, and veal calf) facilities. The *Waterkeeper* court sustained the Agency's determination that CAFOs cannot reasonably bear the cost associated with Option 5. 399 F.3d at 516. Option 5 would have cost Subpart D facilities $167 million. *See* 68 FR 7218. Of the 19 technologies and systems approaches identified by commenters, none of the technologies costs less than $167 million. The least costly of these technologies—gasification recycle, digester based systems, super soils composting, aerobic digestion, and ABS—cost 1.3 times the cost of Option 5. Other technologies reviewed cost as much as seven times the total national costs of Option 5. Having determined that the costs of Option 5 were unachievable for Subpart D facilities, EPA did not evaluate further those treatment technologies that had similar or greater total costs. After rejecting the economically unachievable technologies identified by commenters, 22 technologies remained for further assessment with respect to technical feasibility. EPA found that none of these technologies were technically feasible for all CAFOs in Subpart D.

For Subpart C facilities, EPA did not have a previously identified option that it had already determined to be economically unachievable against which to compare the costs of candidate

BCT technologies. To do an economic achievability analysis of candidate technologies for Subpart C, EPA would have had to conduct an analysis of the economic conditions of individual CAFOs in order to estimate potential closures and evaluate appropriate financial ratios, as it traditionally does for economic achievability analysis. EPA determined that conducting such an analysis was not practical, and eventually also determined that it was not necessary to do so to complete its evaluation of candidate BCT technologies for subpart D. Rather, EPA first evaluated the candidate technologies for technical feasibility, and on this basis, rejected 39 of the 41 technologies (the four options considered for the 2003 rule, 16 identified by EPA and 19 suggested by commenters) as the basis for BCT limitation for fecal coliform for Subpart C. The two remaining technologies were then evaluated directly for cost reasonableness, without considering economic achievability, as explained in section III.G.4(c) of this preamble.

EPA explained the basis for its decisions with respect to feasibility of the other candidate technologies (for both Subparts C and D) in the proposed rule, and commenters have not provided any information that would lead the Agency to change its conclusions. 71 FR 37,768–71.

In addition, EPA specifically solicited comment on additional candidate technologies that might prove feasible and less costly than the technologies already evaluated for the proposal. EPA is aware of technologies that may, on a site-specific basis, be used to provide further reductions of conventional pollutants as compared to the technologies on which the 2003 BPT/BCT limitations were based. However, EPA's record shows these other technologies are not available engineering alternatives for most CAFOs, and they are therefore not feasible technology candidates. See Chapter 8 of the ''Development Document for the Final Revisions to the NPDES and the Effluent Guidelines for CAFOs'' and the docket accompanying this action for descriptions of these additional technologies.

In response to its requests for additional information, EPA received no new data that support evaluation of additional candidate technologies or warrant revision to EPA's conclusions about the costs or performance of the candidate technologies EPA identified. Specifically, while some commenters recommended consideration of additional digester systems, the costs of the various digester systems do not vary sufficiently to warrant a detailed analysis of the costs of these technologies at every type of CAFO. To date, EPA has not identified less expensive, and consequently, economically achievable candidate technologies than those it had previously evaluated. Furthermore, EPA did not further evaluate the systems approach (combinations of one or more candidate technologies) recommended by some commenters because it would not reduce fecal coliform more than the 99 percent assumed by EPA [12] in its analysis as the yardstick for performance of the candidate BCT technology. While not obtaining pollutant removals greater than those already considered by EPA, these systems would cost more than the cost of the individual technologies already reviewed. Therefore, EPA did not evaluate the suite of candidate technologies that performed comparably but were more expensive than the suite of technologies evaluated here. For the reasons described in Chapter 8 of the ''Development Document for the Final Revisions to the NPDES and the Effluent Guidelines for CAFOs'' and the proposal at 71 FR 37,765–8, EPA has determined that the candidate technologies it rejected are not technologically feasible and economically achievable for all CAFOs across a subcategory and thus not appropriate technologies for BCT limitations. The CWA does not authorize EPA to establish BCT limitations that are based on technologies that are not technologically feasible and economically achievable. Because only two technologies were both technically feasible and potentially economically achievable for Subpart C facilities (and none were for Subpart D facilities), EPA is only required to evaluate these two technologies further for cost reasonableness.

(c) EPA's Evaluation of the Remaining Candidate Technologies for Cost Reasonableness

The above assessment resulted in only two remaining candidate technologies (composting and constructed wetlands) that are potentially [13] technically feasible and economically achievable for fecal coliform control for one subcategory, the Subpart C (beef and dairy) subcategory. As discussed above, EPA did not conduct a new analysis of economic achievability for these technologies at Subpart C facilities, although EPA notes the costs are high relative to the BPT technology (which EPA also determined to be BAT). Specifically, the cost of the BPT technology for Subpart C was $214 million per year, while the cost of composting was estimated to be $1.4 billion per year, and the cost of constructed wetlands was $2.9 billion. Thus, EPA expects that if it had conducted a formal economic achievability analysis, EPA would have determined that both of these technologies are not economically achievable.

However, instead of evaluating these technologies with respect to economic achievability, EPA evaluated the cost reasonableness of the technologies using the simplified approach described above. In the past, EPA has adopted such an approach when it lacked a full data base to evaluate different BCT technologies. A simplified approach fits the circumstances here for two reasons. First, as noted, EPA has developed no standardized BCT cost test for fecal coliform. Second, EPA lacks the data to provide a comparison of incremental fecal coliform removals that is the basis for the BCT cost test for TSS and BOD.

The annual operating costs for composting would be more than six times as much as the full BPT level of control at Subpart C facilities (see Chapter 4 and Table A–15 of the Final Cost Methodology, EPA–821–R–03–004), while constructed wetlands would cost Subpart C facilities more than an order of magnitude (13) times the cost of the BPT level of control (see chapter 15 in the supplement to the TDD). EPA has determined that these costs are too high relative to the additional removals. EPA thus concludes that the incremental costs of the additional removals alone support a determination that these technologies are not cost reasonable.

To further evaluate this conclusion, EPA conducted a modeling analysis of POTW removal costs for fecal coliform. As discussed above, the available data do not permit an empirical cost comparison between CAFO candidate

[12] In the proposed rule, as a simplifying assumption all technologies were expected to achieve a 99 percent reduction in fecal coliform. 71 FR 37,765 and 37,767.

[13] EPA believes it is likely that some Subpart C facilities will have space constraints under either candidate technology. In this case the technology would not be feasible for all CAFOs in the subcategory. However, EPA lacks data regarding land availability and possible land constraints beyond an aggregate of data showing the average acres of cropland at Subpart C facilities. To the extent CAFOs can take the necessary amount of land out of crop production to provide the space to install construct wetlands or composting windrows, EPA does not have the data to estimate lost revenues associated with such losses of cropland. Therefore, EPA's estimated costs of such candidate technologies are potentially understated. Nonetheless, EPA analyzed cost reasonableness as if the technologies are feasible.

technologies and POTW fecal coliform performance. However, EPA was able to model POTW fecal coliform removal costs using reasonable approximating assumptions. EPA recognizes that the resulting calculation lacks the rigor of the determination of the 1986 POTW benchmark for TSS and BOD removal costs.[14] What this assessment shows is that POTW average costs of removals of fecal coliform are very low (*i.e.*, $0.33 per trillion CFU; *see* 71 FR 37,772). This is not surprising, given that most POTW permits require achievement of fecal coliform reduction near 99 percent.[15] In contrast, the two technologies being evaluated for cost reasonableness (composting and constructed wetlands) have higher costs for fecal coliform removal ($0.51 per trillion CFU for composting, and $1.02 per trillion CFU for constructed wetlands). (See supplement to Chapter 15 of the TDD, showing unit costs of NCSU technologies as provided by commenters, total national costs of employing such technologies at CAFOs, and a comparison of those costs to the BPT/BAT level of control.)

Even recognizing the necessary imprecision associated with EPA's calculations, EPA has determined that this limited POTW cost comparison further supports its determination that the costs of these two BCT candidate technologies are not cost reasonable, given the lack of hard data on which to base the determination. This is fully consistent with EPA's findings in the proposed rule that POTWs are very cost effective at fecal coliform removals. 71 FR 37,772. The assessment confirms what logic suggests: Given a POTW's requirement to virtually eliminate the extremely high fecal coliform discharges in its influent (basically raw sewage), POTWs, on a national basis, achieve fecal coliform removal on a cheaper basis than CAFOs.

Finally, EPA notes that Congress intended the BCT level of control to be somewhere between the BPT and the BAT levels of control, as established in the statute. As noted in the conference report to the 1977 amendments establishing BPT:

> ''The result of the cost test could be a 1984 requirement which is no more than that which would result from best practicable technology but also could result in effluent reductions equal to that required in the application of best available technology.'' Joint Explanatory Statement of the Committee of Conference, 95th Cong. 1st Sess., H.R. No. 95–830 at 85, *Legislative History* at 269.

Thus, candidate technologies with costs between 6 and 13 times the costs of technologies that have already been determined to be BAT would not generally be appropriate as the basis for BCT.

5. Additional Comments on the Proposal

The following discussion summarizes additional significant comments received by EPA on the proposed CAFO BCT determination for pathogens. For a complete response to the issues raised by commenters, see the Response to Comment Document.

In calculating the BPT cost per unit of fecal coliform removal for its cost-reasonableness assessment, one commenter noted the cost was erroneously calculated in units of dollars per billion colony forming units (CFU); the units should have been dollars per trillion CFU in order for the test to be comparable and consistent with the remaining BCT cost calculations. EPA agrees with this comment and has corrected all calculations to dollars per trillion CFU.

Some commenters correctly noted that as part of the BCT cost test for fecal coliform, EPA calculated the POTW and industry cost benchmarks as the difference in average costs of removing fecal coliform between secondary treatment and advanced secondary treatment rather than as the incremental cost for the upgrade. These commenters believed that such an approach was incorrect. As discussed above, EPA agrees and has not used the revised BCT cost test for this final rule. In regards to the BCT options that were selected for further analysis, some commenters believe that numerical limits are feasible for CAFOs and should have been selected for BCT. They would have liked to see EPA take a similar approach to CAFO waste that EPA has taken regarding human sewage sludge (*i.e.*, setting numerical pathogen standards for use). Some commenters pointed to the ''sludge rule'' or ''biosolids'' program under 40 CFR part 503 as a possible basis for pathogen standards in the CAFO rule. EPA notes that the CWA statutory criteria for sewage sludge standards under section 405 of the Act are health and welfare-based. By contrast, CWA effluent limitations require consideration of different factors. However, the technologies used to meet the regulations in part 503 may, in some cases, be used by CAFOs. For these reasons, EPA included sewage sludge pollution reduction technologies such as composting and lime addition in the suite of BCT candidate technologies the Agency considered. In addition, some commenters criticized EPA's cost analysis for not including cost-share from federal sources such as EQIP, and for not including cost offsets from sale of treated manure. EPA considered both of these aspects in the cost analysis to the 2003 final CAFO rule, and was upheld on its economic analysis. 399 F.3d 486. In addition, EPA considered such cost offsets in a sensitivity analysis, and concluded that the cost offsets did not change EPA's fundamental conclusions regarding economic achievability and feasibility. See Chapter 14 of the TDD for more information.

By contrast, other commenters found no fault or shortcomings in the EPA analysis of the technical feasibility of conventional technologies in determining BCT for pathogen removal. They agree that the candidate technologies examined by EPA present insurmountable challenges to many CAFOs that make them inappropriate as a basis for BCT. They found no fault with the cost data or analytical techniques used by EPA in the BCT cost test. These commenters also presented additional economic analysis of the candidate technologies that has been published in the ''Phase 3'' report on the ''Development of Environmentally Superior Technologies'' per agreements between the North Carolina Attorney General and major pork producers in the State. These commenters note that the ''Phase 3'' economic analysis found that none of the 16 technologies studied were economically feasible for existing swine operations in North Carolina, which is consistent with EPA's findings as discussed in detail above. These commenters also provided State records of CAFO violations and discharge data for the past three years to support their position that EPA has overstated the frequency of production area overflows. These additional data may be found in the record for this final action.

IV. Impact Analysis

A. Environmental Impacts

When EPA issued the revised CAFO regulations on February 12, 2003, it estimated annual pollutant reductions

[14] EPA made a number of assumptions for its calculations because it did not have the data to establish on a national basis the costs to POTWs of fecal coliform control. Thus, EPA's assessment used the cost of advanced secondary treatment as a proxy for the cost of additional technologies (*e.g.*, filtration) that POTWs may employ to achieve high fecal coliform removals (98 percent) required by water quality standards of 200 colony forming units (CFU) per ml. This assumption may overstate the costs of such technologies, in which case the cost per trillion CFU removed would be lower.

[15] As described in the proposal, POTW influents are approximately 5 million CFU per 100 ml, and PCS data shows effluent concentrations of ~ 20 CFU per ml.

for the rule at 56 million pounds of phosphorus, 110 million pounds of nitrogen, and two billion pounds of sediment. This final, revised rule will not change these environmental benefits since the technical requirements for CAFOs that discharge are not affected and all CAFOs, whether covered by NPDES permits or not, still need to control nutrient releases from the production and land application areas in order to comply with the Clean Water Act. Under this rule, all CAFOs that do not apply for permits must be designed, constructed, operated, and maintained such that the CAFO does not discharge or propose to discharge. Therefore, as was true under the 2003 rule, all discharges from CAFOs (except precipitation-related discharges from land application areas under a CAFO's control that qualify as agricultural stormwater discharges) are required to be covered by NPDES permits. The overall magnitude of the benefits will increase compared to 2003 due to growth in the industry, but the analysis for this rule does not recalculate these effects since the increase is not due to changes in the CAFO regulations. EPA is assuming full compliance with the rule, which is standard Agency procedure when modeling impacts of a final rule.

B. Administrative Burden Impacts

Since there is no change in technical requirements, changes in impacts on respondents are due exclusively to changes in the information collection burden. To determine the administrative burden for the Paperwork Reduction Act (PRA) analysis, the Agency first examined the two key permitting changes resulting from the *Waterkeeper* decision and how they would be implemented under the final regulations. These are the change in the duty to apply for CAFOs and the change to the nutrient management plan (NMP) related provisions for CAFO permits.

The 2003 CAFO rule had a universal duty to apply requirement which required virtually all CAFOs to obtain NPDES permit coverage. The supporting analysis for the 2003 rule estimated that as a result of this requirement, approximately 15,500 CAFOs would ultimately receive NPDES permits. See the Technical Development Document for the 2003 rule, Chapter 9.

This final rule changes the duty to apply requirement so that only CAFOs that discharge or propose to discharge are required to seek NPDES coverage. To derive the number of CAFOs that could ultimately fall into this category, EPA first projected total industry size for 2008 based on both U.S. Department of Agriculture (USDA) Census of Agriculture statistics as well as Agency-based sector expertise. This exercise yielded an estimate of approximately 20,700 total CAFOs for 2008. EPA then combined the 2008 projections for each animal sector with information on standardized operational profiles to anticipate the number of facilities as of 2008 that might discharge. For example, when inclement weather precludes land application or dewatering activities, open lot type facilities such as beef lots and dairy operations are more likely to experience conditions that could result in a discharge due to the use of open on-site lagoons. Additionally, EPA assumed that all dairies generate wastewater from the production area and generally have uncovered on-site lagoons. Thus, for purposes of burden estimates, EPA assumed that all dairies and most beef feedlots would apply for permits.

Even though the industry grew to roughly 20,700 CAFOs from 2002 to 2008, the change in the duty to apply requirement is anticipated to reduce the number of facilities needing permit coverage to approximately 15,300 discharging CAFOs. Based on these updated figures, EPA estimates that approximately 25 percent of the total universe of CAFOs would not discharge and thus would not need NPDES coverage under this final rule. Although these facilities may not need to apply for permits, the administrative burden analysis performed by EPA under the PRA nonetheless accounts for the costs that unpermitted facilities will incur for the nutrient management planning that are necessary for demonstrating that the facility is land applying manure in such a way as to qualify for the agricultural stormwater exemption.

These figures may overstate the numbers of CAFOs needing NPDES permits in that the estimates of the number of discharging facilities in each sector make conservative categorical assumptions about the likelihood of a discharge based on broad operational profiles and do not account for more subtle stratifications within specific operational categories. For instance, although most dairies generate wastewater from the production area and have on-site lagoons, there do, in fact, exist dairies designed to be no discharge operations.

Based on the updated estimates of the CAFO universe, EPA's PRA analysis projects, as shown in Table 4.1, that CAFO operators and permitting authorities will collectively experience an increase in total annual administrative burden of approximately $0.5 million as a result of the EPA regulations to address the court decision. Although the PRA burden to CAFOs and permitting authorities declines as a result of the Waterkeeper court decision to limit permits only to discharging CAFOs, this burden reduction is offset by the new NMP-related requirements for permits and by the assumption, for purposes of this PRA analysis, that all unpermitted CAFOs will certify under the voluntary no discharge certification option. More specifically, CAFO operators will experience a $0.2 million reduction in net annual administrative burden. This net result is based on several offsetting changes. CAFOs that do not seek permit coverage under this final rule because they do not discharge or propose to discharge will save approximately $14 million annually in reduced permitting costs. However, even though fewer CAFOs will need to be covered by NPDES permits, permitted facilities as a group face an increase in annual administrative burden of $1.2 million per year due to the new NMP requirements.

EPA's analysis of burden impacts to CAFOs also accounts for the burden that unpermitted facilities will incur in order to be able to qualify for the agricultural stormwater exemption—a cost category that EPA estimates will result in a burden on unpermitted facilities of $12.2 million annually. In addition, EPA estimates that the voluntary certification option for unpermitted CAFOs could add $0.4 million annually to the PRA burden for CAFOs. Although certification is voluntary, EPA elected to cost the PRA burden associated with this option so as to provide a complete accounting of all rule-related impacts. As noted above, the net result of these impacts is an administrative burden savings across all CAFO operators, permitted and unpermitted, of $0.2 million annually.

Permitting authorities, on the other hand, are projected to experience a $0.7 million increase in annual administrative burden. Although the burden to issue permits declines by $4.2 million annually due to fewer facilities needing permits, this decline is more than offset by the added workload arising from the new NMP-related requirements. EPA estimates that States would face an additional PRA burden of $4.9 million annually specifically as a result of the new NMP-related requirements. In addition, States are projected to face a burden increment of up to $0.04 million annually to process the new certifications.

EPA's estimate of PRA burden impacts changed from a reduction of $14.9 million annually for the 2006 proposed rule to an increase of $0.5

million annually in the final rule. This change is due principally to the Agency's decision, as discussed earlier in this section, to amend the PRA analysis to account for the burden incurred by unpermitted CAFOs for nutrient management planning, which is necessary for any unpermitted CAFO that land applies irrespective of whether the CAFO is certified under the voluntary no discharge certification option.

The PRA burden analysis presented in this rule accounts both for growth in the industry and changes in labor rates since the 2003 rule was issued. In addition, the changes are based on annualized impacts and assume a permit term of five years as stipulated in the CWA. EPA submitted draft ICRs with the 2006 proposed rule and 2008 supplemental proposal, and did not receive any comments from the Office of Management and Budget (OMB). The documentation in the public record on the PRA analysis for this rulemaking discusses more fully the assumptions used to estimate the numbers of CAFOs needing permits and to project the associated administrative burden.

TABLE 4.1—PRA BURDEN IMPACT CHANGES

[Note: Numbers may not add due to rounding.]

			Total baseline PRA burden: based on 2003 CAFO rule requirements [1]	Total amended PRA burden: based on final rule requirements	Net change in paperwork burden (2003 rule compared to final rule)
CAFOs needing permits (2008) [2].			20,685	15,281	
CAFOs seeking agricultural stormwater exemption only (2008).			n/a	5,404	
Total CAFOs (2008)			20,685	20,685	
Annualized Costs [3] (in $ millions).	CAFOs	Base NPDES Permit	$54.0	$40.0	($14.0)
		New NMP Provisions	n/a	$1.2	$1.2
		Agricultural Stormwater Exemption	n/a	$12.2	$12.2
		Certification	n/a	$0.4	$0.4
		Total CAFO Burden	$54.0	$53.8	($0.2)
	Permitting Authorities	Base NPDES Permit	$16.5	$12.2	($4.2)
		New NMP Provisions	n/a	$4.9	$4.9
		Certification	n/a	$0.04	$0.04
		Total Permit Authority Burden	$16.5	$17.1	$0.7
	All Respondents		$70.5	$71.0	$0.5

[1] 2003 baseline impacts adjusted to reflect current labor rates and growth in facilities.
[2] Facility totals are annualized over 5 years in burden calcultions presented below to reflect CWA requirement for NPDES permit renewal every 5 years.
[3] Annualized costs represent labor, capital and O&M costs.

C. Response to Public Comment on the Proposal

The Agency received a variety of comments on the impacts analysis presented for the 2006 proposed rule and the 2008 supplemental proposal. Several commenters indicated that the Agency erred in assuming that the environmental benefits from the 2003 rule would be retained under the approach adopted in this final rule. The Agency stands by its position presented in the 2006 proposed rule, but has revised the burden analysis to reflect more fully that all unpermitted CAFOs do not discharge or propose to discharge and, therefore, must implement nutrient management practices to ensure that any discharge from the CAFO's land application area qualifies for the agricultural stormwater exemption. As a consequence, as indicated above, the annual burden reduction realized by CAFOs under the final revised rule is shown as approximately $0.2 million as opposed to the $15.4 million reduction projected for CAFOs in the 2006 proposed rule. This revised analysis also addresses specific comments suggesting that the Agency should recognize that operators without permits will continue to incur costs under the regulation in order to meet the burden of proof required to qualify for the agricultural stormwater exemption.

Other commenters indicated that the impacts analysis underestimated the costs to CAFO operators of complying with the EPA regulations. Careful review of these statements makes clear that commenters with this viewpoint either did not account for the fact that the impacts analysis presented for this rulemaking is exclusively an assessment of the paperwork burden—not the overall compliance burden—faced by CAFOs, or did not fully consider that the costs shown represent average yearly (annualized) burden rather than total paperwork-related costs for a five-year CAFO NPDES permit.

Other commenters provided specific information on nutrient management plan (NMP) development costs, which the Agency determined corroborated the original NMP cost estimates.

One State commenter claimed that the Agency had underestimated costs to permitting authorities for managing the potential public hearings precipitated by the new requirements for public notice. This commenter projected that every public notice regarding NMPs would result in a public hearing. The Agency re-examined its assumptions regarding the incidence of public hearings, but did not find information to corroborate the commenter's projection either based on past NPDES public hearing patterns or based on expectations from other States regarding the number of hearings likely to be triggered by NMP-related public notices. This assumption that public hearings would not be requested for every NMP is further confirmed by the experiences of States that currently require NMPs to be submitted as part of their permitting process.

Several commenters indicated that they believed that the Agency had also

underestimated the cost to States of processing voluntary no discharge certifications. This final rule does not require permitting authority review of no discharge certifications. See discussion of certification submission in section III.A.3(c) of this preamble. The Agency notes that the cost analysis it performed to assess the paperwork burden associated with the final rule shows a net paperwork burden reduction to States on this aspect of the rule, since the 2003 rule required permits-which are more burdensome for permitting authorities to process-from all CAFOs.

V. Cross-Media Considerations and Pathogens

A. Cross-Media Approaches

Since 2003, EPA and CAFO stakeholders have been interested in developing a framework to enable CAFOs to pursue superior environmental performance across all media. Today, some CAFOs voluntarily conduct whole-farm audits to evaluate releases of pollutants to all media through Environmental Management Systems (*e.g.*, ISO 14001 certification), self-assessment tools, EPA's performance track, and State-approved trade-offs in reducing discharges to water and emissions to air that accomplish the best overall level of protection given State and local conditions. The development of new and emerging technologies offers the potential to achieve equivalent or greater pollutant reductions relative to those achieved by the effluent guidelines and standards. Many of these are superior from a cross-media perspective, and EPA encourages superior cross-media solutions. These regulations regarding nutrient management plans may provide an opportunity for EPA to encourage cross-media approaches at CAFOs. For example, the nutrient value in the animal byproducts provides a valuable source of fertilizer for crops. However, inappropriate application can lead to preventable discharges to water and emissions to air. Optimal application technologies and rates reduce potential water quality and air quality standards violations.

The fact that EPA has multiple efforts underway relating to livestock operations under several environmental statutes underscores the need to explore how to leverage existing regulatory authorities most effectively. For example, in addition to the regulations being finalized in this rulemaking, the Agency has recently undertaken a National Air Emissions Monitoring Study. EPA also proposed a rule that would exempt animal feeding operations from certain requirements relating to reporting of air releases under hazardous waste laws.

EPA solicited comment in the 2006 proposed rule on the feasibility (including consideration of legal, technical, and implementation issues) of allowing flexibility in how facilities meet various programmatic requirements, for instance those of the Clean Air Act and the Clean Water Act (CWA), in order to achieve greater cross-media pollutant reductions. EPA received generalized support for this type of approach in the comments submitted in response. EPA will continue to explore cross-media considerations as it works together with CAFOs and stakeholders to build further experience on this issue.

As an example of the Agency's work in this area, in October 2007, EPA awarded $8 million in federal grants for providing technical assistance to livestock operators, including animal feeding operations, for the prevention of water discharges and reduction of air emissions. More recently, EPA's Agricultural Advisor announced the establishment of the Farm, Ranch, and Rural Communities Federal Advisory Committee. One of the issues the committee will focus on will be identification and development of a comprehensive environmental strategy for livestock operations. EPA anticipates that the committee will offer timely observations on the opportunities and challenges of cross-media approaches to programs for addressing environmental concerns at livestock operations as its work progresses.

B. Pathogens and Animal Feeding Operations

Although this final rule does not require any new best conventional pollutant control technology (BCT) effluent limitations specifically to control fecal coliform, EPA is continuing to assess environmental and human health concerns associated with the management of manure and wastewater at CAFOs. Pollutants most commonly associated with animal waste include nutrients (including ammonia), organic matter, solids, odorous compounds, and various pathogens. These pollutants, and others, can be released into the environment through discharge or runoff if manure and wastewater are not properly handled and managed. EPA is interested in recently initiated studies to assess potential impacts from pathogens in livestock manure, especially those which may pose unique risks such as Cryptosporidium and Giardia. These pathogens may be of concern if they make their way into drinking water sources (*e.g.*, lakes, rivers, and streams) because of their stability in the natural environment and their resistance to the most commonly used drinking water disinfection procedure (*i.e.*, chlorination). If proper treatment is not provided for these pathogens, they have the potential to cause adverse health impacts in exposed populations. While the Agency has a number of on-going efforts in these areas, research is still in its early stages. The absence of available information necessarily limits EPA's ability to act with respect to these potential concerns.

EPA's Office of Research and Development (ORD) is actively working to identify sources of Cryptosporidium. In collaboration with the Centers for Disease Control (CDC), EPA Region 3, and the Potomac River Drinking Water Source Protection Partnership (DWSPP), ORD has initiated Cryptosporidium source tracking studies of the Potomac River Watershed. The primary objective of this project is to develop and implement a monitoring program for Cryptosporidium source tracking in order to identify the most significant sources of this parasite within the watershed. Once identified, appropriate source protection efforts, where available, may be mobilized and directed to the reduction of these sources' contributions. In addition, in 2005 EPA's Science to Achieve Results (STAR) program held a solicitation for proposals entitled, ''Development and Evaluation of Innovative Approaches for the Quantitative Assessment of Pathogens in Drinking Water,'' and has funded eleven research grants from this proposal involving the development and evaluation of innovative approaches to quantitatively detect microbial pathogens in drinking water, including Cryptosporidium and Giardia. The goal of the STAR research is to improve the suite of available detection methods for known and emerging microbial drinking water contaminants. EPA expects that this research will result in methods that will, among other things, allow determination of the presence and quantities of waterborne pathogens; present a protocol for preparing and processing water samples for application of the proposed approach; and where possible, allow comparison of the performance of the new detection methods with existing approved EPA methods for specific pathogens.

ORD is also collaborating with the U.S. Department of Agriculture (USDA) in their research programs associated with Cryptosporidium. ORD scientists

participated in the USDA selection process for the National Research Initiative on Watershed Processes and Water Resources. Grants awarded under this program will explore the effects of a number of factors on Cryptosporidium mobility and contamination of waterways. These include the use of buffers and other best management practices for decreasing loadings of Cryptosporidium from land application of wastes and other soluble organic matter. EPA scientists have begun to review recently published research on Cryptosporidium and Giardia oocyst shedding. The research suggests that shedding is highest during early life stages of cattle and zoonotic forms and may greatly diminish as calves age. These factors have already led some veterinarians to recommend that farmers separate these high shedding young animals from older animals to decrease disease spread and economic losses among herds of cattle and dairy cows. The research also suggests that the separation may provide secondary environmental benefits by helping to prevent the release of Cryptosporidium into waterways. As part of their efforts to protect the New York City water supply, the New York State Department of Agriculture has recommended separation controls in their best management practice (BMP) guidance to dairy farmers. Other States, including California, are considering similar separation BMPs.

EPA's ORD will continue to collaborate and assess the impacts that these and other research efforts may have on any future CAFO management recommendations.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51,735; October 4, 1993), this action is a ''significant regulatory action.'' Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in section IV of this preamble above, entitled *Impact Analysis.* A copy of the supporting analysis is available in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations and has assigned OMB control number 2040–0250. The Information Collection Request (ICR) document prepared by EPA was assigned EPA ICR No. 1989.06.

The 2003 CAFO rule had a universal duty to apply requirement which required virtually all CAFOs to obtain NPDES permit coverage. This final revised rule changes the duty to apply requirement so that only CAFOs that discharge or propose to discharge must to seek NPDES coverage. EPA projects that CAFO operators and permitting authorities will collectively experience a reduction in total annual administrative burden of 25,500 hours as a result of the regulatory revisions to address the court decision. Labor burden is projected to undergo a net decrease compared to a net increase in administrative costs of $0.5 million annually as discussed in Chapter IV. This difference arises from the fact that the PRA analysis performed for the final rule converts labor hour burden to labor costs using a higher wage rate for State permitting authorities than for CAFO operators.[16] The higher wage rate for State permitting authorities causes the State labor cost increase to be large enough to offset the labor cost reduction experienced by CAFO operators once labor hours are converted to dollars in the PRA analysis of annual administrative impacts.

More specifically, the estimated reduction in total annual administrative burden of 25,500 hours is based on a projected decrease in labor burden to CAFO operators of approximately 54,100 hours annually and a projected increase in labor burden to State permitting authorities of approximately 28,600 hours annually. For CAFOs, much of the labor burden decrease derives from the smaller number of facilities that will need permits, which results in an annual burden decrease of more than 703,000 labor hours. This burden reduction for CAFOs is offset by a concomitant increase of 603,200 labor hours annually at unpermitted facilities for activities necessary to meet the agricultural stormwater exemption, along with an increment of 33,100 hours annually for permitted facilities to undertake the NMP-related activities and 12,600 hours annually for those CAFOs who elect to pursue the voluntary certification option.

The annual labor burden increase for State permitting authorities of 28,600 hours includes an estimated annual reduction in labor burden of 93,000 hours due to the need to process fewer permits. However, for State permitting authorities this burden reduction is more than offset by an increment in annual labor burden of 120,700 hours to address the new NMP-related requirements combined with a relatively minor annual burden increase of 900 hours to handle the voluntary certifications.

Additional details on the assumptions and parameters of the PRA analysis are available in the ICR document referenced above, which is available in the docket supporting this final rulemaking. Burden is defined at 5 CFR 1320.3(b).

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 40 CFR are listed in 40 CFR part 9.

This final rule responds to OMB or public comments on the information collection requirements as discussed in the *Impact Analysis* (section IV) in this preamble.

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 this rule on small entities, small entity is defined as: (1) A small business based on Small Business Administration (SBA) size standards 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

[16] Wage rates for the PRA analysis supporting this rulemaking were drawn from recent reports filed by the U.S. Department of Labor, Bureau of Labor Statistics. For further information please refer to the ICR prepared by EPA for the rulemaking, available in the record as EPA ICR No. 1989.06.

not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant adverse economic impact on a substantial number of small entities. This final rule does not change the substantive requirements for CAFO operators or increase the net paperwork burden faced by facilities compared to the burden imposed under the 2003 CAFO rule. Some CAFOs will face increased permitting costs due to the new NMP provisions, while others will face reduced costs due to the changes in the duty to apply. However, these paperwork cost changes are generally small and do not rise to the level of a significant adverse economic impact on a substantial number of operators. Additionally, this rule would not affect small governments as the permitting authorities are State or federal agencies.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. The revised administrative burden EPA calculated for the final rule constitutes a reduction of roughly 25,500 labor hours annually compared to the administrative burden estimated for the 2003 CAFO rule. This burden reduction reflects a decrease in annual labor burden of 54,100 hours for CAFO operators and an annual labor burden increase to State permitting authorities of 28,600 hours. In addition, this rulemaking is in response to a federal court decision and is necessary to assure compliance with applicable law. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. There are no local or Tribal governments authorized to implement the NPDES permit program and the Agency is unaware of any local or Tribal governments who are owners or operators of CAFOs. Thus this rule is not subject to the requirements of section 203 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43,255; August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. EPA estimates that the average annual impact on all authorized States together is a cost increase of $0.7 million. EPA does not consider an annual impact of this magnitude on States to be a substantial effect. In addition, EPA does not expect this rule to have any impact on local governments. EPA also considered flexibility as an important factor when developing this regulation.

Further, the revised regulations will not alter the basic State-federal scheme established in the CWA under which EPA authorizes States to carry out the NPDES permitting program. EPA expects the revised regulations to have little effect on the relationship between, or the distribution of power and responsibilities among, the federal and State governments. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicited comment on the proposed rule from State and local officials. In addition, through a variety of meetings with State associations during the rulemaking process, States have been informed about the issues related to addressing the court's decisions. States provided input during these meetings. State concerns generally focused on the process for incorporating NMPs into permits and the related public review process, and also on guidance related to what constitutes a discharge from a CAFO given that the proposed rule would have required only those operations that discharge or propose to discharge to apply for a permit. These concerns have been addressed in such a way as to provide flexibility and accountability in the new permit application requirements and review processes promulgated in this rule.

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

Executive Order 13175, entitled, ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67,249; November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.''

This rule does not have tribal implications. There are currently no tribal governments authorized for the NPDES program. This rulemaking provides increased opportunity for the public and tribal governments to comment on specific CAFOs' applications for permit coverage. It will not have substantial direct effects on

tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicited comment on the proposed rule from tribal officials.

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

Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19,885; April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The benefits analysis performed for the 2003 CAFO rule determined that the rule would result in certain significant benefits to children's health. (Please refer to the *Benefits Analysis* in the record for the 2003 CAFO final rule.) This action does not affect the environmental benefits of the 2003 CAFO rule.

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, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28,355; May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. EPA has concluded that this rule is not likely to have any adverse energy effects since CAFOs in general do not figure significantly in the energy market, and the regulatory revisions finalized in this rule are not likely to change existing energy generation or consumption profiles for CAFOs.

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. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This final rule does not change the technical requirements for land application from those of the 2003 rule. Production area requirements are the same for existing sources and for new sources as in the 2003 rule. The no discharge production area requirements for new sources in this rulemaking, however, now include an option for complying with the requirement through the development of site-specific design, operation and maintenance permit conditions that will ensure no discharge from the site. However, the specific no discharge conditions applicable to a specific operator choosing this option for compliance will be determined by the permitting authority on a site-specific BPJ basis. EPA encourages the use by permitting authorities of voluntary consensus standards, such as those that may be developed by USDA, in establishing the site-specific technical requirements in CAFO permits when the permittee demonstrates that these standards are consistent with the achievement of no discharge from a specific CAFO.

This rule for new source requires that CAFOs complying with the no discharge requirement through the development of site-specific design, maintenance and operation standards must use prescribed technical standards in demonstrating that a specific CAFO's design, operation and maintenance will be consistent with no discharge from its production area. (In certain circumstances, a CAFO may use either equivalent evaluation and simulation procedures or technical standards developed for a class of specific facilities within a specified geographical area if approved by its permitting authority), EPA has not required the use of any particular voluntary consensus standards in this rule. The use, however, of voluntary consensus standards such as those that may be developed by USDA for the required demonstration that site-specific design, maintenance and operational requirements for CAFOs to comply with the no discharge standard is encouraged. The decisions as to what specific best management practices and technologies must be applied at individual animal feeding operations are left to the State or EPA in the exercise of their NPDES authority.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will become effective December 22, 2008.

BILLING CODE 6560–50–P

APPENDIX TO PREAMBLE – FORM 2B
NPDES Application Form for Concentrated Animal Feeding Operations (and Concentrated Aquatic Animal Production Facilities)

EPA I.D. NUMBER (*copy from Item 1 of Form 1*)

OMB Control No. 2040-0250
Approval expires *xx/xx/xx*

FORM 2B NPDES

EPA U.S. ENVIRONMENTAL PROTECTION AGENCY
APPLICATIONS FOR PERMIT TO DISCHARGE WASTEWATER
CONCENTRATED ANIMAL FEEDING OPERATIONS AND AQUATIC ANIMAL PRODUCTION FACILITIES

I. GENERAL INFORMATION Applying for: Individual Permit ☐ Coverage Under General Permit ☐

A. TYPE OF BUSINESS	B. CONTACT INFORMATION	C. FACILITY OPERATION STATUS
❑ 1. Concentrated Animal Feeding Operation (complete items B, C, D, and section II) ❑ 2. Concentrated Aquatic Animal Production Facility (complete items B, C, and section III)	Owner/or Operator Name: ..... Telephone: (.....) ..... Address: ..... Facsimile: (.....) ..... City: ..... State: ..... Zip Code:	❑ 1. Existing Facility ❑ 2. Proposed Facility

D. FACILITY INFORMATION

Name: ..... Telephone: (.....) .....
Address: ..... Facsimile: (.....) .....
City: ..... State: ..... Zip Code: .....
County: ..... Latitude: ..... Longitude: .....

If contract operation: Name of Integrator: .....
Address of Integrator: .....

II. CONCENTRATED ANIMAL FEEDING OPERATION CHARACTERISTICS

A. TYPE AND NUMBER OF ANIMALS

1. TYPE	2. ANIMALS	
	NO. IN OPEN CONFINEMENT	NO. HOUSED UNDER ROOF
❑ Mature Dairy Cows		
❑ Dairy Heifers		
❑ Veal Calves		
❑ Cattle (not dairy or veal calves)		
❑ Swine (55 lbs. or over)		

B. Manure, Litter, and/or Wastewater Production and Use

1. How much manure, litter, and wastewater is generated annually by the facility? .....tons ..... gallons

2. If land applied how many acres of land under the control of the applicant are available for applying the CAFOs manure/litter/wastewater? .....acres

3. How many tons of manure or litter, or gallons of wastewater produced by the CAFO will be transferred annually to other persons? ..... tons/gallons (*circle one*)

❑ Swine (under 55 lbs.)			
❑ Horses			
❑ Sheep or Lambs			
❑ Turkeys			
❑ Chickens (Broilers)			
❑ Chickens (Layers)			
❑ Ducks			
❑ Other Specify.....			
3. TOTAL ANIMALS			

C. ❑ TOPOGRAPHIC MAP

D. TYPE OF CONTAINMENT, STORAGE AND CAPACITY

1. Type of Containment	Total Capacity (in gallons)	
❑ Lagoon		
❑ Holding Pond		
❑ Evaporation Pond		
❑ Other: Specify		

2. Report the total number of acres contributing drainage: ..... acres

3. Type of Storage	Total Number of Days	Total Capacity (gallons/tons)	
❑ Anaerobic Lagoon			
❑ Storage Lagoon			
❑ Evaporation Pond			
❑ Aboveground Storage Tanks			
❑ Belowground Storage Tanks			
❑ Roofed Storage Shed			
❑ Concrete Pad			
❑ Impervious Soil Pad			
❑ Other: Specify			

E. NUTRIENT MANAGEMENT PLAN

Note: Effective February 27, 2009, a permit application is not complete until a nutrient management plan is submitted to the Permitting Authority.

1. Please indicate whether a nutrient management plan has been included with this permit application. ☐ Yes ☐ No

2. If no, please explain:

_____

_____

3. Is a nutrient management plan being implemented for the facility? ☐ Yes ☐ No

4. The date of the last review or revision of the nutrient management plan. Date: .....

5. If not land applying, describe alternative use(s) of manure, litter, and or wastewater:

_____

_____

F. LAND APPLICATION BEST MANAGEMENT PRACTICES

Please check any of the following best management practices that are being implemented at the facility to control runoff and protect water quality:

❑ Buffers ❑ Setbacks ❑ Conservation tillage ❑ Constructed wetlands ❑ Infiltration field ❑ Grass filter ❑ Terrace

III. CONCENTRATED AQUATIC ANIMAL PRODUCTION FACILITY CHARACTERISTICS

A. For each outfall give the maximum daily flow, maximum 30-day flow, and the long-term average flow.

B. Indicate the total number of ponds, raceways, and similar structures in your facility.

1. Outfall No.	2. Flow (*gallons per day*)			1. Ponds	2. Raceways	3. Other
	a. Maximum. Daily	b. Maximum 30 Day	c. Long Term Average	C. Provide the name of the receiving water and the source of water		
				1. Receiving Water	2. Water Source	

D. List the species of fish or aquatic animals held and fed at your facility. For each species, give the total weight produced by your facility per year in pounds of harvestable weight, and also give the maximum weight present at any one time.

1. Cold Water Species			2. Warm Water Species		
a. Species	b. Harvestable Weight (*pounds*)		a. Species	b. Harvestable Weight (*pounds*)	
	(1) Total Yearly	(2) Maximum		(1) Total Yearly	(2) Maximum

E. Report the total pounds of food during the calendar month of maximum feeding.	1. Month	2. Pounds of Food

IV. CERTIFICATION .....

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this application and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

A. Name and Official Title (*print or type*)	B. Phone No. ( )
C. Signature	D. Date Signed

EPA Form 3510-2B (08-08)

INSTRUCTIONS

GENERAL

This form must be completed by all applicants who check "yes" to Item II-B in Form 1. Not all animal feeding operations or fish farms are required to obtain NPDES permits. Exclusions are based on size and whether or not the facility discharges proposed to discharge. *See* the description of these exclusions in the CAFO regulations at 40 CFR 122.23.

For aquatic animal production facilities, the size cutoffs are based on whether the species are warm water or cold water, on the production weight per year in harvestable pounds, and on the amount of feeding in pounds of food (*for cold water species*). Also, facilities which discharge less than 30 days per year, or only during periods of excess runoff (*for warm water fish*) are not required to have a permit.

Refer to the Form 1 instructions to determine where to file this form.

Item I-A

See the note above to be sure that your facility is a "concentrated animal feeding operation" (CAFO).

Item I-B

Use this space to give owner/operator contact information.

Item I-C

Check "proposed" if your facility is not now in operation or is expanding to meet the definition of a CAFO in accordance with the CAFO regulations at 40 CFR 122.23.

Item I-D

Use this space to give a complete legal description of your facility's location including name, address, and latitude/longitude. Also, if a contract grower, the name and address of the integrator.

Item II

Supply all information in item II if you checked (1) in item I-A.

Item II-A

Give the maximum number of each type of animal in open confinement or housed under roof (either partially or totally) which are held at your facility for a total of 45 days or more in any 12 month period. Provide the total number of animals confined at the facility.

Item II-B

Provide the total amount of manure, litter, and wastewater generated annually by the facility. Identify if manure, litter, and wastewater generated by the facility is to be land applied and the number of acres, under the control of the CAFO operator, suitable for land application. If the answer to question 3 is yes, provide the estimated annual quantity of manure, litter, and wastewater that the applicant plans to transfer off-site.

Item II-C

Check this box if you have submitted a topographic map of the entire operation, including the production area and land under the operational control of the CAFO operator where manure, litter, and/or wastewater are applied with Form 1.

Item II-D

1. Provide information on the type of containment and the capacity of the containment structure (s).
2. The number of acres that are drained and collected in the containment structure (s).
3. Identify the type of storage for the manure, litter, and/or wastewater. Give the capacity of this storage in days.

Item II-E

Provide information concerning the status of submitting a nutrient management plan for the facility to complete the application. In those cases where the nutrient management plan has not been submitted, provide an explanation. If not land applying, describe the alternative uses of the manure, litter, and wastewater (*e.g.*, composting, pelletizing, energy generation, etc.).

Item II-F

Check any of the identified conservation practices that are being implemented at the facility to control runoff and protect water quality.

Item III

Supply all information in Item III if you checked (2) in Item I-A.

Item III-A

Outfalls should be numbered to correspond with the map submitted in Item XI of Form 1. Values given for flow should be representative of your normal operation. The maximum daily flow is the maximum measured flow occurring over a calendar day. The maximum 30-day flow is the average of measured daily flow over the calendar month of highest flow. The long-term average flow is the average of measure daily flows over a calendar year.

Item III-B

Give the total number of discrete ponds or raceways in your facility. Under "other," give a descriptive name of any structure which is not a pond or a raceway but which results in discharge to waters of the United States.

Item III-C

Use names for receiving water and source of water which correspond to the map submitted in Item XI of Form 1.

Item III-D

The names of fish species should be proper, common, or scientific names as given in special Publication No. 6 of the American Fisheries Society. "A List of Common and Scientific Names of Fishes from the United States and Canada." The values given for total weight produced by your facility per year and the maximum weight present at any one time should be representative of your normal operation.

Item III-E

The value given for maximum monthly pounds of food should be representative of your normal operation.

Item IV

The Clean Water Act provides for severe penalties for submitting false information on this application form.

Section 309(C)(2) of the Clean Water Act provides that "Any person who knowingly makes any false statement, representation, or certification in any application..shall upon conviction, be punished by a fine of no more than $10,000 or by imprisonment for not more than six months, or both."

	Federal regulations require the certification to be signed as follows: A. For corporation, by a principal executive officer of at least the level of vice president. B. For a partnership or sole proprietorship, by a general partner or the proprietor, respectively; or C. For a municipality, State, federal, or other public facility, by either a principal executive officer or ranking elected official. **Paper Reduction Act Notice** **The public reporting and recordkeeping burden for this collection of information is estimated to average 9.5 hours per response. The public reporting and recordkeeping burden for development of the nutrient management plan to be submitted with the form is estimated to average 58 hours per response. Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the Director, Collection Strategies Division, U.S. Environmental Protection Agency (2822T), 1200 Pennsylvania Ave., NW, Washington, D.C. 20460. Include the OMB control number in any correspondence. Do not send the completed form to this address.**

BILLING CODE 6560–50–C

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 122

Administrative practice and procedure, confidential business information, hazardous substances, reporting and recordkeeping requirements, water pollution control.

40 CFR Part 412

Environmental protection, feedlots, livestock, waste treatment and disposal, water pollution control.

Dated: October 31, 2008.

Stephen L. Johnson,

Administrator.

■ For the reasons set out in the preamble, chapter I of Title 40 of the Code of Federal Regulations is to be amended as follows:

PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.*, 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.*, 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345(d) and (e), 1361; Executive Order 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.*, 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

■ 2. In § 9.1 the table is amended by adding entries in numerical order under the indicated heading to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB control No.
* * * * *	
EPA Administered Permit Programs: The National Pollutant Discharge Elimination System	
* * * * *	
122.21(i)	2040–0250
* * * * *	
122.23 (d), (e), (h)	2040–0250
* * * * *	

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 3. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 4. Section 122.21 is amended by revising the last sentence in paragraph (a)(1), and revising paragraph (i)(1)(x), to read as follows:

§ 122.21 Application for a permit (applicable to State programs, see § 123.25).

(a) * * *

(1) * * * The requirements for concentrated animal feeding operations are described in § 122.23(d).

* * * * *

(i) * * *

(1) * * *

(x) A nutrient management plan that at a minimum satisfies the requirements specified in § 122.42(e), including, for all CAFOs subject to 40 CFR part 412, subpart C or subpart D, the requirements of 40 CFR 412.4(c), as applicable.

* * * * *

■ 5. Section 122.23 is amended as follows:

■ a. By revising paragraph (a).

■ b. By revising paragraphs (d)(1) and (d)(2).

■ c. By adding paragraphs (e)(1) and (e)(2).

■ d. By revising paragraph (f).

■ e. By revising paragraph (g).

■ f. By revising paragraph (h).

■ g. By adding paragraph (i).

■ h. By adding paragraph (j).

§ 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).

(a) *Scope.* Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

* * * * *

(d) * * *

(1) *Permit Requirement.* The owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges or proposes to discharge. A

CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur. Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Director has not made a general permit available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Director.

(2) *Information to submit with permit application or notice of intent.* An application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

* * * * *

(e) * * *

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(f) When must the owner or operator of a CAFO seek coverage under an NPDES permit? Any CAFO that is required to seek permit coverage under paragraph (d)(1) of this section must seek coverage when the CAFO proposes to discharge, unless a later deadline is specified below.

(1) *Operations defined as CAFOs prior to April 14, 2003.* For operations defined as CAFOs under regulations that were in effect prior to April 14, 2003, the owner or operator must have or seek to obtain coverage under an NPDES permit as of April 14, 2003, and comply with all applicable NPDES requirements, including the duty to maintain permit coverage in accordance with paragraph (g) of this section.

(2) *Operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date.* For all operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date, the owner or operator of the CAFO must seek to obtain coverage under an NPDES permit by February 27, 2009.

(3) *Operations that become defined as CAFOs after April 14, 2003, but which are not new sources.* For a newly constructed CAFO and for an AFO that makes changes to its operations that result in its becoming defined as a CAFO for the first time after April 14, 2003, but is not a new source, the owner or operator must seek to obtain coverage under an NPDES permit, as follows:

(i) For newly constructed operations not subject to effluent limitations guidelines, 180 days prior to the time CAFO commences operation;

(ii) For other operations (*e.g.*, resulting from an increase in the number of animals), as soon as possible, but no later than 90 days after becoming defined as a CAFO; or

(iii) If an operational change that makes the operation a CAFO would not have made it a CAFO prior to April 14, 2003, the operation has until February 27, 2009, or 90 days after becoming defined as a CAFO, whichever is later.

(4) *New sources.* The owner or operator of a new source must seek to obtain coverage under a permit at least 180 days prior to the time that the CAFO commences operation.

(5) *Operations that are designated as CAFOs.* For operations designated as a CAFO in accordance with paragraph (c) of this section, the owner or operator must seek to obtain coverage under a permit no later than 90 days after receiving notice of the designation.

(g) *Duty to Maintain Permit Coverage.* No later than 180 days before the expiration of the permit, or as provided by the Director, any permitted CAFO must submit an application to renew its permit, in accordance with § 122.21(d), unless the CAFO will not discharge or propose to discharge upon expiration of the permit.

(h) *Procedures for CAFOs seeking coverage under a general permit.* (1) CAFO owners or operators must submit a notice of intent when seeking authorization to discharge under a general permit in accordance with § 122.28(b). The Director must review notices of intent submitted by CAFO owners or operators to ensure that the notice of intent includes the information required by § 122.21(i)(1), including a nutrient management plan that meets the requirements of § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. When additional information is necessary to complete the notice of intent or clarify, modify, or supplement previously submitted material, the Director may request such information from the owner or operator. If the Director makes a preliminary determination that the notice of intent meets the requirements of §§ 122.21(i)(1) and 122.42(e), the Director must notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit. The process for submitting public comments and hearing requests, and the hearing process if a request for a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the general permit, an appropriate period of time for the public to comment and request a hearing that differs from the time period specified in 40 CFR 124.10. The Director must respond to significant comments received during the comment period, as provided in 40 CFR 124.17, and, if necessary, require the CAFO owner or operator to revise the nutrient management plan in order to be granted permit coverage. When the Director authorizes coverage for the CAFO owner or operator under the general permit, the terms of the nutrient management plan shall become incorporated as terms and conditions of the permit for the CAFO. The Director shall notify the CAFO owner or operator and inform the public that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(2) *For EPA-issued permits only.* The Regional Administrator shall notify each person who has submitted written comments on the proposal to grant coverage and the draft terms of the nutrient management plan or requested notice of the final permit decision. Such notification shall include notice that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(3) Nothing in this paragraph (h) shall affect the authority of the Director to require an individual permit under § 122.28(b)(3).

(i) *No Discharge Certification Option.* (1) The owner or operator of a CAFO that meets the eligibility criteria in paragraph (i)(2) of this section may certify to the Director that the CAFO does not discharge or propose to discharge. A CAFO owner or operator who certifies that the CAFO does not

discharge or propose to discharge is not required to seek coverage under an NPDES permit pursuant to paragraph (d)(1) of this section, provided that the CAFO is designed, constructed, operated, and maintained in accordance with the requirements of paragraphs (i)(2) and (3) of this section, and subject to the limitations in paragraph (i)(4) of this section.

(2) Eligibility Criteria. In order to certify that a CAFO does not discharge or propose to discharge, the owner or operator of a CAFO must document, based on an objective assessment of the conditions at the CAFO, that the CAFO is designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge, as follows:

(i) The CAFO's production area is designed, constructed, operated, and maintained so as not to discharge. The CAFO must maintain documentation that demonstrates that:

(A) Any open manure storage structures are designed, constructed, operated, and maintained to achieve no discharge based on a technical evaluation in accordance with the elements of the technical evaluation set forth in 40 CFR 412.46(a)(1)(i) through (viii);

(B) Any part of the CAFO's production area that is not addressed by paragraph (i)(2)(i)(A) of this section is designed, constructed, operated, and maintained such that there will be no discharge of manure, litter, or process wastewater; and

(C) The CAFO implements the additional measures set forth in 40 CFR 412.37(a) and (b);

(ii) The CAFO has developed and is implementing an up-to-date nutrient management plan to ensure no discharge from the CAFO, including from all land application areas under the control of the CAFO, that addresses, at a minimum, the following:

(A) The elements of § 122.42(e)(1)(i) through (ix) and 40 CFR 412.37(c); and

(B) All site-specific operation and maintenance practices necessary to ensure no discharge, including any practices or conditions established by a technical evaluation pursuant to paragraph (i)(2)(i)(A) of this section; and

(iii) The CAFO must maintain documentation required by this paragraph either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(3) Submission to the Director. In order to certify that a CAFO does not discharge or propose to discharge, the CAFO owner or operator must complete and submit to the Director, by certified mail or equivalent method of documentation, a certification that includes, at a minimum, the following information:

(i) The legal name, address and phone number of the CAFO owner or operator (see § 122.21(b));

(ii) The CAFO name and address, the county name and the latitude and longitude where the CAFO is located;

(iii) A statement that describes the basis for the CAFO's certification that it satisfies the eligibility requirements identified in paragraph (i)(2) of this section; and

(iv) The following certification statement: ''I certify under penalty of law that I am the owner or operator of a concentrated animal feeding operation (CAFO), identified as [Name of CAFO], and that said CAFO meets the requirements of 40 CFR 122.23(i). I have read and understand the eligibility requirements of 40 CFR 122.23(i)(2) for certifying that a CAFO does not discharge or propose to discharge and further certify that this CAFO satisfies the eligibility requirements. As part of this certification, I am including the information required by 40 CFR 122.23(i)(3). I also understand the conditions set forth in 40 CFR 122.23(i)(4), (5) and (6) regarding loss and withdrawal of certification. I certify under penalty of law that this document and all other documents required for this certification were prepared under my direction or supervision and that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons directly involved in gathering and evaluating the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.''; and

(v) The certification must be signed in accordance with the signatory requirements of 40 CFR 122.22.

(4) Term of Certification. A certification that meets the requirements of paragraphs (i)(2) and (i)(3) of this section shall become effective on the date it is submitted, unless the Director establishes an effective date of up to 30 days after the date of submission. Certification will remain in effect for five years or until the certification is no longer valid or is withdrawn, whichever occurs first. A certification is no longer valid when a discharge has occurred or when the CAFO ceases to meet the eligibility criteria in paragraph (i)(2) of this section.

(5) Withdrawal of Certification. (i) At any time, a CAFO may withdraw its certification by notifying the Director by certified mail or equivalent method of documentation. A certification is withdrawn on the date the notification is submitted to the Director. The CAFO does not need to specify any reason for the withdrawal in its notification to the Director.

(ii) If a certification becomes invalid in accordance with paragraph (i)(4) of this section, the CAFO must withdraw its certification within three days of the date on which the CAFO becomes aware that the certification is invalid. Once a CAFO's certification is no longer valid, the CAFO is subject to the requirement in paragraph (d)(1) of this section to seek permit coverage if it discharges or proposes to discharge.

(6) Recertification. A previously certified CAFO that does not discharge or propose to discharge may recertify in accordance with paragraph (i) of this section, except that where the CAFO has discharged, the CAFO may only recertify if the following additional conditions are met:

(i) The CAFO had a valid certification at the time of the discharge;

(ii) The owner or operator satisfies the eligibility criteria of paragraph (i)(2) of this section, including any necessary modifications to the CAFO's design, construction, operation, and/or maintenance to permanently address the cause of the discharge and ensure that no discharge from this cause occurs in the future;

(iii) The CAFO has not previously recertified after a discharge from the same cause;

(iv) The owner or operator submits to the Director for review the following documentation: a description of the discharge, including the date, time, cause, duration, and approximate volume of the discharge, and a detailed explanation of the steps taken by the CAFO to permanently address the cause of the discharge in addition to submitting a certification in accordance with paragraph (i)(3) of this section; and

(v) Notwithstanding paragraph (i)(4) of this section, a recertification that meets the requirements of paragraphs (i)(6)(iii) and (i)(6)(iv) of this section shall only become effective 30 days from the date of submission of the recertification documentation.

(j) *Effect of certification.* (1) An unpermitted CAFO certified in accordance with paragraph (i) of this section is presumed not to propose to discharge. If such a CAFO does discharge, it is not in violation of the requirement that CAFOs that propose to discharge seek permit coverage pursuant

to paragraphs (d)(1) and (f) of this section, with respect to that discharge. In all instances, the discharge of a pollutant without a permit is a violation of the Clean Water Act section 301(a) prohibition against unauthorized discharges from point sources.

(2) In any enforcement proceeding for failure to seek permit coverage under paragraphs (d)(1) or (f) of this section that is related to a discharge from an unpermitted CAFO, the burden is on the CAFO to establish that it did not propose to discharge prior to the discharge when the CAFO either did not submit certification documentation as provided in paragraph (i)(3) or (i)(6)(iv) of this section within at least five years prior to the discharge, or withdrew its certification in accordance with paragraph (i)(5) of this section. Design, construction, operation, and maintenance in accordance with the criteria of paragraph (i)(2) of this section satisfies this burden.

■ 6. Section 122.28 is amended by adding a new paragraph (b)(2)(vii), to read as follows:

§ 122.28 General permits (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) * * *

(2) * * *

(vii) A CAFO owner or operator may be authorized to discharge under a general permit only in accordance with the process described in § 122.23(h).

* * * * *

■ 7. Section 122.42 is amended as follows:

■ a. By revising paragraph (e) introductory text and paragraph (e)(1) introductory text.

■ b. By removing the period at the end of paragraph (e)(4)(vii) and adding in its place ''; and''.

■ c. By adding paragraph (e)(4)(viii).

■ d. By adding paragraphs (e)(5) and (e)(6).

§ 122.42 Additional conditions applicable to specified categories of NPDES permits (applicable to State NPDES programs, see § 123.25).

* * * * *

(e) *Concentrated animal feeding operations (CAFOs).* Any permit issued to a CAFO must include the requirements in paragraphs (e)(1) through (e)(6) of this section.

(1) *Requirement to implement a nutrient management plan.* Any permit issued to a CAFO must include a requirement to implement a nutrient management plan that, at a minimum, contains best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards, including those specified in 40 CFR part 412. The nutrient management plan must, to the extent applicable:

* * * * *

(4) * * *

(viii) The actual crop(s) planted and actual yield(s) for each field, the actual nitrogen and phosphorus content of the manure, litter, and process wastewater, the results of calculations conducted in accordance with paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section, and the amount of manure, litter, and process wastewater applied to each field during the previous 12 months; and, for any CAFO that implements a nutrient management plan that addresses rates of application in accordance with paragraph (e)(5)(ii) of this section, the results of any soil testing for nitrogen and phosphorus taken during the preceding 12 months, the data used in calculations conducted in accordance with paragraph (e)(5)(ii)(D) of this section, and the amount of any supplemental fertilizer applied during the previous 12 months.

(5) *Terms of the nutrient management plan.* Any permit issued to a CAFO must require compliance with the terms of the CAFO's site-specific nutrient management plan. The terms of the nutrient management plan are the information, protocols, best management practices, and other conditions in the nutrient management plan determined by the Director to be necessary to meet the requirements of paragraph (e)(1) of this section. The terms of the nutrient management plan, with respect to protocols for land application of manure, litter, or process wastewater required by paragraph (e)(1)(viii) of this section and, as applicable, 40 CFR 412.4(c), must include the fields available for land application; field-specific rates of application properly developed, as specified in paragraphs (e)(5)(i) through (ii) of this section, to ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater; and any timing limitations identified in the nutrient management plan concerning land application on the fields available for land application. The terms must address rates of application using one of the following two approaches, unless the Director specifies that only one of these approaches may be used:

(i) *Linear approach.* An approach that expresses rates of application as pounds of nitrogen and phosphorus, according to the following specifications:

(A) The terms include maximum application rates from manure, litter, and process wastewater for each year of permit coverage, for each crop identified in the nutrient management plan, in chemical forms determined to be acceptable to the Director, in pounds per acre, per year, for each field to be used for land application, and certain factors necessary to determine such rates. At a minimum, the factors that are terms must include: The outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses of a field such as pasture or fallow fields; the realistic yield goal for each crop or use identified for each field; the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field; credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; and accounting for all other additions of plant available nitrogen and phosphorus to the field. In addition, the terms include the form and source of manure, litter, and process wastewater to be land-applied; the timing and method of land application; and the methodology by which the nutrient management plan accounts for the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

(B) Large CAFOs that use this approach must calculate the maximum amount of manure, litter, and process wastewater to be land applied at least once each year using the results of the most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application; or

(ii) *Narrative rate approach.* An approach that expresses rates of application as a narrative rate of application that results in the amount, in tons or gallons, of manure, litter, and process wastewater to be land applied, according to the following specifications:

(A) The terms include maximum amounts of nitrogen and phosphorus derived from all sources of nutrients, for each crop identified in the nutrient management plan, in chemical forms determined to be acceptable to the Director, in pounds per acre, for each field, and certain factors necessary to determine such amounts. At a minimum, the factors that are terms must include: the outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses such as pasture or fallow fields (including

alternative crops identified in accordance with paragraph (e)(5)(ii)(B) of this section); the realistic yield goal for each crop or use identified for each field; and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field. In addition, the terms include the methodology by which the nutrient management plan accounts for the following factors when calculating the amounts of manure, litter, and process wastewater to be land applied: Results of soil tests conducted in accordance with protocols identified in the nutrient management plan, as required by paragraph (e)(1)(vii) of this section; credits for all nitrogen in the field that will be plant available; the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied; consideration of multi-year phosphorus application; accounting for all other additions of plant available nitrogen and phosphorus to the field; the form and source of manure, litter, and process wastewater; the timing and method of land application; and volatilization of nitrogen and mineralization of organic nitrogen.

(B) The terms of the nutrient management plan include alternative crops identified in the CAFO's nutrient management plan that are not in the planned crop rotation. Where a CAFO includes alternative crops in its nutrient management plan, the crops must be listed by field, in addition to the crops identified in the planned crop rotation for that field, and the nutrient management plan must include realistic crop yield goals and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop. Maximum amounts of nitrogen and phosphorus from all sources of nutrients and the amounts of manure, litter, and process wastewater to be applied must be determined in accordance with the methodology described in paragraph (e)(5)(ii)(A) of this section.

(C) For CAFOs using this approach, the following projections must be included in the nutrient management plan submitted to the Director, but are not terms of the nutrient management plan: The CAFO's planned crop rotations for each field for the period of permit coverage; the projected amount of manure, litter, or process wastewater to be applied; projected credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; accounting for all other additions of plant available nitrogen and phosphorus to the field; and the predicted form, source, and method of application of manure, litter, and process wastewater for each crop. Timing of application for each field, insofar as it concerns the calculation of rates of application, is not a term of the nutrient management plan.

(D) CAFOs that use this approach must calculate maximum amounts of manure, litter, and process wastewater to be land applied at least once each year using the methodology required in paragraph (e)(5)(ii)(A) of this section before land applying manure, litter, and process wastewater and must rely on the following data:

(*1*) A field-specific determination of soil levels of nitrogen and phosphorus, including, for nitrogen, a concurrent determination of nitrogen that will be plant available consistent with the methodology required by paragraph (e)(5)(ii)(A) of this section, and for phosphorus, the results of the most recent soil test conducted in accordance with soil testing requirements approved by the Director; and

(*2*) The results of most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application, in order to determine the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

(6) *Changes to a nutrient management plan.* Any permit issued to a CAFO must require the following procedures to apply when a CAFO owner or operator makes changes to the CAFO's nutrient management plan previously submitted to the Director:

(i) The CAFO owner or operator must provide the Director with the most current version of the CAFO's nutrient management plan and identify changes from the previous version, except that the results of calculations made in accordance with the requirements of paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section are not subject to the requirements of paragraph (e)(6) of this section.

(ii) The Director must review the revised nutrient management plan to ensure that it meets the requirements of this section and applicable effluent limitations and standards, including those specified in 40 CFR part 412, and must determine whether the changes to the nutrient management plan necessitate revision to the terms of the nutrient management plan incorporated into the permit issued to the CAFO. If revision to the terms of the nutrient management plan is not necessary, the Director must notify the CAFO owner or operator and upon such notification the CAFO may implement the revised nutrient management plan. If revision to the terms of the nutrient management plan is necessary, the Director must determine whether such changes are substantial changes as described in paragraph (e)(6)(iii) of this section.

(A) If the Director determines that the changes to the terms of the nutrient management plan are not substantial, the Director must make the revised nutrient management plan publicly available and include it in the permit record, revise the terms of the nutrient management plan incorporated into the permit, and notify the owner or operator and inform the public of any changes to the terms of the nutrient management plan that are incorporated into the permit.

(B) If the Director determines that the changes to the terms of the nutrient management plan are substantial, the Director must notify the public and make the proposed changes and the information submitted by the CAFO owner or operator available for public review and comment. The process for public comments, hearing requests, and the hearing process if a hearing is held must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the CAFO's permit, an appropriate period of time for the public to comment and request a hearing on the proposed changes that differs from the time period specified in 40 CFR 124.10. The Director must respond to all significant comments received during the comment period as provided in 40 CFR 124.17, and require the CAFO owner or operator to further revise the nutrient management plan if necessary, in order to approve the revision to the terms of the nutrient management plan incorporated into the CAFO's permit. Once the Director incorporates the revised terms of the nutrient management plan into the permit, the Director must notify the owner or operator and inform the public of the final decision concerning revisions to the terms and conditions of the permit.

(iii) Substantial changes to the terms of a nutrient management plan incorporated as terms and conditions of a permit include, but are not limited to:

(A) Addition of new land application areas not previously included in the CAFO's nutrient management plan. Except that if the land application area that is being added to the nutrient management plan is covered by terms of a nutrient management plan incorporated into an existing NPDES permit in accordance with the requirements of paragraph (e)(5) of this section, and the CAFO owner or operator applies manure, litter, or

process wastewater on the newly added land application area in accordance with the existing field-specific permit terms applicable to the newly added land application area, such addition of new land would be a change to the new CAFO owner or operator's nutrient management plan but not a substantial change for purposes of this section;

(B) Any changes to the field-specific maximum annual rates for land application, as set forth in paragraphs (e)(5)(i) of this section, and to the maximum amounts of nitrogen and phosphorus derived from all sources for each crop, as set forth in paragraph (e)(5)(ii) of this section;

(C) Addition of any crop or other uses not included in the terms of the CAFO's nutrient management plan and corresponding field-specific rates of application expressed in accordance with paragraph (e)(5) of this section; and

(D) Changes to site-specific components of the CAFO's nutrient management plan, where such changes are likely to increase the risk of nitrogen and phosphorus transport to waters of the U.S.

(iv) *For EPA-issued permits only.* Upon incorporation of the revised terms of the nutrient management plan into the permit, 40 CFR 124.19 specifies procedures for appeal of the permit decision. In addition to the procedures specified at 40 CFR 124.19, a person must have submitted comments or participated in the public hearing in order to appeal the permit decision.

■ 8. Section 122.62 is amended by adding paragraph (a)(17) to read as follows:

§ 122.62 Modification or revocation and reissuance of permits (applicable to State programs, see § 123.25)

* * * * *

(a) * * *

(17) *Nutrient Management Plans.* The incorporation of the terms of a CAFO's nutrient management plan into the terms and conditions of a general permit when a CAFO obtains coverage under a general permit in accordance with §§ 122.23(h) and 122.28 is not a cause for modification pursuant to the requirements of this section.

* * * * *

■ 9. Section 122.63 is amended by adding paragraph (h) to read as follows:

§ 122.63 Minor modification of permits.

* * * * *

(h) Incorporate changes to the terms of a CAFO's nutrient management plan that have been revised in accordance with the requirements of § 122.42(e)(6).

PART 412—CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFO) POINT SOURCE CATEGORY

■ 10. The authority citation for part 412 continues to read as follows:

Authority: 33 U.S.C. 1311, 1314, 1316, 1317, 1318, 1342, and 1361.

■ 11. Section 412.37 is amended by revising paragraph (a)(2) to read as follows:

§ 412.37 Additional measures.

(a) * * *

(2) *Depth marker.* All open surface liquid impoundments must have a depth marker which clearly indicates the minimum capacity necessary to contain the runoff and direct precipitation of the 25-year, 24-hour rainfall event. In the case of new sources subject to effluent limitations established pursuant to § 412.46(a)(1) of this part, all open surface manure storage structures associated with such sources must include a depth marker which clearly indicates the minimum capacity necessary to contain the maximum runoff and direct precipitation associated with the design storm used in sizing the impoundment for no discharge.

■ 12. Section 412.46 is amended by revising paragraphs (a)(1), (d), and (e) to read as follows:

§ 412.46 New source performance standards (NSPS).

* * * * *

(a) * * *

(1) Any CAFO subject to this subpart may request that the Director establish NPDES permit best management practice effluent limitations designed to ensure no discharge of manure, litter, or process wastewater based upon a site-specific evaluation of the CAFO's open surface manure storage structure. The NPDES permit best management practice effluent limitations must address the CAFO's entire production area. In the case of any CAFO using an open surface manure storage structure for which the Director establishes such effluent limitations, ''no discharge of manure, litter, or process wastewater pollutants,'' as used in this section, means that the storage structure is designed, operated, and maintained in accordance with best management practices established by the Director on a site-specific basis after a technical evaluation of the storage structure. The technical evaluation must address the following elements:

(i) Information to be used in the design of the open manure storage structure including, but not limited to, the following: minimum storage periods for rainy seasons, additional minimum capacity for chronic rainfalls, applicable technical standards that prohibit or otherwise limit land application to frozen, saturated, or snow-covered ground, planned emptying and dewatering schedules consistent with the CAFO's Nutrient Management Plan, additional storage capacity for manure intended to be transferred to another recipient at a later time, and any other factors that would affect the sizing of the open manure storage structure.

(ii) The design of the open manure storage structure as determined by the most recent version of the National Resource Conservation Service's Animal Waste Management (AWM) software. CAFOs may use equivalent design software or procedures as approved by the Director.

(iii) All inputs used in the open manure storage structure design including actual climate data for the previous 30 years consisting of historical average monthly precipitation and evaporation values, the number and types of animals, anticipated animal sizes or weights, any added water and bedding, any other process wastewater, and the size and condition of outside areas exposed to rainfall and contributing runoff to the open manure storage structure.

(iv) The planned minimum period of storage in months including, but not limited to, the factors for designing an open manure storage structure listed in paragraph (a)(1)(i) of this section. Alternatively the CAFO may determine the minimum period of storage by specifying times the storage pond will be emptied consistent with the CAFO's Nutrient Management Plan.

(v) Site-specific predicted design specifications including dimensions of the storage facility, daily manure and wastewater additions, the size and characteristics of the land application areas, and the total calculated storage period in months.

(vi) An evaluation of the adequacy of the designed manure storage structure using the most recent version of the Soil Plant Air Water (SPAW) Hydrology Tool. The evaluation must include all inputs to SPAW including but not limited to daily precipitation, temperature, and evaporation data for the previous 100 years, user-specified soil profiles representative of the CAFO's land application areas, planned crop rotations consistent with the CAFO's Nutrient Management Plan, and the final modeled result of no overflows from the designed open manure storage structure. For those CAFOs where 100 years of local weather data for the CAFO's location is not available, CAFOs

may use a simulation with a confidence interval analysis conducted over a period of 100 years. The Director may approve equivalent evaluation and simulation procedures.

(vii) The Director may waive the requirement of (a)(1)(vi) for a site-specific evaluation of the designed manure storage structure and instead authorize a CAFO to use a technical evaluation developed for a class of specific facilities within a specified geographical area.

(viii) Waste management and storage facilities designed, constructed, operated, and maintained consistent with the analysis conducted in paragraphs (a)(1)(i) through (a)(1)(vii) of this section and operated in accordance with the additional measures and records required by § 412.47(a) and (b), will fulfill the requirements of this section.

(ix) The Director has the discretion to request additional information to support a request for effluent limitations based on a site-specific open surface manure storage structure.

* * * * *

(d) Any source subject to this subpart that commenced discharging after April 14, 1993, and prior to April 14, 2003, which was a new source subject to the standards specified in § 412.15, revised as of July 1, 2002, must continue to achieve those standards for the applicable time period specified in 40 CFR 122.29(d)(1). Thereafter, the source must achieve the standards specified in § 412.43(a) and (b).

(e) Any source subject to this subpart that commenced discharging after April 14, 2003, and prior to January 20, 2009, which was a new source subject to the standards specified in § 412.46(a) through (d) in the July 1, 2008, edition of 40 CFR part 439, must continue to achieve those standards for the applicable time period specified in 40 CFR 122.29(d)(1).

[FR Doc. E8–26620 Filed 11–19–08; 8:45 am]

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Federal Register

Thursday,
November 20, 2008

Part III

Department of Commerce

National Oceanic and Atmospheric Administration

15 CFR Part 922

Gulf of the Farallones National Marine Sanctuary Regulations; Monterey Bay National Marine Sanctuary Regulations; and Cordell Bank National Marine Sanctuary Regulations; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

[Docket No. 080302355–81415–02]

RINs 0648–AT14, 0648–AT15, 0648–AT16

Gulf of the Farallones National Marine Sanctuary Regulations; Monterey Bay National Marine Sanctuary Regulations; and Cordell Bank National Marine Sanctuary Regulations

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Final rule.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) is issuing final revised management plans and revised regulations for the Gulf of the Farallones, Cordell Bank, and Monterey Bay national marine sanctuaries (GFNMS, CBNMS, and MBNMS respectively). This final rule updates the existing regulations for these three sanctuaries and establishes new regulatory prohibitions for them. New prohibitions contained in this final rule include restrictions on: the introduction of introduced species; discharges from cruise ships and other vessels; attracting or approaching white sharks in GFNMS; anchoring vessels in seagrass in Tomales Bay; deserting vessels; motorized personal watercraft use in the MBNMS (definition revision); and, possessing, moving, or injuring historic resources. This final rule also codifies three dredge disposal sites in the MBNMS that existed prior to the MBNMS designation in 1992 and expands the boundaries of the MBNMS to include the Davidson Seamount and surrounding area.

DATES: *Effective Date:* Pursuant to section 304(b) of the National Marine Sanctuaries Act (NMSA) (16 U.S.C. 1434(b)), the revised designations and regulations shall take effect and become final after the close of a review period of forty-five days of continuous session of Congress beginning on November 20, 2008. Announcement of the effective date of the final regulations will be published in the **Federal Register**.

ADDRESSES: Copies of the final management plans and final environmental impact statement and the record of decision are available upon request to NOAA's Office of National Marine Sanctuaries, 1305 East-West Highway, N/NMS, Silver Spring, MD 20910. Copies are also available on the Web at *http://www.sanctuaries.nos.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: John Armor, NOAA Office of National Marine Sanctuaries, 301–713–7234.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to section 304(e) of the National Marine Sanctuaries Act (16 U.S.C. 1434 *et seq.*) (NMSA), the National Marine Sanctuary Program (NMSP)[1] conducted a review of the management plans for the GFNMS, CBNMS, and MBNMS. The review resulted in revised management plans for the sanctuaries, revisions to existing regulations (including new regulatory prohibitions), and changes to the terms of designation for each sanctuary. On October 6, 2006, NOAA issued notices of availability of the DMPs and DEIS, and published the associated proposed rules. (GFNMS, 71 FR 59338; CBNMS, 71 FR 59039; and MBNMS, 71 FR 59050). On March 27, 2008, NOAA published a supplemental proposed rule relating to discharges from vessels 300 gross registered tons or more in the three sanctuaries (73 FR 16224). This final rule publishes the response to comments on the proposed rule and the final regulations for the GFNMS, CBNMS, and MBNMS, and announces the availability of the final revised management plans.

A. GFNMS Background

NOAA established the GFNMS in 1981 to protect and preserve a unique and fragile ecological community, including the largest seabird colony in the contiguous United States and diverse and abundant marine mammals. The GFNMS lies off the coast of California, to the west and north of San Francisco. The GFNMS is composed of 1,279 square statute miles (966 square nautical miles) of offshore waters extending out to and around the Farallon Islands and nearshore waters (up to the mean high tide line) from Bodega Head to Rocky Point in Marin. The GFNMS is characterized by the widest continental shelf on the west coast of the contiguous United States. In the Gulf of the Farallones, the shelf reaches a width of 37 statute miles (32 nmi). Shoreward of the Farallon Islands, the continental shelf is a relatively flat sandy/muddy plain, which slopes gently to the west and north from the mainland shoreline. The Farallon Islands lie along the outer edge of the continental shelf, between 15 and 22 statute miles (13 and 19 nmi) southwest of Point Reyes and approximately 30 statute miles (26 nmi) due west of San Francisco. In addition to sandy beaches, rocky cliffs, small coves, and offshore stacks, the GFNMS includes open bays (Bodega Bay, Drakes Bay) and enclosed bays or estuaries (Bolinas Lagoon, Tomales Bay, Estero Americano, and Estero de San Antonio).

B. CBNMS Background

NOAA established the CBNMS in 1989 to protect and preserve the extraordinary ecosystem, including marine birds, mammals, and other natural resources of Cordell Bank and its surrounding waters. The CBNMS protects an area of 529 square statute miles (399 square nautical miles) off the northern California coast. The main feature of the sanctuary is Cordell Bank, an offshore granite bank located on the edge of the continental shelf, about 43 nautical miles (nmi) northwest of the Golden Gate Bridge and 23 statute miles (20 nmi) west of the Point Reyes lighthouse. The CBNMS is entirely offshore and shares its southern and eastern boundary with the GFNMS. The CBNMS eastern boundary is six miles from shore and the western boundary is the 1000 fathom isobath on the edge of the continental slope. The CBNMS is located in one of the world's four major coastal upwelling systems. The combination of oceanic conditions and undersea topography provides for a highly productive environment in a discrete, well-defined area. The vertical relief and hard substrate of the Bank provide benthic habitat with near-shore characteristics in an open ocean environment 23 statute miles (20 nmi) from shore.

C. MBNMS Background

NOAA established the MBNMS in 1992 for the purposes of protecting and managing the conservation, ecological, recreational, research, educational, historical, and esthetic resources and qualities of the area. The MBNMS is located offshore of California's central coast, adjacent to and south of the GFNMS. It encompasses a shoreline length of approximately 276 statute miles (240 nmi) between Marin Rocky Pt. in Marin County and Cambria in San Luis Obispo County and, with the inclusion of the Davidson Seamount,

[1] The National Marine Sanctuary Program was recently elevated to an ''Office'' level within NOAA's National Ocean Service (NOS). Therefore, the official name of the operating unit within NOAA that implements the National Marine Sanctuaries Act is now the National Ocean Service Office of National Marine Sanctuaries. However, to minimize confusion that might be created by using different operating unit names between proposed rule and final rule, we have chosen to use National Marine Sanctuary Program and its associated acronym NMSP in this document.

approximately 6,094 square statute miles (4,602 square nautical miles) of ocean and coastal waters, and the submerged lands thereunder, extending an average distance of 30 statute miles (26 nmi) from shore. Supporting some of the world's most diverse marine ecosystems, it is home to numerous mammals, seabirds, fishes, invertebrates, sea turtles and plants in a remarkably productive coastal environment.

II. Revisions to Sanctuary Terms of Designation

Section 304(a)(4) of the NMSA (16 U.S.C. 1434(a)(4)) requires that, in designating national marine sanctuaries, NOAA specify the sanctuary's ''terms of designation.'' The NMSA requires that each sanctuary's terms of designation include:

1. The geographic area proposed to be included within the sanctuary;

2. The characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or esthetic value; and

3. The types of activities that will be subject to regulation by the Secretary of Commerce to protect those characteristics.

The NMSA further requires that terms of designation be modified only by following the same procedures for designating the sanctuary.

Following the extensive public process for reviewing the management plans for the sanctuaries, NOAA determined that revisions to all three sanctuaries' terms of designation are necessary to ensure they continue to reflect current management priorities. The sections below describe the changes NOAA is making to each sanctuary's terms of designation and provide a printed version of each (as modified) in its entirety.

A. Revisions to the GFNMS Terms of Designation

NOAA is revising the GFNMS terms of designation to:

- Clarify that submerged lands are part of the GFNMS;
- Revise the description of activities that may be regulated to include additional activities; and
- Make minor updates to ensure the text reflects the current text of the NMSA and to ensure its description of the area is current.

1. Submerged Lands

NOAA is clarifying that the submerged lands of GFNMS are legally part of the sanctuary and included in the boundary description. At the time the sanctuary was designated in 1981, Title III of the Marine Protection, Research, and Sanctuaries Act (now also known as the NMSA) characterized national marine sanctuaries as consisting of coastal and ocean waters but did not expressly mention submerged lands thereunder. NOAA has consistently interpreted its authority under the NMSA as extending to submerged lands, and amendments to the NMSA in 1984 (Pub. L. 98–498) clarified that submerged lands may be designated by the Secretary of Commerce as part of a national marine sanctuary (16 U.S.C. 1432(3)). Therefore, NOAA is modifying the GFNMS terms of designation and the boundary description to replace the term ''seabed'' with ''submerged lands.'' Additionally, boundary coordinates in the revised terms of designation and in the sanctuary regulations are expressed by coordinates based on the North American Datum of 1983 (NAD 83).

2. List of Regulated Activities

NOAA is also revising the GFNMS terms of designation to modify the list of activities that may be regulated. The revised terms of designation now also authorize regulation of: discharging or depositing from beyond the boundary of the sanctuary; activities regarding cultural or historical resources; taking or possessing any marine mammal, sea turtle, or bird within or above the Sanctuary except as authorized by the Marine Mammal Protection Act, Endangered Species Act, and the Migratory Bird Treaty Act; introducing or otherwise releasing from within or into the sanctuary an introduced species; attracting or approaching any animal; and operating a vessel (i.e., watercraft of any description) within the sanctuary, including but not limited to, anchoring or deserting a vessel. These revisions will enable NOAA to more effectively and efficiently address new and emerging resource management issues, and are necessary in order to ensure protection, preservation, and management of the conservation, recreational, ecological, historical, cultural, educational, archeological, scientific, and esthetic resources and qualities of the GFNMS. Finally, a technical correction is being made to Article V to delete the phrase ''and in Article IV'' from the statement that ''fishing'' includes mariculture.[2] The term ''fishing'' does not appear in Article IV.

[2] Throughout this document, the term ''mariculture'' means the same as ''marine aquaculture.''

3. Updates

NOAA is also modifying the GFNMS terms of designation to provide: an updated and more complete description of characteristics that give the sanctuary particular value; greater clarity on the applicability of sanctuary emergency regulations (and consistency with the National Marine Sanctuary Program regulations of general applicability, 15 CFR Part 922, Subpart E); an updated explanation of the effect of Sanctuary authority on preexisting leases, permits, licenses, and rights; and various minor revisions to conform wording of the Designation Document, where appropriate, to wording used for more recently designated sanctuaries. In Article V (Relation to Other Regulatory Programs), the ''Fishing and Waterfowl Hunting'' section is revised to clarify the original intent that, although the Sanctuary does not have authority to regulate fishing, fishing vessels may be regulated with respect to activities such as discharge/deposit and anchoring in accordance with Article IV. No changes are made to the ''Defense Activities'' section of the Designation Document.

An additional change to the terms of designation updates Article VI regarding the process to modify the terms of designation. This change deletes the requirement that modifications must be approved by the President of the United States and replaces it with a requirement that changes be approved by the Secretary of Commerce or his or her designee. This change is consistent with amendments to the NMSA enacted after the sanctuary was designated in 1981.

The revised terms of designation printed below replace the current terms of designation first printed in the **Federal Register** on January 26, 1981 (46 FR 7936).

REVISED DESIGNATION DOCUMENT FOR GULF OF THE FARALLONES NATIONAL MARINE SANCTUARY

Preamble

Under the authority of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, Public Law 92–532 (the Act), the waters and submerged lands along the Coast of California north and south of Point Reyes Headlands, between Bodega Head and Rocky Point and surrounding the Farallon Islands, are hereby designated a National Marine Sanctuary for the purposes of preserving and protecting this unique and fragile ecological community.

Article I. Effect of Designation

Within the area designated in 1981 as The Point Reyes/Farallon Islands

National Marine Sanctuary (the Sanctuary) described in Article II, the Act authorizes the promulgation of such regulations as are reasonable and necessary to protect the values of the Sanctuary. Section 1 of Article IV of this Designation Document lists activities of the types that are either to be regulated on the effective date of final rulemaking or may have to be regulated at some later date in order to protect Sanctuary resources and qualities. Listing does not necessarily mean that a type of activity will be regulated; however, if a type of activity is not listed it may not be regulated, except on an emergency basis, unless section 1 of Article IV is amended to include the type of activity by the same procedures by which the original designation was made.

Article II. Description of the Area

The Sanctuary consists of an area of the waters and the submerged lands thereunder adjacent to the coast of California of approximately 966 square nautical miles (nmi), extending seaward to a distance of 6 nmi from the mainland from Point Reyes to Bodega Bay and 12 nmi west from the Farallon Islands and Noonday Rock, and including the intervening waters and submerged lands. The precise boundaries are defined by regulation.

Article III. Characteristics of the Area That Give It Particular Value

The Sanctuary includes a rich and diverse marine ecosystem and a wide variety of marine habitats, including habitat for over 36 species of marine mammals. Rookeries for over half of California's nesting marine bird populations and nesting areas for at least 12 of 16 known U.S. nesting marine bird species are found within the boundaries. Abundant populations of fish and shellfish are also found within the Sanctuary. The Sanctuary also has one of the largest seasonal concentrations of white sharks (*Carcharodon carcharias*) in the world.

Article IV. Scope of Regulation

Section 1. Activities Subject to Regulation

The following activities are subject to regulation, including prohibition, as may be necessary to ensure the management, protection, and preservation of the conservation, recreational, ecological, historical, cultural, archeological, scientific, educational, and aesthetic resources and qualities of this area:

a. Hydrocarbon operations;

b. Discharging or depositing any substance within or from beyond the boundary of the Sanctuary;

c. Drilling into, dredging, or otherwise altering the submerged lands of the Sanctuary; or constructing, placing, or abandoning any structure, material, or other matter on or in the submerged lands of the Sanctuary;

d. Activities regarding cultural or historical resources;

e. Introducing or otherwise releasing from within or into the Sanctuary an introduced species;

f. Taking or possessing any marine mammal, marine reptile, or bird within or above the Sanctuary except as permitted by the Marine Mammal Protection Act, Endangered Species Act and Migratory Bird Treaty Act;

g. Attracting or approaching any animal; and

h. Operating a vessel (i.e., watercraft of any description) within the Sanctuary.

Section 2. Consistency With International Law

The regulations governing the activities listed in section 1 of this Article will apply to foreign flag vessels and persons not citizens of the United States only to the extent consistent with recognized principles of international law, including treaties and international agreements to which the United States is signatory.

Section 3. Emergency Regulations

Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality, or minimize the imminent risk of such destruction, loss, or injury, any and all activities, including those not listed in section 1 of this Article, are subject to immediate temporary regulation, including prohibition.

Article V. Relation to Other Regulatory Programs

Section 1. Fishing and Waterfowl Hunting

The regulation of fishing, including fishing for shellfish and invertebrates, and waterfowl hunting, is not authorized under Article IV. However, fishing vessels may be regulated with respect to vessel operations in accordance with Article IV, section 1, paragraphs (b) and (h), and mariculture activities involving alterations of or construction on the seabed, or release of introduced species by mariculture activities not covered by a valid lease from the State of California and in effect on the effective date of the final regulation, can be regulated in accordance with Article IV, section 1, paragraph (c) and (e). All regulatory programs pertaining to fishing, and to waterfowl hunting, including regulations promulgated under the California Fish and Game Code and Fishery Management Plans promulgated under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, will remain in effect, and all permits, licenses, and other authorizations issued pursuant thereto will be valid within the Sanctuary unless authorizing any activity prohibited by any regulation implementing Article IV.

The term ''fishing'' as used in this Article includes mariculture.

Section 2. Defense Activities

The regulation of activities listed in Article IV shall not prohibit any Department of Defense activity that is essential for national defense or because of emergency. Such activities shall be consistent with the regulations to the maximum extent practicable.

Section 3. Other Programs

All applicable regulatory programs will remain in effect, and all permits, licenses, and other authorizations issued pursuant thereto will be valid within the Sanctuary unless prohibited by regulations implementing Article IV. The Sanctuary regulations will set forth any necessary certification procedures.

Article VI. Alterations to This Designation

The terms of designation, as defined under section 304(a) of the Act, may be modified only by the same procedures by which the original designation is made, including public hearings, consultation with interested Federal, State, and local agencies, review by the appropriate Congressional committees and Governor of the State of California, and approval by the Secretary of Commerce or designee.

[END OF DESIGNATION DOCUMENT]

B. Revisions to the CBNMS Terms of Designation

NOAA is revising the CBNMS terms of designation to:

- Clarify that submerged lands are a part of the CBNMS;
- Revise the description of activities that may be regulated to include additional activities;
- Make minor updates to ensure the text reflects the current text of the NMSA and to ensure its description of the area is current.

1. Submerged Lands

NOAA is clarifying that the submerged lands of the CBNMS are legally part of the sanctuary and are included in the boundary description.

At the time the sanctuary was designated in 1989, Title III of the Marine Protection, Research, and Sanctuaries Act (now also known as the National Marine Sanctuaries Act) characterized national marine sanctuaries as consisting of coastal, marine and ocean waters but did not expressly mention submerged lands thereunder. NOAA has consistently interpreted its authority under the NMSA as extending to submerged lands, and amendments to the NMSA in 1984 (Pub. L. 98–498) clarified that submerged lands may be designated by the Secretary of Commerce as part of a national marine sanctuary (16 U.S.C. 1432(3)). Therefore, to be consistent with the NMSA, NOAA is updating the terms of designation and the boundary description, by adding ''submerged lands thereunder'' to the term ''marine waters.'' Additionally, boundary coordinates in the revised Designation Document and in the sanctuary regulations will be expressed by coordinates based on the North American Datum of 1983 (NAD 83).

2. List of Regulated Activities

NOAA is revising the CBNMS terms of designation to modify the list of activities that may be regulated. The revised terms of designation now also authorize regulation of: activities regarding cultural or historic resources; placing or abandoning any structure, material, or other matter on or in the submerged lands of the Sanctuary; taking or possessing any marine mammal, sea turtle, or bird; introducing or otherwise releasing an introduced species from within or into the Sanctuary; and drilling into, dredging, altering, or constructing on the submerged lands.

3. Updates

NOAA is also modifying the CBNMS terms of designation to provide: an updated and more complete description of characteristics that give the Sanctuary particular value; an updated explanation of the effect of Sanctuary authority on preexisting leases, permits, licenses, and rights; and various minor revisions in order to conform wording of the Designation Document, where appropriate, to wording used for more recently designated sanctuaries.

In Article V (Relation to Other Regulatory Programs), the ''Fishing'' section is revised to clarify the original intent that, although the Sanctuary does not have authority to regulate fishing, fishing vessels may be regulated with respect to discharge/deposit and anchoring in accordance with Article IV. No changes are being made to the ''Defense Activities'' section of the Designation Document.

Revised Designation Document for the Cordell Bank National Marine Sanctuary

Preamble

Under the authority of Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 *et seq.* (the ''Act''), the Cordell Bank and its surrounding waters offshore northern California, as described in Article 2, are hereby designated as the Cordell Bank National Marine Sanctuary (the Sanctuary) for the purpose of protecting and conserving that special, discrete, highly productive marine area and ensuring the continued availability of the conservation, ecological, research, educational, aesthetic, historical, and recreational resources therein.

Article I. Effect of Designation

The Sanctuary was designated on May 24, 1989 (54 FR 22417). Section 308 of the National Marine Sanctuaries Act, 16 U.S.C. 1431 *et seq.* (NMSA), authorizes the issuance of such regulations as are necessary to implement the designation, including managing, protecting and conserving the conservation, recreational, ecological, historical, cultural, archeological, scientific, educational, and aesthetic resources and qualities of the Sanctuary. Section 1 of Article IV of this Designation Document lists activities of the types that are either to be regulated on the effective date of final rulemaking or may have to be regulated at some later date in order to protect Sanctuary resources and qualities. Listing does not necessarily mean that a type of activity will be regulated; however, if a type of activity is not listed it may not be regulated, except on an emergency basis, unless Section 1 of Article IV is amended to include the type of activity by the same procedures by which the original designation was made.

Article II. Description of the Area

The Sanctuary consists of a 399 square nautical mile area of marine waters and the submerged lands thereunder encompassed by a boundary extending approximately 250° from the northernmost boundary of Gulf of the Farallones National Marine Sanctuary (GFNMS) to the 1,000 fathom isobath northwest of the Bank, then south along this isobath to the GFNMS boundary and back to the northeast along this boundary to the beginning point. The precise boundaries are set forth in the regulations.

Article III. Characteristics of the Area That Give It Particular Value

Cordell Bank is characterized by a combination of oceanic conditions and undersea topography that provides for a highly productive environment in a discrete, well-defined area. In addition, the Bank and its surrounding waters may contain historical resources of national significance. The Bank consists of a series of steep-sided ridges and narrow pinnacles rising from the edge of the continental shelf. It lies on a plateau 300 to 400 feet (91 to 122 meters) deep and ascends to within about 115 feet (35 meters) of the surface at its shallowest point. The seasonal upwelling of nutrient-rich bottom waters and wide depth ranges in the vicinity, have led to a unique association of subtidal and oceanic species. The vigorous biological community flourishing at Cordell Bank includes an exceptional assortment of algae, invertebrates, fishes, marine mammals and seabirds.

Article IV. Scope of Regulation

Section 1. Activities Subject to Regulation

The following activities are subject to regulation, including prohibition, as may be necessary to ensure the management, protection, and preservation of the conservation, recreational, ecological, historical, cultural, archeological, scientific, educational, and aesthetic resources and qualities of this area:

a. Depositing or discharging any material or substance;

b. Removing, taking, or injuring or attempting to remove, take, or injure benthic invertebrates or algae located on the Bank or on or within the line representing the 50 fathom isobath surrounding the Bank;

c. Hydrocarbon (oil and gas) activities within the Sanctuary;

d. Anchoring on the Bank or on or within the line representing the 50 fathom isobath surrounding the Bank;

e. Activities regarding cultural or historical resources;

f. Drilling into, dredging, or otherwise altering the submerged lands of the Sanctuary; or constructing, placing, or abandoning any structure, material, or other matter on or in the submerged lands of the Sanctuary;

g. Taking or possessing any marine mammal, marine reptile, or bird except as permitted under the Marine Mammal Protection Act, Endangered Species Act or Migratory Bird Treaty Act; and

h. Introducing or otherwise releasing from within or into the Sanctuary an introduced species.

Section 2. Consistency With International Law

The regulations governing activities listed in Section 1 of this Article shall apply to foreign flag vessels and foreign persons only to the extent consistent with generally recognized principles of international law, and in accordance with treaties, conventions, and other agreements to which the United States is a party.

Section 3. Emergency Regulations

Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality, or minimize the imminent risk of such destruction, loss, or injury, any and all activities, including those not listed in Section 1 of this Article, are subject to immediate temporary regulation, including prohibition, within the limits of the Act on an emergency basis for a period not to exceed 120 days.

Article V. Relation to Other Regulatory Programs

Section 1. Fishing

The regulation of fishing is not authorized under Article IV. All regulatory programs pertaining to fishing, including Fishery Management Plans promulgated under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq*. (''Magnuson-Stevens Act''), shall remain in effect. All permits, licenses, approvals, and other authorizations issued pursuant to the Magnuson-Stevens Act shall be valid within the Sanctuary. However, all fishing vessels are subject to regulation under Article IV with respect to discharges and anchoring.

Section 2. Defense Activities

The regulation of activities listed in Article IV shall not prohibit any Department of Defense (DOD) activities that are necessary for national defense. All such activities being carried out by DOD within the Sanctuary on the effective date of designation shall be exempt from any prohibitions contained in the Sanctuary regulations. Additional DOD activities initiated after the effective date of designation that are necessary for national defense will be exempted after consultation between the Department of Commerce and DOD. DOD activities not necessary for national defense, such as routine exercises and vessel operations, shall be subject to all prohibitions contained in the Sanctuary regulations.

Section 3. Other Programs

All applicable regulatory programs shall remain in effect, and all permits, licenses, approvals, and other authorizations issued pursuant to those programs shall be valid unless prohibited by regulations implementing Article IV.

Article VI. Alterations to This Designation

The terms of designation, as defined under section 304(a) of the Act, may be modified only by the same procedures by which the original designation is made, including public hearings, consultation with interested Federal, State, and local agencies, review by the appropriate Congressional committees and Governor of the State of California, and approval by the Secretary of Commerce or designee.

[END OF DESIGNATION DOCUMENT]

C. Revisions to the MBNMS Terms of Designation

NOAA is revising the MBNMS terms of designation to:

- Add Davidson Seamount Management Zone;
- Revise the description of activities that may be regulated to include additional activities; and
- Make minor updates to ensure the text reflects the current text of the NMSA and to ensure its description of the area is current.

1. Add Davidson Seamount Management Zone

NOAA is amending the MBNMS boundary description to include the Davidson Seamount Management Zone, a 775 square statute mile (585 square nautical mile) area defined by the geodetic lines connecting the coordinates provided in Appendix F to this subpart. The Davidson Seamount is located approximately 80 statute miles (70 nmi) to the southwest of Monterey, due west of San Simeon, and is home to a diverse assemblage of deep water organisms. This highly diverse community includes many endemic species and fragile, long-lived cold-water corals and sponges. NOAA also updates Article III, Characteristics of the Area that Give it Particular Value to include a discussion of the Davidson Seamount Management Zone.

2. List of Regulated Activities

NOAA is revising the MBNMS terms of designation to modify the list of activities that may be regulated. A priority issue identified during the management plan review was addressing the threat posed by introduced species. One of the recommended strategies for addressing this issue was to develop regulations prohibiting such releases. In addition, NOAA modifies the terms of designation to authorize regulation of the possession of a Sanctuary historical resource wherever the resource is found. The existing designation document currently lists as subject to regulation ''possessing within the Sanctuary a Sanctuary resource * * * ''. NOAA is making clear that a prohibition against possession of Sanctuary historical resources would apply outside the Sanctuary boundaries (e.g., at a harbor).

With these changes, the revised terms of designation now authorize regulation of: Activities regarding cultural or historic resources; placing or abandoning any structure, material, or other matter on or in the submerged lands of the Sanctuary; taking or possessing any marine mammal, sea turtle, or bird; introducing or otherwise releasing an introduced species from within or into the Sanctuary; and drilling into, dredging, altering, or constructing on the submerged lands.

3. Updates

NOAA is also modifying the MBNMS terms of designation to make minor punctuation improvements and to delete Appendices I and II of the MBNMS Designation Document and refer to the site regulations for sanctuary seaward boundaries and the location of four sites designated for disposal of dredged material. NOAA is also deleting outdated language related to study areas for dredged material disposal sites outside the MBNMS boundaries.

REVISED TERMS OF DESIGNATION DOCUMENT FOR THE MONTEREY BAY NATIONAL MARINE SANCTUARY

Preamble

Under the authority of Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended (the ''Act''), 16 U.S.C. 1431 *et seq*., Monterey Bay and the Davidson Seamount, and their surrounding waters offshore of central California, and the submerged lands under Monterey Bay and its surrounding waters, as described in Article II, and the Davidson Seamount Management Zone, as described in Article II, are hereby designated as the Monterey Bay National Marine Sanctuary (the Sanctuary) for the purposes of protecting and managing the conservation, ecological, recreational, research, educational, historical, and

esthetic resources and qualities of the area.

Article I. Effect of Designation

The Act authorizes the issuance of such regulations as are necessary and reasonable to implement the designation, including managing and protecting the conservation, recreational, ecological, historical, research, educational, and esthetic resources and qualities of the Sanctuary. Section 1 of Article IV of this Designation Document lists activities of the types that either are to be regulated on the effective date of designation or may have to be regulated at some later date in order to protect Sanctuary resources and qualities. Listing does not necessarily mean that a type of activity will be regulated; however, if a type of activity is not listed it may not be regulated, except on an emergency basis, unless section 1 of Article IV is amended to include the type of activity by the same procedures by which the original designation was made.

Article II. Description of the Area

The Sanctuary consists of two separate areas. (a) The first area consists of an area of approximately 4017 square nautical miles (nmi) of coastal and ocean waters, and submerged lands thereunder, in and surrounding Monterey Bay off the central coast of California. The northern terminus of the Sanctuary boundary is located along the southern boundary of the Gulf of the Farallones National Marine Sanctuary (GFNMS) beginning at Rocky Point just south of Stinson Beach in Marin County. The Sanctuary boundary follows the GFNMS boundary westward to a point approximately 29 nmi offshore from Moss Beach in San Mateo County. The Sanctuary boundary then extends southward in a series of arcs, which generally follow the 500 fathom isobath, to a point approximately 27 nmi offshore of Cambria, in San Luis Obispo County. The Sanctuary boundary then extends eastward towards shore until it intersects the Mean High Water Line (MHWL) along the coast near Cambria. The Sanctuary boundary then follows the MHWL northward to the northern terminus at Rocky Point. The shoreward Sanctuary boundary excludes a small area between Point Bonita and Point San Pedro. Pillar Point Harbor, Santa Cruz Harbor, Monterey Harbor, and Moss Landing Harbor are all excluded from the Sanctuary shoreward from the points listed in Appendix A of the site regulations except for Moss Landing Harbor, where all of Elkhorn Slough east of the Highway One bridge, and west of the tide gate at Elkhorn Road and toward the center channel from the MHWL is included within the Sanctuary, excluding areas within the Elkhorn Slough National Estuarine Research Reserve. Exact coordinates for the seaward boundary and harbor exclusions are provided in Appendix A of the site regulations.

(b) The Davidson Seamount Management Zone (DSMZ) is also part of the Sanctuary. This area, bounded by geodetic lines connecting a rectangle centered on the top of the Davidson Seamount, consists of approximately 585 square nmi of ocean waters and the submerged lands thereunder. The shoreward boundary of this portion of the Sanctuary is located approximately 65 nmi off the coast of San Simeon in San Luis Obispo County. Exact coordinates for the DSMZ boundary are provided in Appendix F of the site regulations.

Article III. Characteristics of the Area That Give It Particular Value

The Monterey Bay area is characterized by a combination of oceanic conditions and undersea topography that provides for a highly productive ecosystem and a wide variety of marine habitat. The area is characterized by a narrow continental shelf fringed by a variety of coastal types. The Monterey Submarine Canyon is unique in its size, configuration, and proximity to shore. This canyon system provides habitat for pelagic communities and, along with other distinct bathymetric features, may modify currents and act to enrich local waters through strong seasonal upwelling. Monterey Bay itself is a rare geological feature, as it is one of the few large embayments along the Pacific coast.

The Monterey Bay area has a highly diverse floral and faunal component. Algal diversity is extremely high and the concentrations of pinnipeds, whales, otters and some seabird species are outstanding. The fish populations, particularly in Monterey Bay, are generally abundant and the variety of crustaceans and other invertebrates is high.

In addition there are many direct and indirect human uses of the area. The most important economic activity directly dependent on the resources is commercial fishing, which has played an important role in the history of Monterey Bay and continues to be of great economic value.

The diverse resources of the Monterey Bay area are enjoyed by the residents of this area as well as numerous visitors. The population of Monterey and Santa Cruz counties is rapidly expanding and is based in large part on the attractiveness of the area's natural beauty. The high water quality and the resulting variety of biota and their proximity to shore is one of the prime reasons for the international renown of the area as a prime tourist location. The quality and abundance of the natural resources have attracted human beings from the earliest prehistoric times to the present and as a result the area contains significant historical, e.g., archaeological and paleontological, resources, such as Costanoan Indian midden deposits, aboriginal remains, and sunken ships and aircraft.

The biological and physical characteristics of the Monterey Bay area combine to provide outstanding opportunities for scientific research on many aspects of marine ecosystems. The diverse habitats are readily accessible to researchers. These research institutions are exceptional resources with a long history of research and large databases possessing a considerable amount of baseline information on the Bay and its resources, providing interpretive exhibits of the marine environment, docent programs serving the public and marine related programs for school groups and teachers.

The Davidson Seamount located offshore of California, 70 nmi southwest of Monterey, due west of San Simeon, and is one of the largest known seamounts in U.S. waters. Davidson Seamount is twenty-six statute miles long and eight statute miles wide. From base to crest, Davidson Seamount is 7,480 feet (2,280 meters) tall; yet still 4,101 feet (1,250 meters) below the sea surface. Davidson Seamount has an atypical seamount shape, having northeast-trending ridges created by a type of volcanism only recently described. It last erupted about 12 million years ago. This large geographic feature was the first underwater formation to be characterized as a ''seamount'' and was named after the Coast and Geodetic Survey (forerunner to the National Ocean Service) scientist George Davidson. Davidson Seamount's geographical importance is due to its location in the California Current, which likely provides a larger flux of carbon (food) to the sessile organisms on the seamount surface relative to a majority of other seamounts in the Pacific and may have unique links to the nearby Partington and Monterey submarine canyons.

The surface water habitat of the Davidson Seamount hosts a variety of seabirds, marine mammals, and pelagic fishes, e.g., albatrosses, shearwaters, sperm whales, killer whales, albacore

tuna, and ocean sunfish. Organisms in the midwater habitat have a patchy distribution, e.g., jellies and swimming worms, with marine snow, organic matter that continually ''rains'' down from the sea surface, providing an important food source for deep-sea animals. The seamount crest habitat is the most diverse of habitats in the Davidson Seamount area, including large gorgonian coral (e.g., *Paragorgia* sp.) forests, vast sponge fields (many undescribed species), crabs, deep-sea fishes, shrimp, and basket stars. The seamount slope habitat is composed of cobble and rocky areas interspersed with areas of ash and sediment, and hosts a diverse assemblage of sessile invertebrates and rare deep-sea fishes. The seamount base habitat is the interface between rocky outcrops and the flat, deep soft bottom habitat.

Davidson Seamount is home to previously undiscovered species and species assemblages, such as large patches of corals and sponges, where there is an opportunity to discover unique associations between species and other ecological processes. The high biological diversity of these assemblages has not been found on other California seamounts. Davidson Seamount's importance for conservation revolves around the endemism of seamount species, potential future harvest damage to coral and sponge assemblages, and the low resilience of these species. Abundant and large, fragile species (e.g., corals greater than eight feet tall, and at least 200 years old, as well as vast fields of sponges) and a physically undisturbed seafloor appear relatively pristine.

The final environmental impact statements (1992 and 2008) provide more detail on the characteristics of the Monterey Bay and Davidson Seamount area that give it particular value.

Article IV. Scope of Regulations

Section 1. Activities Subject to Regulation

The following activities are subject to regulation, including prohibition, to the extent necessary and reasonable to ensure the protection and management of the conservation, ecological, recreational, research, educational, historical, and esthetic resources and qualities of the Sanctuary:

a. Exploring for, developing, or producing oil, gas, or minerals (e.g., clay, stone, sand, metalliferous ores, gravel, non-metalliferous ores, or any other solid material or other matter of commercial value) within the Sanctuary;

b. Discharging or depositing, from within the boundary of the Sanctuary, any material or other matter, except dredged material deposited at disposal sites authorized prior to the effective date of Sanctuary designation, as described in Appendix C to the regulations, provided that the activity is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval existing on the effective date of Sanctuary designation;

c. Discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter, except dredged material deposited at the authorized disposal sites described in Appendix D to the site regulations, provided that the activity is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval;

d. Taking, removing, moving, catching, collecting, harvesting, feeding, injuring, destroying, or causing the loss of, or attempting to take, remove, move, catch, collect, harvest, feed, injure, destroy, or cause the loss of, a marine mammal, sea turtle, seabird, historical resource, or other Sanctuary resource;

e. Drilling into, dredging, or otherwise altering the submerged lands of the Sanctuary; or constructing, placing, or abandoning any structure, material, or other matter on or in the submerged lands of the Sanctuary;

f. Possessing within the Sanctuary a Sanctuary resource or any other resource, regardless of where taken, removed, moved, caught, collected, or harvested, that, if it had been found within the Sanctuary, would be a Sanctuary resource;

g. Possessing any Sanctuary historical resource;

h. Flying a motorized aircraft above the Sanctuary;

i. Operating a vessel (i.e., water craft of any description) within the Sanctuary;

j. Aquaculture or kelp harvesting within the Sanctuary;

k. Interfering with, obstructing, delaying, or preventing an investigation, search, seizure, or disposition of seized property in connection with enforcement of the Act or any regulation or permit issued under the Act; and

l. Introducing or otherwise releasing from within or into the Sanctuary an introduced species.

Section 2. Emergencies

Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality, or minimize the imminent risk of such destruction, loss, or injury, any and all activities, including those not listed in section 1 of this Article, are subject to immediate temporary regulation, including prohibition.

Article V. Effect on Leases, Permits, Licenses, and Rights

Pursuant to section 304(c)(1) of the Act, 16 U.S.C. 1434(c)(1), no valid lease, permit, license, approval, or other authorization issued by any Federal, State or local authority of competent jurisdiction, or any right of subsistence use or access, may be terminated by the Secretary of Commerce or designee as a result of this designation or as a result of any Sanctuary regulation if such authorization or right was in existence on the effective date of this designation. The Secretary of Commerce or designee, however, may regulate the exercise (including, but not limited to, the imposition of terms and conditions) of such authorization or right consistent with the purposes for which the Sanctuary is designated.

In no event may the Secretary or designee issue a permit authorizing, or otherwise approve: (1) The exploration for, development of or production of oil, gas, or minerals within the Sanctuary except for limited, small-scale jade collection in the Jade Cove area of the Sanctuary [defined as the area bounded by the 35.92222 N latitude parallel (coastal reference point: beach access stairway at South Sand Dollar Beach), the 35.88889 N latitude parallel (coastal reference point: westernmost tip of Cape San Martin), and the mean high tide line seaward to the 90 foot isobath (depth line)]; (2) the discharge of primary-treated sewage (except for regulation, pursuant to section 304(c)(1) of the Act, of the exercise of valid authorizations in existence on the effective date of Sanctuary designation and issued by other authorities of competent jurisdiction); or (3) the disposal of dredged material within the Sanctuary other than at sites authorized by the U.S. Environmental Protection Agency (in consultation with the U.S. Army Corps of Engineers) prior to the effective date of designation. Any purported authorizations issued by other authorities after the effective date of Sanctuary designation for any of these activities within the Sanctuary shall be invalid.

Article VI. Alterations to This Designation

The terms of designation, as defined under section 304(a) of the Act, may be modified only by the same procedures by which the original designation is made, including public hearings, consultation with interested Federal, State, and local agencies, review by the

appropriate Congressional committees and Governor of the State of California, and approval by the Secretary of Commerce or designee.

[END OF DESIGNATION DOCUMENT]

III. Summary of Regulatory Amendments

This section describes the changes NOAA is making to the regulations for the CBNMS, GFNMS, and the MBNMS (hereinafter the ''Sanctuaries'') to implement the management plan reviews for the three sanctuaries. Because the rationale behind the amendments to each sanctuary's regulations is similar or the same, the discussion of the changes has been grouped by subject area, except where explicitly noted otherwise. References in this section to ''former regulations'' are to the state of the regulations as they existed before this final rule becomes effective.

A. Update and Clarify the Regulations on Discharges

NOAA is modifying the regulatory prohibition on discharging or depositing material or other matter (hereafter ''discharge regulations'') into the Sanctuaries. The following regulatory changes are made to all three sanctuaries unless otherwise specified.

1. This rule clarifies the prohibition on discharging or depositing any material or other matter to make it clear that the regulation applies to discharges and deposits ''from within or into'' the Sanctuaries. Adding the word ''into'' is intended to clarify that the prohibition applies not only to discharges and deposits originating in the Sanctuaries (e.g., from vessels in the Sanctuaries), but also, for example, from discharges and deposits above the Sanctuaries.

2. This rule clarifies that the exception to the discharge/deposit prohibition for fish, fish parts, or chumming materials (bait) applies only to discharges or deposits made during the conduct of lawful fishing activities within the Sanctuaries.

3. This rule clarifies that the exception to the discharge prohibition for biodegradable effluent discharges/deposits from marine sanitation devices applies only to operable Type I or II marine sanitation devices approved by the United States Coast Guard in accordance with the Federal Water Pollution Control Act, as amended. Although the exception for vessel wastes ''generated by marine sanitation devices'' was intended to prohibit the discharge of untreated sewage into the Sanctuaries, it was unclear if it allowed discharges from Type III marine sanitation devices. Therefore, NOAA modifies its regulations to clarify that such discharges are only allowed if generated by properly functioning Type I or II marine sanitation devices. Type I and Type II marine sanitation devices treat wastes, but Type III marine sanitation devices store waste until it is removed at designated pump-out stations on shore or discharged at sea. Finally, the revised regulations also require vessel operators to lock all marine sanitation devices in a manner that prevents the discharge of untreated sewage. This requirement would aid in enforcement and compliance with Sanctuary regulations.

Note that in the response to comments ''biodegradable'' has been replaced with ''clean.'' See Section IV.

4. This rule eliminates the exception for discharging or depositing food waste resulting from meals onboard vessels into CBNMS and GFNMS. Coast Guard regulations prohibit all discharges of food wastes (garbage) within three nmi of land and require that they be ground to less than one inch when discharged between three and twelve nmi of land. This rule modifies the regulations for CBNMS and GFNMS to mirror the Coast Guard regulations, and to be consistent with the MBNMS regulations. This amendment provides increased protection to sanctuary resources and qualities from such marine debris vis-à-vis the Coast Guard regulations in the area of the two sanctuaries beyond three nmi.

5. This rule prohibits discharges/deposits originating beyond the boundary of the GFNMS that subsequently enters the sanctuary and injures a sanctuary resource or quality. ''Sanctuary resource'' is defined at 15 CFR 922.3 as ''any living or non-living resource of a National Marine Sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the Sanctuary, including, but not limited to, the substratum of the area of the sanctuary, other submerged features and the surrounding seabed, carbonate rock, corals and other bottom formations, coralline algae and other marine plants and algae, marine invertebrates, brine-seep biota, phytoplankton, zooplankton, fish, seabirds, sea turtles and other marine reptiles, marine mammals and historical resources.'' ''Sanctuary quality'' is defined at 15 CFR 922.3 as ''any of those ambient conditions, physical-chemical characteristics and natural processes, the maintenance of which is essential to the ecological health of the Sanctuary, including, but not limited to, water quality, sediment quality and air quality.'' This modification will help protect sanctuary resources and qualities from harmful influences originating outside the boundaries of the GFNMS. The coastal waters of the sanctuary, particularly the estuarine habitats of Bolinas Lagoon, Tomales Bay, Estero Americano and Estero de San Antonio, are vulnerable to land-based nonpoint source pollution from outside the sanctuary. Sources of concern include runoff, agriculture, marinas and boating activities, past mining, and aging and undersized septic systems. Water quality in offshore areas of the sanctuary could be threatened or impacted by large or continuous discharges from shore, spills by vessels, illegal dumping activities or residual contaminants from past dumping activities. The threat of an offshore oil spill is a constant reality near the busy shipping lanes in and adjacent to the sanctuary. CBNMS and MBNMS regulations already prohibit this activity. This modification makes the discharge/deposit regulations for the three sanctuaries consistent.

6. This rule eliminates in the GFNMS regulations the exceptions at § 922.84 for the disposal of dredged material at the interim dumpsite and the discharge of municipal sewage because they are no longer necessary. The exception for the disposal of dredged material at the ''interim dumpsite'' is no longer necessary because this site is no longer being used as a permanent dumpsite. The interim dumpsite, located approximately 10 nmi south of Southeast Farallon Island, is no longer in use. The permanent dumpsite outside the sanctuary has been in use for more than fifteen years, making this exception unnecessary. Similarly, since the designation of the sanctuary in 1981, there have been no applications to discharge municipal sewage into the sanctuary. Thus, this exception is also unnecessary. By removing these two exceptions, the discharge/deposit regulation has been streamlined, focusing on current and necessary exceptions to the prohibition.

7. In addition, this rule clarifies that current exceptions to the prohibition on discharges/deposits from vessels for graywater and deck wash down must be clean, meaning not containing detectable levels of harmful matter as defined. It clarifies that discharges/deposits from clean vessel deck wash down, clean vessel generator cooling water, clean vessel engine cooling water, clean bilge water, and anchor wash are excepted from the discharge/deposit prohibition. The discharge/deposit of oily wastes from bilge pumping has been and continues to be prohibited. However, this rule modifies

this prohibition by requiring that all bilge discharges/deposits be clean, meaning not containing detectable levels of harmful matter as defined. For purposes of determining detectable levels of oil in bilge discharges/deposits, a detectable level of oil is interpreted here to include anything that produces a visible sheen. This rule provides clarification regarding permitted contents of bilge water discharges/deposits.

The discharge/deposit of ballast water is already prohibited.

B. Prohibit Certain Discharges From Cruise Ships and Large Vessels

This rule amends the discharge regulations for the Sanctuaries to narrow the types of vessels that may discharge certain types of material or other matter.

This rule prohibits vessels 300 GRT or greater with sufficient holding tank capacity from discharging or depositing graywater, and effluent from any type of marine sanitation device. In the GFNMS and CBNMS the discharge/deposit of graywater is already prohibited and that remains unchanged. The former regulations did not make a distinction between sizes of vessels for discharge purposes. The regulations prohibiting discharge/deposit of treated sewage from vessels 300 GRT or more are consistent with existing state law applicable to state waters. The regulations now extend the prohibition to all waters of the national marine sanctuaries including federal waters. The regulation does not restrict vessels without capacity to hold the waste while in a national marine sanctuary.

The revised regulation better addresses NOAA's concerns about the potential impacts of discharges/deposits from large vessels in the Sanctuaries. Blackwater from vessels includes raw or treated sewage. Such discharges are more concentrated than domestic land-based sewage and may introduce disease-causing microorganisms (pathogens), such as bacteria, protozoans, and viruses, into the marine environment (EPA 2007). They may also contain high concentrations of nutrients that can lead to eutrophication (the process that can cause oxygen-depleted ''dead zones'' in aquatic environments), and may yield unpleasant esthetic impacts to the Sanctuary (diminishing Sanctuary resources and its ecological, conservation, esthetic, recreational and other qualities).

Graywater from vessels includes wastewater from showers, baths, and galleys. Graywater can contain a variety of substances including (but not limited to) detergents, oil and grease, pesticides and food wastes (Eley 2000). Very little research has been done on the impacts of graywater on the marine environment, but many of the chemicals commonly found in graywater are known to be toxic (Casanova *et al.* 2001). These chemicals have been implicated in the occurrence of cancerous growths in bottom-dwelling fish (Mix 1986). Furthermore, studies of graywater discharges from large cruise ships in Alaska (prior to strict state effluent standards for cruise ship graywater discharges) found very high levels of fecal coliform in large cruise ship graywater (well exceeding the federal standards for fecal coliform from Type II MSDs). These same studies also found high mean total suspended solids in some graywater sources (exceeding the federal standards for total suspended solids from Type II MSDs).

2. This rule revises the discharge/deposit regulations to implement additional restrictions on cruise ships. Under the revised discharge/deposit regulations, cruise ships are allowed to discharge or deposit only clean vessel engine cooling water, clean vessel generator cooling water, clean bilge water, and anchor wash into the Sanctuaries. Other discharges or deposits are no longer allowed in the Sanctuaries. Cruise ship discharges and deposits are more stringently regulated than other vessels to reduce the adverse effects on the marine environment from this growing source of pollutants.

The strict prohibition on cruise ships protects sanctuary water quality from the potentially large volume of wastewater that may be discharged by these vessels, while allowing them to continue to transit the Sanctuaries. ''Cruise ship'' is defined to mean: a vessel with 250 or more passenger berths for hire. Currently 643,000 cruise ship passengers embark annually from California ports in San Francisco Bay, Los Angeles, and San Diego. Ninety cruise ship arrivals and departures (Metropolitan Stevedore Company) were estimated at the San Francisco Passenger Terminal in 2006. Many of these cruise ships enter and exit the Bay through the northbound vessel traffic lanes, which transit through the Sanctuaries. Although partly constrained by the lack of local docking facilities, cruise ship visits are likely to increase as the fleet shifts from international to more domestic cruises, and as they begin to use a new cruise ship docking facility planned for San Francisco Bay.

Due to their sheer size and passenger capacity, cruise ships are able to generate larger volumes of a wide array of pollutants, which can cause serious impacts to the marine environment. The main pollutants generated by a cruise ship are: sewage, also referred to as blackwater; graywater; oily bilge water; hazardous wastes, and solid wastes. The large volumes of discharged effluent associated with cruise ships may not adequately disperse to avoid harm to marine resources. Based on EPA estimates, in one week a 3000-passenger cruise ship generates about 210,000 gallons of sewage, 1,000,000 gallons of graywater, 37,000 gallons of oily bilge water, more than 8 tons of solid waste, millions of gallons of ballast water containing potential invasive species, and toxic wastes from dry cleaning and photo-processing laboratories. Additionally, the volume of material from a cruise ship resulting from deck washdown greatly exceeds the volumes associated with other vessels used in the Sanctuaries. Although several laws and regulations partly address these issues, this regulation is needed to ensure a more comprehensive prohibition on cruise ship discharges/deposits within the Sanctuaries.

C. Clarify and Update the Regulation on Disturbing Sanctuary Areas

To ensure consistency among the regulations for the Sanctuaries, this rule implements a prohibition on drilling into, dredging, or otherwise altering the submerged lands, or constructing, placing or abandoning any structure, material, or other matter on or in the submerged lands of the Sanctuaries. While this prohibition has been in effect for the MBNMS since 1992, this is a new prohibition for the CBNMS, and updates the regulations for the GFNMS. As described below, this rule maintains some differences in the exceptions to the prohibition for the different sanctuaries.

This rule makes a technical change to the regulations by replacing the term ''seabed'' with ''submerged lands'' throughout the regulations for the Sanctuaries in order to be consistent with the NMSA, and to ensure that certain estuarine areas within the MBNMS, such as Elkhorn Slough, are described accurately. This change is necessary to eliminate any confusion created by the term ''seabed.''

This rule makes additional changes to the regulations for the GFNMS and the CBNMS to implement new prohibitions regarding disturbance to the submerged lands in these two sanctuaries. The revised regulations prohibit abandoning structures, materials, or other matter, for these two sanctuaries. The term ''abandoning'' means leaving without intent to remove, any structure, material, or other matter on or in the

submerged lands of the Sanctuaries. In addition to this provision, this rule implements a new provision in the CBNMS that prohibits drilling into, dredging or otherwise altering the submerged lands.

These prohibitions as they apply to the area within the 50-fathom isobath of the CBNMS, do not apply to use of bottom contact gear used during fishing activities. This activity is prohibited pursuant to 50 CFR part 660 (Fisheries off West Coast States). These prohibitions as they apply to the area outside of the 50-fathom isobath of the CBNMS, do not apply to the anchoring of any vessels, or the lawful use of fishing gear during normal fishing activities. The coordinates for the line representing the 50-fathom isobath are listed in Appendix B to the regulations. This regulation ensures the prominent geological features of the Bank, such as the pinnacles and ridges, are protected from permanent destruction from activities such as anchoring or exploratory activity.

For the GFNMS, NOAA revises the exception for the laying of pipelines related to hydrocarbon operations to clarify that the laying of pipelines is specifically limited to hydrocarbon operations that are adjacent to the GFNMS (i.e., bordering) rather than anywhere outside the sanctuary. This revision is made to protect sensitive sanctuary benthic habitats from impacts from disturbance. Additionally, in the GFNMS regulations, NOAA revises the prohibition regarding disturbance to the submerged lands, by removing the exception for ecological maintenance in the GFNMS regulations (formerly at 15 CFR 922.82(a)(3)(iii)). Ecological maintenance is not defined in the regulations or administrative record, which made it difficult to interpret, and thus the definition was removed to streamline the regulatory language. There is no record of the use of the ecological maintenance exception.

There are no exceptions to the prohibition against disturbing the submerged lands within the Davidson Seamount Management Zone of the MBNMS, other than as incidental and necessary to the conduct of lawful fishing activities. Fishing in the Davidson Seamount Management Zone below 3000 feet is prohibited under 50 CFR 660 (Fisheries off West Coast States). Please see the discussion on the Davidson Seamount Management Zone below for more information.

This regulation helps protect the Sanctuaries from, for example, unwanted debris, and adds protection to the shallow sand and mud deposits that make up the surrounding soft bottom of the continental shelf and slope of CBNMS, which are important habitats that provide support for the living resources of the sanctuary.

D. Prohibit the Desertion of Vessels

NOAA modifies the regulations for the GFNMS and MBNMS to prohibit the desertion of a vessel within these two sanctuaries. Leaving vessels unattended increases the likelihood of a calamitous event or the risk of sinking. These events could result in the discharge of harmful toxins, chemicals or oils into the marine environment, reducing water quality and impacting biological resources and habitats. In addition, the vessel itself could cause injury. This revision is not made for the CBNMS because that site is offshore and vessel abandonment is not a pressing resource issue.

To address concerns regarding the threats to the marine environment from deserted vessels, NOAA is prohibiting deserting a vessel aground, at anchor, or adrift in the GFNMS and the MBNMS. The term ''deserting'' means leaving a vessel aground or adrift: (1) Without notification to the Director of the vessel going aground or becoming adrift within 12 hours of its discovery and developing and presenting to the Director a preliminary salvage plan within 24 hours of such notification; (2) after expressing or otherwise manifesting intention not to undertake or to cease salvage efforts; or (3) when the owner/operator cannot after reasonable efforts by the Director be reached within 12 hours of the vessel's condition being reported to authorities. Deserting also means leaving a vessel at anchor when its condition creates potential for a grounding, discharge, or deposit and the owner/operator fails to secure the vessel in a timely manner.

This rule also prohibits leaving harmful matter aboard a grounded or deserted vessel in the GFNMS and MBNMS. Once a vessel is grounded or deserted, there is a high risk of discharge/deposit of harmful matter into the marine environment. Harmful matter aboard a deserted vessel also poses a threat to water quality. Preemptive removal of harmful matter (*e.g.*, motor oil) was not required by the former regulations. The prohibition implemented by this rule helps reduce or avoid harm to sanctuary resources and qualities from potential leakage of hazardous or other harmful matter from a vessel. This revision is not made for the CBNMS because that site is offshore and leaving harmful matter on abandoned vessels is not a pressing resource issue.

E. Clarify the Prohibition on Disturbing Historic Resources

NOAA modifies the regulation for the GFNMS and MBNMS to amend the prohibitions regarding removing or damaging any historical or cultural resource. For the GFNMS, this rule adds ''moving'' and ''possessing'' to the existing prohibition; replaces ''damage'' with ''injure,'' a term defined at 15 CFR 922.3; and adds the word ''attempting'' to move, remove, injure, or possess as a prohibition. This modification provides added protection to the fragile, finite, and non-renewable resources so they may be studied, and appropriate information may be made available for the benefit of the public. (The MBNMS regulations already contain these terms.)

For the GFNMS, this rule replaces the phrase ''historical or cultural resource'' with ''Sanctuary historical resource'' to be consistent with regulatory language used at more recently designated national marine sanctuaries, *e.g.*, the MBNMS. The term ''historical resource'' is defined in NMSP program-wide regulations as ''any resource possessing historical, cultural, archaeological or paleontological significance, including sites, contextual information, structures, districts, and objects significantly associated with or representative of earlier people, cultures, maritime heritage, and human activities and events. Historical resources include ''submerged cultural resources,'' and ''historical properties,'' as defined in the National Historic Preservation Act, as amended, and its implementing regulations, as amended.'' (15 CFR 922.3).

This rule prohibits the possession of a sanctuary historical resource either within or outside the sanctuary. The clarification will increase protection of sanctuary resources by making it illegal to possess historical resources in any geographic location. For example, this rule makes it illegal to have an artifact taken from a shipwreck in MBNMS even if you are no longer in the sanctuary.

F. Prohibit the Take and Possession of Certain Species

NOAA modifies its regulations for the GFNMS and the CBNMS to include a new prohibition on take of marine mammals, birds, and sea turtles, except as authorized by the Marine Mammal Protection Act, as amended (16 U.S.C. 1361 *et seq.*) (MMPA), Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*) (ESA), Migratory Bird Treaty Act, as amended (16 U.S.C. 703 *et seq.*) (MBTA), or any regulation, as amended, promulgated under one of these acts. ''Take'' is defined in the

NMSP program-wide regulations at 15 CFR 922.3. This rule prohibits possessing within the CBNMS and the GFNMS (regardless of where taken, moved, or removed from) any marine mammal, bird (including, but not limited to, seabirds, shorebirds and waterfowl) within or above the two sanctuaries or sea turtle except as authorized under the MMPA, the ESA, the MBTA, and any regulations, as amended, promulgated under these acts. This regulation provides a stronger deterrent for violations of existing laws designed to protect marine mammals, birds, or sea turtles, than that offered by those other laws alone and is consistent with regulatory language used at more recently designated national marine sanctuaries, *e.g.*, the MBNMS. This regulation does not apply to activities (including a federally or state-approved fishery) that have been authorized under the MMPA, ESA, or MBTA or an implementing regulation. Therefore, under this regulation, if the National Marine Fisheries Service (NMFS) or the United States Fish and Wildlife Service (USFWS) issues a permit for, or otherwise authorizes, the take of a marine mammal, bird, or sea turtle, the permitted or authorized taking is allowed under this rule and would not require an additional sanctuary permit unless the activity also violates another provision of the sanctuary's regulations.

The intent of this regulation is to bring a special focus to the protection of the diverse and vital marine mammal, bird, and sea turtle populations of the Sanctuaries. This area-specific focus is complementary to efforts of other resource protection agencies, especially given that other federal and state authorities spread limited resources over much wider geographic areas.

This prohibition also complements the provisions of the GFNMS regulations prohibiting disturbing birds or marine mammals by flying motorized aircraft at less than 1000 feet over the waters within one nmi of the Farallon Islands, Bolinas Lagoon, or any ASBS. This provision remains unique and important in that it provides special focus on a specific type of activity, operation of motorized aircraft, within particularly sensitive environments of the GFNMS. The MBNMS regulations already contain this take and possession prohibition. There is a minor wording change to conform to the new GFNMS and CBNMS prohibition.

G. Prohibit the Introduction of Introduced Species

This rule prohibits introducing or otherwise releasing from within or into the Sanctuaries an introduced species, except: (1) striped bass (*Morone saxatilis*) released in the Sanctuaries during catch and release fishing; and (2) species cultivated by mariculture in Tomales Bay (in the GFNMS), pursuant to a valid lease, permit, license or other authorization issued by the State of California.

The term ''introduced species'' is defined as: any species (including but not limited to any of its biological matter capable of propagation) that is non-native to the ecosystems of the Sanctuary; or any organism into which altered genetic matter, or genetic matter from another species, has been transferred in order that the host organism acquires the genetic traits of the transferred genes.

During consultations with the State of California, concern was expressed that striped bass would qualify as an introduced species and that an angler who catches and then releases a striped bass would be in violation of the proposed regulation. While prohibiting such activity is not the intent of the regulation, to address this concern, the regulation now exempts striped bass, the only introduced species for which there is an active fishery. Striped bass were intentionally introduced in California in 1879, and in 1980 the California Department of Fish and Game initiated a striped bass hatchery program to support the striped bass sport fishery, which according to the California Department of Fish and Game is an important fishery on the Pacific Coast. The California Department of Fish and Game manages the striped bass fishery through a Striped Bass Management Conservation Plan.

The prohibition also does not apply to species cultivated by mariculture activities in Tomales Bay in the GFNMS, pursuant to a valid lease, permit, license or other authorization issued by the State of California. There are twelve active state water bottom mariculture leases in Tomales Bay managed by the California Department of Fish and Game. Three leases have been recently renewed: M–430–19 (Marin Oyster Company, 2001), M430–05 (Tomales Bay Oyster Company, 2002), and M–430–06 (Cove Mussel Company, 2002).

The other nine leases were issued in the 1980s and have not yet come up for renewal. The exception to the introduced species prohibition grandfathers in the renewals of existing current lease agreements in effect on the effective date of the final regulation that allow for the introduction of introduced species as specified in these original lease agreements. However, new lease agreements executed after the effective date of this rule are subject to this prohibition. Operations conducted under new lease agreements could cultivate native species but not introduced species. NOAA is not aware of any pending lease applications.

The prohibition against introducing species into the Sanctuaries is designed to help reduce the risk from introduced species, including their seeds, eggs, spores, and other biological material capable of propagating. The intent of the prohibition is to prevent injury to the Sanctuaries' resources and qualities, to protect the biodiversity of sanctuary ecosystems, and to preserve the native functional aspects of sanctuary ecosystems, which are put at risk by introduced species. Introduced species may become a new form of predator, competitor, disturber, parasite, or disease that can have devastating effects upon ecosystems. For example, introduced species impacts on native coastal marine species of the Sanctuaries could include: replacement of a functionally similar native species through competition; reduction in abundance or elimination of an entire population of a native species, which can affect native species richness; inhibition of normal growth or increased mortality of the host and associated species; increased intra- or interspecies competition with native species; creation or alteration of original substrate and habitat; hybridization with native species; and direct or indirect toxicity (e.g., toxic diatoms). Changes in species interactions can lead to disrupted nutrient cycles and altered energy flows that ripple with unpredictable results through an entire ecosystem. Introduced species may also pose threats to endangered species and native species diversity.

For example, a number of non-native species now found in the Gulf of the Farallones and Monterey Bay regions were introduced elsewhere on the west coast but have spread through vessel hull-fouling, ballast water discharge, and accidental introductions. In the MBNMS, the European green crab, now found in Elkhorn Slough, both preys on the young of valuable species (such as Dungeness crab) and competes with them for resources. Introduced species may also cause changes in physical habitat structure. For example, burrows caused by the isopod *Sphaeroma quoyanum*, originally from New Zealand and Australia, are found in banks throughout the Elkhorn Slough, and may exacerbate the high rate of tidal erosion in the Slough. Introduced species pose a significant threat to the natural biological communities and ecological processes in the MBNMS and

may have a particularly large impact on the sanctuary's twenty-six threatened and endangered species.

Introduced species are also a major economic and environmental threat to the living resources and habitats of the Sanctuaries as well as the commercial and recreational uses that depend on these resources. Once established, introduced species can be extremely difficult, if not impossible, to eradicate. Introduced species have become increasingly common in recent decades, and the rate of invasions continues to accelerate at a rapid pace. Estuaries are particularly vulnerable to invasion; and large ports, such as San Francisco Bay, can support hundreds of introduced species with significant impacts to native ecosystems.

H. Prohibit the Attraction of White Sharks

This rule expands the prohibition on attracting white sharks in state waters of the MBNMS to the entire MBNMS and GFNMS. It also prohibits approaching within 50 meters of a white shark within 2 nmi around the Farallon Islands. Attract or attracting means the conduct of any activity that lures or may lure any animal in the Sanctuary by using food, bait, chum, dyes, decoys (e.g., surfboards or body boards used as decoys), acoustics or any other means, except the mere presence of human beings (e.g., swimmers, divers, boaters, kayakers, surfers).

Disturbance related to human interaction is increasing as a result of controversial cage shark diving operations, also known as adventure tourism, and other wildlife watching operations. These activities may degrade the natural environment, impacting the species as a whole, and individual sharks may be negatively impacted from repeated encounters with humans and boats. Implementing these regulations will resolve user conflicts (between shark researchers and adventure tourism) and prevent interference with the seasonal feeding behavior of white sharks. Reducing human interaction and chumming would decrease the impacts on natural shark behavior. This regulation is not expected or intended to impact any current lawful fishing activities within the GFNMS and MBNMS. The purpose of this prohibition is to protect white sharks from intrusive activities during their critical feeding life-cycle in the GFNMS and the MBNMS.

With respect to the MBNMS, this rule modifies the regulations to expand the prohibition against shark attraction to the entire sanctuary. White sharks have experienced disturbance from cage diving operations, filming, and other wildlife watching operations. The former regulations prohibited white shark attraction activities within specific areas of the sanctuary, including the area out to the seaward limit of state waters (three miles from the coastline). This rule extends the prohibition to the entire sanctuary.

I. Prohibit Anchoring in Certain Zones of Tomales Bay in the GFNMS

This rule prohibits anchoring a vessel in a designated no-anchoring seagrass protection zone in Tomales Bay. This prohibition does not apply to vessels anchoring as necessary for mariculture operations that are conducted pursuant to a valid lease, permit, or license. For the purposes of this regulation, anchoring refers to the dropping and placement of an anchor that is attached to a vessel, and which, being cast overboard, retains the vessel in a particular station.

There are a total of seven no-anchoring zones implemented in this regulation, which comprise 22% of the surface area of Tomales Bay. The location and extent of the no-anchoring zones encompass the known seagrass coverage and are based upon seagrass data provided by California Department of Fish and Game from 1992, 2000, 2001 and 2002. The no-anchoring seagrass protection zones include some areas where seagrass coverage is extensive and other areas where coverage is discontinuous and patchy. All zones extend shoreward to the Mean High Water Line (MHWL). Also, the extent of the seagrass beds can change over time. NOAA will review and update periodically the adequacy of these zones, as needed, based on new seagrass monitoring data.

This prohibition protects seagrass beds in Tomales Bay from the destructive effects of anchoring vessels. Seagrass means any species of marine angiosperms (flowering plants) that inhabit portions of the seabed in the Sanctuary. Those species include, but are not limited to: *Zostera asiatica* and *Zostera marina*. Seagrass beds are commonly found in tidal and upper subtidal zones and foster high levels of biological productivity. Seagrass beds are located throughout the sanctuary in estuaries, bays and lagoons, such as Tomales Bay, Bolinas Lagoon, Estero de San Antonio and Estero Americano. Seagrass species within GFNMS jurisdiction, including *Zostera marina* and *Gracilaria spp.*, cover an estimated 397 hectares (1.5 mi^2) or 13% of Tomales Bay. The seagrass beds help trap sediments and reduce excess nutrients and pollutants in the water column and thereby contribute towards the Bay's high water quality. Seagrass provides breeding and nursery grounds for fish such as herring, which attach their eggs to the seagrass blades. Seagrass beds also provide important habitats for migratory birds, such as shorebirds, who feed upon the abundant fish and invertebrate species that live in the seagrass beds. Disappearance of this habitat poses a particular threat to vulnerable species worldwide. Seagrass beds also serve as buffer zones in protecting coastal erosion and are a filter for pollutants.

J. Clarify and Update the Use of Motorized Personal Watercraft in MBNMS

This rule (1) updates the definition of motorized personal watercraft (MPWC) for MBNMS, and (2) adds a new seasonal MPWC zone to the Pillar Point area. Implementing this modified definition will help fulfill the original intent of the regulation and its zoning restriction, namely to avoid disturbance and other injury of marine wildlife by MPWCs, minimize user conflicts between MPWC operators and other recreationalists, and continue to provide opportunities for MPWC within the MBNMS. The new MPWC zone is restricted to periods of high surf warnings and during winter months. This additional exception accommodates recreational activities in the area without impacting Sanctuary uses or exacerbating user conflicts.

NOAA received comments that the Mavericks surf break at Half Moon Bay was a unique big wave tow-in surfing location in the continental United States, accessible only by MPWC tow-in techniques and should be given special consideration for MPWC access. See discussion in Appendix A of the DEIS at page 18–19 (of Appendix 1). Based upon the evidence that Mavericks was such a special national sporting venue, NOAA investigated whether allowing MPWC operations at that location could be accomplished in a manner compatible with the Sanctuary's primary goal of marine resource protection. As a result of the review this rule establishes a new MPWC zone off Pillar Point Harbor that will allow for recreational access via MPWC to the Mavericks surf break during National Weather Service High Surf Warnings issued for San Mateo County during December, January, and February. High Surf Warning conditions from December through February are not likely to occur at Mavericks more than 3–4 days per year. These are the conditions that create oversized wave face, for which motorized tow-in support is necessary.

They are the very conditions that big wave tow-in surfers desire and that have made Mavericks a world renowned surf break. Surfers and other water users not operating MPWC will have access to Mavericks year-round, so the presence of MPWC at the site for potentially 1% of the year will not significantly disrupt other recreational activities there. Furthermore, during High Surf Warning conditions, most people do not enter the ocean, further reducing potential user conflicts due to MPWC operations at Mavericks.

MPWC are small, fast, and highly maneuverable craft that possess unconventionally high thrust capability and horsepower relative to their size and weight. Their small size, shallow draft, instant thrust, and ''quick reflex'' enable them to operate closer to shore and in areas that would commonly pose a hazard to conventional craft operating at comparable speeds. Resources such as sea otters and seabirds are either unable to avoid these craft or are frequently alarmed enough to significantly modify their behavior such as cessation of feeding or abandonment of young. Tow-in surfing activity using MPWC has been increasing at many traditional surfing locations in the MBNMS, regardless of surf conditions. The MBNMS has received complaints by surfers, beachgoers, and coastal residents that the use of MPWC in traditional surfing areas has produced conflicts with other ocean users and has caused disturbance of wildlife. During the designation of the MBNMS, the operation of MPWC in nearshore areas was identified as an activity that should be prohibited to avoid such impacts. NOAA's rationale and authority to impose such restrictions were affirmed in *Personal Watercraft Industry Association, et al.* v. *Department of Commerce*, 48 F.3d 540 (D.C. Cir. 1995). The former regulations restricted MPWC to specific zones within the MBNMS; however, the definition did not cover all types of existing MPWC. Watercraft that were larger and that could accommodate three or more persons were not subject to the regulations because the former definition did not define them as MPWC. The former regulations therefore did not fully address the threat posed by MPWC to marine resources and the issue of user conflict. To address these concerns, the new definition of MPWC covers all categories of MPWC and therefore eliminates the loophole in the former regulations. The changes expand the definition of MPWC to address a broader range of watercraft that are restricted.

Under the new definition, MPWC means (1) any vessel, propelled by machinery, that is designed to be operated by standing, sitting, or kneeling on, astride, or behind the vessel, in contrast to the conventional manner, where the operator stands or sits inside the vessel; (2) any vessel less than 20 feet in length overall as manufactured and propelled by machinery and that has been exempted from compliance with the U.S. Coast Guard's Maximum Capacities Marking for Load Capacity regulations found at 33 CFR Parts 181 and 183, except submarines; or (3) any other vessel that is less than 20 feet in length overall as manufactured, and is propelled by a water jet pump or drive. Part 1 of the definition focuses on operating characteristics and is not constrained by hull design or propulsion unit specifications. Part 2 focuses on high-speed hull designs that shed water (e.g., Kawasaki Corporation's Jet Ski line) and is not constrained by propulsion unit specifications or operating characteristics. Part 3 focuses on jet boats that share the same operating capabilities as craft that meet the definition under parts 1 and 2 but where passengers sit inside the craft.

The new definition is intended to effectively identify all craft of concern without inadvertently restricting other watercraft by including them in the definition. The former definition was insufficient to meet NOAA's original goal of restricting the operation of small, highly maneuverable watercraft within the boundaries of the MBNMS. It did not encompass the majority of MPWC operating within the MBNMS because it was based upon outdated MPWC design characteristics of the early 1990s. Since 1992, MPWC manufacturers have built increasingly larger craft with 3+ passenger riding capacity or varied design characteristics that place these craft outside the former MBNMS regulatory definition. These newer craft effectively skirt the definition, yet they retain or exceed the performance capabilities of their predecessors that pose a threat to Sanctuary resources and qualities. The former definition was based solely upon static design characteristics that have rendered it obsolete and ineffective over time. NOAA has therefore developed a more flexible, integrated three-part definition that will continue to be relevant even in light of continuing MPWC design changes. Should a future MPWC design unexpectedly displace any one part of the definition, one or both of the remaining two parts would still apply to sustain the intent of the definition.

Though the vast majority of MPWC operated in the Sanctuary today are similar to Kawasaki Corporation's classic Jet Ski design, a variety of craft are currently marketed that are equally maneuverable at high speeds, with shallow drafts and powerful thrust/weight ratios. One such innovation involves a remotely operated water-jet propulsion pod controlled via a tow line by a skier behind the pod. Water-jet propelled surf boards are also available. Small, highly maneuverable jet boats have also entered the market. These non-conventional watercraft designs demonstrate the creative variations in MPWC that warrant a more resilient regulatory definition.

Part 1 of the definition is similar to current definitions of MPWC used by the Gulf of the Farallones and Florida Keys National Marine Sanctuaries, the National Park Service, and the State of California's Harbor and Navigation Code. However, it differs by omitting reference to particular hull design, length, or propulsion system in order to prevent the definition from becoming obsolete over time due to the rapidly evolving MPWC design. It also no longer includes a reference to a speed threshold. This language was difficult to enforce and did not sufficiently encompass those vessels of concern to the NOAA. The new definition also identifies a wide variety of riding postures common to the unconventional vessel designs that pose a threat to Sanctuary resources and qualities. These threats arise because these design features increase the vessel's maneuverability and allow riders to enter shallow water zones and areas adjacent to small islands and off-shore rocks used by marine mammals and seabirds as breeding, nursing, and resting areas. Although part 1 identifies the operating characteristics of most vessels of concern at the present time, it alone does not reach all craft of concern. For this reason, parts 2 and 3 were included in the definition.

Part 2 utilizes an existing U.S. Coast Guard regulation to identify many existing and future vessel designs that pose a threat to Sanctuary resources and qualities. The Coast Guard requires special testing for most powered vessels under 20 feet in length. This is due to the unique stability and displacement characteristics of these vessels that affect passenger safety (33 CFR part 183). The weight/size ratio of these small craft presents a higher risk of swamping, capsizing, sinking, and passenger dismount. The Coast Guard requires that the results of the vessel stability tests be printed on a capacity plate affixed to each vessel design for which the special testing is required (33 CFR part 181). A key component of the Coast Guard's regulation is a stability

test. To conduct this test, weight is systematically added to the outer hull until it tips to the waterline, allowing water to flood into the vessel. From such tests, computations can be made to determine the maximum safe passenger and cargo loading capacity for that vessel design.

Some high-speed unconventional vessels (e.g., jet bikes, hovercraft, air boats, and race boats) are designed without carrying spaces that hold water. In other words, their hull designs prevent flooding, because they do not have open hulls into which water will flow. Since this design feature makes it impossible to complete the tests required by 33 CFR Part 183, the manufacturers of such craft routinely seek and receive exemptions from these testing and labeling requirements.

With the exception of submarines, the ''powered'' surface vessel designs that are exempted from the Coast Guard regulations at 33 CFR parts 181 and 183 (e.g., jet bikes, hovercraft, air boats, and race boats) possess two or more of the following characteristics: Robust buoyancy, are capable of rapid acceleration, are capable of high maneuverability at speed, and have a shallow draft. These and other associated design characteristics afford such vessels unique access and operability within sensitive marine areas (e.g., marine mammal and seabird enclaves). This fact poses a threat to Sanctuary resources and qualities—the same threat that prompted regulatory restrictions on the operation of such hull designs within the MBNMS in 1992. By using the Coast Guard's maximum capacity standard (33 CFR Parts 181 and 183) in part 2 of the definition, NOAA can effectively and precisely identify various vessels of concern while avoiding an excessively complicated and lengthy definition for MPWC. Although part 2 of the definition includes some vessel designs already captured by part 1, it compensates for static aspects of part 1 that could result in a regulatory loophole due to rapidly evolving MPWC designs, as has happened with the former definition.

Parts 1 and 2 largely address problems caused by non-conventional hull designs, which allow the user to enter sensitive and important wildlife habitats. But they do not adequately address the emergence of small, conventional hulls powered by water jet propulsion systems. Jet propulsion systems give vessels many of the same operating characteristics and capabilities of the previously identified vessels of concern (e.g., rapid acceleration, high maneuverability at speed, and shallow draft). They therefore allow these vessels to operate in areas where wildlife is most frequently found. Part 3 was thus developed to include these small craft in the definition. Jet propulsion vessels that are longer than twenty feet do not generally possess these same operational characteristics and capabilities, and are thus excluded from the definition. Further, Coast Guard regulations often categorize small boats as less than 20 feet in length. NOAA has similarly adopted this standard to differentiate between smaller and larger jet-propelled vessels.

K. Incorporate Davidson Seamount Management Zone (DSMZ) Into MBNMS

This rule defines and incorporates the DSMZ into the MBNMS, and establishes a unique set of prohibitions for that area. The shoreward boundary of the DSMZ is located 75 statue miles (65 nmi) due west of San Simeon, and is one of the largest known seamounts in U.S. waters. It is 26 statute miles long and 8 miles wide. From base to crest, the Davidson Seamount is 7,480 feet (2,280 meters) tall, yet it is still 4,101 feet (1,250 meters) below the sea surface. Threats from fishing are relatively remote; the top of the seamount is too deep for most fish trawling technology. However, future fishing efforts could target the seamount.

NOAA determined the Davidson Seamount requires protection from the take or other injury to benthic organisms or those organisms living near the sea floor because of the seamount's special ecological and fragile qualities and potential future threats that could adversely affect these qualities. For example, the crest of the seamount supports large gorgonian coral forests, vast sponge fields, crabs, deep sea fishes, shrimp and basket stars.

NOAA consulted with the Pacific Fishery Management Council (PFMC) on the most appropriate level of resource protection for the Davidson Seamount and the various means for achieving it. This consultation coincided with the culmination of the PFMC's separate, longer-term efforts to identify and protect Essential Fish Habitat (EFH) on the West Coast. The PFMC unanimously supported the incorporation of the seamount into the MBNMS, but recommended that protection from fishing impacts be achieved by including Davidson Seamount as one of the areas considered for protection as EFH under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (at 50 CFR part 660). NOAA subsequently approved and implemented this recommendation by designating Davidson Seamount as EFH and prohibiting all fishing below 3000 feet in the area proposed to be included in the MBNMS (71 FR 27408, May 11, 2006).

In order to protect its resources and provide opportunities for a better understanding of the seamount, this rule incorporates into the MBNMS a square area of approximately 29 statute miles (25 nmi) per side. The incorporated area includes the water and submerged lands thereunder. This rule prohibits moving, removing, taking, collecting, catching, harvesting, disturbing, breaking, cutting, or otherwise injuring, or attempting to move, remove, take, collect, catch, harvest, disturb, break, cut, or otherwise injure, any sanctuary resource located more than 3,000 feet below the sea surface within the DSMZ. It also prohibits possessing any sanctuary resource the source of which is more than 3,000 feet below the sea surface within the DSMZ. Although the prohibitions do not apply to commercial and recreational fishing (or possession resulting from such activity) below 3000 feet within the DSMZ, these activities are prohibited under 50 CFR part 660 (Fisheries off West Coast States). The Sanctuary regulations do, however, prohibit resource extraction conducted for research purposes, as research extraction is not within the scope of 50 CFR part 660.

Preexisting Activities in the DSMZ

1. *Military activities.* Most of the prohibitions in the MBNMS regulations do not apply to military activities that were conducted by the Department of Defense prior to the 1992 designation of the MBNMS and listed in the 1992 FEIS. For purposes of the DSMZ, the date of designation is the effective date of this rule and the germane FEIS is the 2008 FEIS. This means that the military activities identified in the 2008 FEIS are exempted from the indicated MBNMS regulations within the DSMZ.

2. *Non-military activities.* Section 304(c) of the NMSA provides that: ''Nothing in this chapter shall be construed as terminating or granting to the Secretary the right to terminate any valid lease, permit, license, or right of subsistence use or of access that is in existence on the date of designation of any national marine sanctuary.'' This provision is implemented by National Marine sanctuary Program Regulations at 15 CFR 922.47.

Although NOAA is not aware of any non-military activities being conducted in the DSMZ, anyone who has a preexisting activity in the DSMZ that

falls within section 304(a) of the NMSA may request certification of that activity by filing a formal application to NOAA within 90 days of the effective date of this rule.

L. Codify Preexisting Dredged Material Disposal Sites in MBNMS

This rule clarifies the location of areas where dredged material may be disposed within MBNMS by codifying and clearly identifying the coordinates of four disposal sites: (1) SF–12 outside Moss Landing at the head of Monterey Canyon; (2) SF–14 offshore of Moss Landing; (3) Twin Lakes Disposal Site outside Santa Cruz Harbor; and (4) Monterey Disposal Site adjacent to Wharf 2 near Monterey Harbor. All four sites were approved by the U.S. Environmental Protection Agency and Army Corps of Engineers and have been in use since before the MBNMS designation in 1992. The former MBNMS regulations did not include the coordinates for these sites. To ensure these sites are used appropriately and accurately, this final rule contains a table in the Appendix that includes the coordinates.

M. Update and Clarify Permitting Regulations for the Sanctuaries

This rule makes a number of changes the former permitting regulations.

1. NOAA amends its regulations to modify the GFNMS permit regulations to add ''assist in the managing of the Sanctuary'' to the list of the types of activities for which a permit may be issued. This addition provides the Director authority to issue permits for otherwise prohibited activities in order to further Sanctuary management.

2. This rule also modifies the permit regulations for the GFNMS and CBNMS to strengthen and augment the factors that NOAA considers when evaluating applications and issuing permits. Under this rule, NOAA may not issue a permit unless it first considers certain additional factors, including but not limited to, the manner in which the activity will be conducted and whether it is compatible with the primary objective of protection of Sanctuary resources and qualities, considering the extent to which the conduct of the activity may diminish or enhance Sanctuary resources and qualities, any potential indirect, secondary, or cumulative effects of the activity, and the duration of such effects; and the necessity to conduct the activity within the Sanctuary.

3. This rule also modifies the permit application process to require applicants to submit information that addresses the factors that the Director must consider in order to issue a permit.

4. Finally, this rule modifies the regulations to require the permittee to hold the United States harmless against any claims arising out of the permitted activities.

N. Implement Other Technical Changes and Updates

1. Clarify that ''submerged lands'' are within the Sanctuaries'' boundary, (i.e., part of the GFNMS and CBNMS). This updates the boundary regulation to make it consistent with the NMSA and revised terms of designation.

2. Update the calculation for the area of the GFNMS. Since designation the area of GFNMS has been described as approximately 948 square nautical miles. However, adjusting for technical corrections and using updated technologies, the GFNMS area is now calculated to be approximately 966 square nautical miles. The legal description of GFNMS is updated to reflect this change. This update does not constitute a change in the geographic area of the GFNMS but rather represents a more precise measurement of its size.

3. Permanently fix the shoreward boundary of the GFMNS adjacent to Point Reyes National Seashore (PRNS). The 1981 designation of GFNMS linked the boundary to the seaward limit of PRNS. Since then, the National Park Service has made at least two boundary modifications to the PRNS in areas adjacent to the GFNMS, requiring NOAA to redefine the GFNMS boundary, the geographic extent of its authority, and enforcement and implementation of programs. Fixing the shoreward boundary of the GFNMS adjacent to PRNS as it was at the time of GFNMS designation in 1981 by coordinates using the North American Datum of 1983 ensures consistency and continuity for the boundary, sanctuary management and user groups.

4. Technical corrections to the CBNMS boundary and the boundary coordinates are based on the North American Datum of 1983. Since designation, the area of CBNMS has been described as approximately 397 square nautical miles. However, adjusting for technical corrections and using updated technologies, the CBNMS area is now accurately described as approximately 399 square nautical miles. The legal description of CBNMS reflects this change. This update does not constitute a change in the geographic area of the Sanctuary but rather represents a more precise measurement of its size.

5. Additional changes to the Sanctuaries' regulations include grammatical and technical changes to the permitting procedures section to remove extraneous language concerning standard permit conditions and to add clarity to the necessary findings and considerations for issuance of a permit.

6. The changes also include technical changes to the MBNMS boundaries, which are referenced in Appendix A to the MBNMS regulations below. With the exception of adding Davidson Seamount, discussed above, the minor changes are for purposes of clarifying existing MBNMS boundaries.

IV. Comments and Responses

During the public comment period, NOAA received over 17,250 written comments, some of which were submitted as part of a mass mailing campaign. NOAA conducted 7 information sessions and 7 public hearings to gather additional input. Written and verbal comments were compiled and grouped by general topics into general topics and specific sub-issues. Substantive comments received are summarized below, followed by NOAA's response. Multiple but similar comments have been treated as one comment for purposes of response. Comments beyond the scope of the proposed action are neither summarized nor responded to. NOAA summarized the comments according to the content of the statement or question put forward in written statements or oral testimony regarding the proposed actions. NOAA made appropriate changes to the FEIS and Sanctuary Management Plans in response to the comments including updates to socioeconomic and ecological data where the comments affect the impact analysis or is relevant to the sanctuary action plans. Several technical or editorial comments on the DEIS and Management Plans were also taken under consideration by NOAA and, where appropriate, applied to the FEIS and/or Management Plans. These comments are not however included in the list below.

Alteration of or Construction on the Seabed

Anchoring on Cordell Bank

Comment: The Cordell Bank regulation regarding anchoring outside the 50-fathom line should be edited to make clear that anchoring is only allowed in conjunction with lawful fishing activities, with the assumption that allowances/regulations for other cases (such as anchoring in emergency situations) are handled elsewhere as needed.

Response: The regulation does not prohibit anchoring of any type outside

the 50-fathom depth contour around Cordell Bank. Anchoring for both lawful fishing and other uses is allowed outside the 50-fathom line. The intent of the prohibition is consistent with the wording as drafted and no changes are necessary.

Coastal Armoring

Comment: The MBNMS Coastal Armoring Action Plan should include a guidance statement acknowledging that the implementation of this Action Plan may involve costs, which are not feasible for the landowner.

Response: The Coastal Armoring Action Plan in the MBNMS Management Plan provides programmatic guidance and no additional regulations for landowners. NOAA understands development of additional structures to protect existing structures involves certain market and non-market costs for landowners and the public. Loss of natural resources also represents costs to landowners and the public.

Comment: The Coastal Armoring Action Plan should be more neutral in tone and discuss the circumstances in which the benefits of projects might outweigh potential environmental impacts.

Response: NOAA recognizes coastal armoring may have benefits in certain situations. The MBNMS Management Plan and Action Plans were written to describe the issues that MBNMS is addressing—in the case of coastal armoring, NOAA is concerned about damage to the seafloor, wildlife impacts, loss of habitat, aesthetic impacts, and loss of recreational opportunities.

Comment: I strongly support regulations to restrict coastal armoring along MBNMS's coastline. The proliferation of structures such as seawalls and breakwaters is having a damaging effect on intertidal habitats and is blocking public access to beaches.

Response: NOAA recognizes coastal armoring can involve adverse impacts to coastal habitats and users. The action plans for the MBNMS Management Plan were written to address these issues as part of a comprehensive program including existing sanctuary regulatory prohibitions regarding alteration of the seabed and discharging into the sanctuary.

Artificial Reefs

Comment: How would the vessel abandonment prohibition affect proposals to sink ships as artificial reefs? Some people are interested in doing this in MBNMS and areas north of San Francisco.

Response: The regulation prohibiting deserting a vessel is primarily designed to address vessels posing a threat of discharge or seabed alteration but that have not yet submerged. However, current regulations for the sanctuaries prohibit discharge and abandonment of any matter onto the seafloor within the sanctuary. The current and new prohibitions do not apply, however, if a person/entity conducting an otherwise prohibited activity has a valid permit or authorization from the appropriate sanctuary superintendent issued pursuant to the regulations for that sanctuary. Anyone wishing to establish an artificial reef within one of the sanctuaries could apply for a permit or authorization. NOAA's review of such a project would include a consideration of all relevant environmental issues, such as contaminant discharges/leaching/flaking, entrapment hazards, loss of natural habitat and displacement/loss of natural species assemblages, alteration of local trophic relationships, fisheries interactions, physical stability and long-term impacts, monitoring and liability.

Ocean Drilling

Comment: An offshore oil drilling ban should be expanded.

Response: There is currently a regulatory prohibition on exploring for, developing, or producing oil, gas, or minerals in the three national marine sanctuaries (with the exception of mineral extraction in MBNMS, these prohibitions are also statutory for the MBNMS and CBNMS); this ban on oil drilling activities does not extend beyond the boundaries of the sanctuaries. Other regulatory authorities including the Minerals Management Service and the State of California have regulatory authority for oil drilling, e.g., outside of national marine sanctuaries.

Comment: Offshore drilling for oil and gas should be permitted.

Response: The regulations currently prohibit exploring for, developing or producing oil, gas or minerals in all three sanctuaries. The MBNMS Designation Document also contains such a prohibition. NOAA has not modified these prohibitions because it believes they are appropriate. In addition, in the MBNMS and CBNMS there are statutory prohibitions on certain oil and gas activities NOAA cannot change. Public Law 101–74 (August 9, 1989) prohibits ''the exploration for, or the development or production of, oil, gas, or minerals in any area of the'' CBNMS. Similarly, Public Law 102–587 (November 4, 1992 at section 2203) prohibits ''any leasing, exploration, development, or production of oil or gas'' within the MBNMS.

Comment: There is concern with the 'MBNMS alteration of submerged lands' prohibition, as it relates to the sanctuary permitting process for a potential large-scale research project associated with the Integrated Ocean Drilling Program.

Response: The general permitting process, protocols, and guidelines have not changed in response to the updated language used to describe the prohibition on the alteration of submerged lands within the sanctuary. NOAA will continue to review any proposal to conduct an otherwise prohibited activity, whether it is a commercial or research project, and evaluate proposals on a case-by-case basis, to determine whether the project is consistent with the NMSA and MBNMS regulations.

Research and Fishing Exceptions

Comment: The bottom trawling exception for alteration of submerged lands in GFNMS, 922.82(5)(B), should be modified to allow ''setting fish traps or longlines'' and ''permitted research vessel.''

Response: The regulatory text has been revised to use language consistent with MBNMS regulations. The exception to altering submerged lands for ''bottom trawling from a commercial fishing vessel'' is changed to ''while conducting lawful fishing activities.'' This change did not necessitate modification to the environmental analysis. However, the regulations do not provide an exception for permitted research vessels. The Director, at his or her discretion, may issue a permit, subject to certain conditions, to allow otherwise prohibited activities if they further research related to Sanctuary resources and qualities.

Submerged Cables

Comment: Should the Submerged Cables Action Plan in the MBNMS Management Plan also be incorporated into the Gulf of the Farallones and Cordell Bank management plans?

Response: The siting of submerged cables was not identified as a priority issue in the GFNMS and CBNMS scoping meetings and is thus not addressed in the GFNMS or CBNMS management plans. NOAA reviews permit applications to install submerged cables in those sanctuaries pursuant to the NMSA and applicable sanctuary regulations in 15 CFR Part 922. NOAA would also consider how similar applications were addressed by the NMSP for other sanctuaries.

Comment: NOAA is wrong in distinguishing between submarine

cables for scientific purposes and those for commercial purposes. Both have nearly identical environmental impacts and pose a conflict for other lawful users of a sanctuary. Although NOAA's special use permit policy on submarine cables does not distinguish among the reasons for the ''maintenance of submarine cables beneath or below the seabed,'' MBNMS recently issued a permit for a research cable not subject to the special use permit restrictions in the National Marine Sanctuaries Act. In 2000, Congress added language waiving ''fees for any special use permit'' for a non-profit activity but did not authorize waiving the requirement for the permit. This issue must be clarified in a manner confirming that any submarine cable operator must first obtain a special use permit and file an appropriate bond to protect other users of a marine sanctuary. Also, research cables may have commercial benefits to the owners, so an assessment needs to be made as to whether fees are appropriate.

Response: Submarine cables for scientific and commercial purposes could have similar impacts to marine resources. Both types of cable projects are required to undergo thorough environmental review. The NMSP has distinct authorities (prescribed by law and regulations) to allow the conduct of specific otherwise prohibited activities within national marine sanctuaries. The most commonly used authority is found in NMSP regulations (15 CFR Part 922) to allow certain types of activities, such as research, education and resource management, to occur in instances where it would otherwise be prohibited by the NMSP regulations. In addition, NMSP regulations applicable to MBNMS allow ''authorization'' of other agency permits for prohibited activities not qualifying for a research or other permit. Another authority derives from Section 310 of the National Marine Sanctuaries Act (16 U.S.C. 1441), regarding ''Special use permits'' for activities requiring access to or non-injurious use of sanctuary resources. To date, the NMSP has issued few special use permits for various commercial activities not injuring sanctuary resources. NOAA would issue special use permits for submerged cables only for continued presence of commercial submarine cables already on or beneath the seafloor and likely in conjunction with an authorization for the installation and removal components of any project. The NMSP clarified special use authority for commercial submarine cables in the **Federal Register** (Vol. 71, No. 19, Monday, January 30, 2006). As stated therein, ''The NMSP does not consider intrusive activities related to commercial submarine cables such as installation (e.g., burial), removal, and maintenance/repair work to qualify for a special use permit. When such activities are subject to NMSP regulatory prohibitions, they will be reviewed and, if appropriate, approved through the NMSP's regulatory authority (and not through the special use permit authority).'' Currently, only special use permits are subject to fees.

Comment: The MBNMS Draft MP should not include reference to allowing a special use permit for submarine cables for commercial purposes within sanctuary waters. Many of the activities inherent to submarine cable installation, operation, repair and removal are generally incompatible with the National Marine Sanctuaries Act's statutory objective of resource protection and violate existing MBNMS prohibitions against ''drilling into, dredging, or otherwise altering the submerged lands of the sanctuary; or constructing, placing or abandoning any structure, material or other matter on the submerged lands of the sanctuary * * *'' Although exceptions may be made for cable projects designed to enhance scientific understanding of the sanctuary, no such exception exists for purely commercial projects. Special use permits are designed for activities that have a short-term duration (no more than five years). Therefore, the MBNMS Draft MP should be revised to clarify that submarine cables for commercial projects will not be permitted.

Response: The MBNMS Superintendent has the discretion to issue appropriate permits or authorizations allowing specific activities otherwise prohibited in the sanctuary and NOAA's regulations do not limit this discretion in the manner recommended by the commenter. See previous response regarding special use permits. The National Marine Sanctuaries Act states that special use permits shall not authorize the conduct of any activity for a period of more than 5 years unless they are renewed. Consideration of any permit or authorization for commercial cables requires extensive information and analyses as outlined in detail in the MBNMS Submerged Cables Action Plan. The MBNMS will continue to evaluate projects and proposals on a case-by-case basis to ensure compatibility with protection of sanctuary resources.

Aquaculture and Kelp Harvesting

Aquaculture

Comment: Commercial fish farming poses tremendous risk to native species and the environment from food additives, fecal contamination, interbreeding/genetic pollution, pharmaceuticals, food colorings and pathogens. Consider a ban or subject these activities to rigorous regulation and monitoring. Aquaculture should be restricted to native species only.

Response: Permitting decisions for aquaculture involving any species other than native species will consider the risk of harm from escape or predation. Certain activities associated with aquaculture operations are already regulated. Discharges from a future aquaculture operation, if allowed, is also regulated under prohibitions against discharge or depositing from within or into the sanctuary as well as any discharge or deposits from beyond the boundary of the sanctuary that enter the sanctuary and injure a sanctuary resource. If NOAA determines additional aquaculture regulation is necessary for the protection of sanctuary resources and qualities in the future, NOAA could issue regulations as appropriate.

Comment: Mariculture operations should be part of the sanctuary's education component, in terms of educating public/children during tours of facilities about this sustainable food system, its impacts, and the marine ecosystem as a whole.

Response: Ocean-based commerce and industries are important to the maritime history, the modern economy, and the social character of this region. The GFNMS Maritime Heritage Action Plan includes activities to cultivate partnerships with local and state programs and communities to help educate the public about maritime economic activities and human interaction with the ocean. NOAA's implementation of the MBNMS Fishing Related Education and Research Action Plan will educate the public about fishing issues, including mariculture operations in the MBNMS, to increase public education about sustainable fisheries and food systems.

Comment: The proposed regulations prohibit new piers and docks in the GFNMS. There had been some exemption for coastal dependent uses in the past because these facilities are important to mariculture industry, in terms of being able to land shellfish in the GFNMS.

Response: NOAA is not issuing a new prohibition on piers and docks in these regulations. The construction of docks and piers has been prohibited within the GFNMS since its original designation in 1981. The exception to this prohibition in Tomales Bay remains in the regulations. New language

clarifies existing regulations and all current exemptions. This regulation also does not prohibit mariculture operations from using existing piers and docks.

Comment: The proposed regulations include a provision about a moratorium on laying any pipeline. This may be an issue for mariculture in terms of intakes.

Response: The regulations do not include a moratorium on laying pipelines for water intake. The new language in the GFNMS regulations clarifies the existing regulation and prohibits installing pipeline in the GFNMS related to hydrocarbon operations outside the GFNMS.

Kelp Harvesting

Comment: The kelp beds surrounding Pleasure Point (Santa Cruz) that used to clean and calm the surf under windy/choppy conditions have been over-harvested. There is a noticeable effect on the water quality involving lack of kelp and the oils that the kelp provides for calming the surface conditions. The kelp is cut at low tide and is reducing the protection it provides to the eroding cliffs. The kelp is nine feet under water at high tide. The effects on aquatic life have not been researched adequately. Kelp beds that are adjacent to surf areas should be left in their natural state as a control and compared to those areas that are being harvested.

Response: Kelp harvesting is currently regulated by the California Department of Fish and Game (CDFG) under the authority of the Fish and Game Commission. CDFG has conducted extensive research on impacts of kelp removal and prescribes restrictions for kelp harvesting by permitted parties. NOAA will continue to work with CDFG to implement the kelp harvesting policies adopted by the Commission in 2000.

Boundaries

Davidson Seamount

Comment: NOAA should prohibit deep sea trawling at Davidson Seamount.

Response: On June 12, 2006, NOAA prohibited use of any gear that could contact the bottom, including trawl gear, at a depth of greater than 3,000 feet in the Davidson Seamount Management Zone. This prohibition was included in management measures to implement Amendment 19 to the West Coast Groundfish Fishery Management Plan. See **Federal Register** Docket No. 051213334–6119–02; I.D. 112905C.

Comment: There is no reason at this time for including the Davidson Seamount within the Monterey Bay sanctuary, since there are no threats currently on the horizon to that area.

Response: Sanctuary designation or expansion is premised upon setting aside areas of the marine environment that have nationally, and sometimes internationally significant living or non-living resources. Sanctuary designation provides authority for comprehensive protection and management, including research, education, and outreach. Thus, designation does not require an existing or imminent threat. The MBNMS Management Plan, however, describes threats to the Davidson Seamount in the Davidson Seamount Action Plan. In addition to resource protection, other management interests warrant including the Davidson Seamount in the National Marine Sanctuary System. There is currently no comprehensive conservation and management scheme in place to protect the organisms on the seamount or the surrounding ecosystem. While resource protection is the primary purpose for designation as a national marine sanctuary, NOAA also seeks to increase national awareness and public understanding of seamount systems.

Comment: The addition of Davidson Seamount to the sanctuary will certainly provide additional protection for this area. Will there be considerations for researchers who may want to study the seamount and its ecology?

Response: NOAA's goals in incorporating the Davidson Seamount into the MBNMS are to increase understanding and protection of the seamount through characterization and ecological process studies. NOAA encourages researchers to study the seamount and to share the gained knowledge about this important area. However, if the research involves collection of resources or involves prohibited activities such as disturbance of the seafloor or discharge of matter, the researchers must seek a permit from NOAA prior to engaging in those activities.

Comment: Can you provide supporting references regarding the uniqueness of Davidson Seamount?

Response: Davidson Seamount is the largest seamount in the western Pacific Ocean and is one of the largest seamounts in the world. It may have unique links to the nearby Partington and Monterey submarine canyons. The seamount is home to fragile coral colonies estimated to be more than 100 years old. It provides habitat for many rare and endemic species. Davidson Seamount is home to previously undiscovered species (i.e., 15 species are currently being described as new to science) and large patches of corals and sponges provide an opportunity to discover new ecological processes. The high biological diversity of these assemblages may be found on other central California seamounts; however, we currently do not have enough scientific information. The seamount habitat of Davidson Seamount would be unique to the MBNMS and National Marine Sanctuary System as there are no other seamounts within the current sanctuary boundaries. The Davidson Seamount description in the Designation Document has been clarified to describe the national significance of the resources and qualities of the Davidson Seamount.

(Davis *et al.* 2002; GSA Bulletin 14(3):316–333)

(DeVogelaere *et al.* 2005; In: A. Freiwald and J.M. Roberts (eds), Cold-water Corals and Ecosystems. Springer-Verlag Berlin Heidelberg, pp 1189–1198)

(Planet Earth DVD 2007; British Broadcasting Corporation)

Comment: Use NMSA to protect Davidson Seamount if MSA protections are reduced or eliminated.

Response: NOAA has two statutory authorities relevant to this *comment*, the National Marine Sanctuaries Act (NMSA) and the Magnuson-Stevens Fishery Conservation and Management Act (MSA). NOAA considers both the NMSA and MSA as tools that can be used exclusively or in conjunction to protect sanctuary resources. NOAA evaluates the regulatory options on a case by case basis to determine which mechanism is most appropriate to meet the stated goals and objectives of a sanctuary. In the case of the Davidson Seamount Zone, NOAA chose to use both authorities to prohibit fishing and other extractive activities below 3,000 feet. If, in the future, the goals and objectives of the Davidson Seamount Zone are not met because of the reduction or removal of MSA protections in the Davidson Seamount Zone, NOAA will re-evaluate impacts on the zone. If additional regulations on fishing are warranted, NOAA will follow the process set forward in Section 304(a)(5) of the NMSA.

Comment: How does the circular designation match the EFH designation? Which one more closely matches the EFH designation—the circle or the square? Perhaps a depth contour approach or lines based on a contour would be more appropriate.

Response: NOAA selected the rectangular boundary based on input from the Sanctuary Advisory Council and the Pacific Fishery Management Council for ease of understanding and enforcement of regulations. The rectangular shape matches the designation of the area as Essential Fish

Habitat and a Habitat Area of Particular Concern, as well as associated fishing regulations.

Expansion

Comment: NOAA should expand the Cordell Bank and Gulf of the Farallones National Marine Sanctuary boundaries north to cover the entire Sonoma County Coast to the Mendocino County line including the rivers and estuaries.

Response: NOAA did not propose to expand the Cordell Bank and Gulf of the Farallones Sanctuary boundaries as part of the Joint Management Plan Review process. However, the CBNMS and GFNMS management plans include strategies to develop a framework for identifying and analyzing boundary alternatives.

Comment: Bodega Harbor should be included in GFNMS.

Response: At this time, NOAA is not considering adding Bodega Harbor to GFNMS and is not considering any expansion of the Sanctuary boundary.

Comment: The Santa Cruz City Council unanimously voted to support a boundary adjustment to include the nearshore waters of the City of Santa Cruz within the MBNMS. In addition to the technical corrections to the boundary, specific mention of this area should be included in the Final EIS.

Response: Consistent with the request of the Santa Cruz City Council, NOAA has adjusted the MBNMS boundary to include within the sanctuary the outer harbor waters of the City of Santa Cruz, but exclude Santa Cruz Small Craft Harbor. This boundary change is now explicitly referenced in Section 2.6 of the Final EIS.

Comment: Expand the MBNMS boundary south to Pt. Sal to encompass San Luis Obispo County.

Response: During the scoping and prioritization process, NMSP determined there was support for and opposition to a boundary expansion of MBNMS to include additional waters offshore of San Luis Obispo County. There were also various suggestions on how far south to extend the boundary. The NMSP, in consultation with elected officials in this region, determined not to expand the boundary to allow the local community to work towards a consensus on boundary expansion. For this management plan review process, the NMSP has not included or expanded the boundary off San Luis Obispo coastline, but could reconsider this in the future.

Internal Boundaries

Comment: The Marin coastline in the Sanctuary System is divided between MBNMS (5%) and GFNMS (95%), which has no basis in science and is simply a historic attribute. There is unnecessary confusion, and the Marin coastline should be part of the GFNMS. Also, the current ''fixed boundary'' proposed between GFNMS and National Park Service (NPS) is unworkable and should be amended to be a flexible boundary that follows the NPS boundary or the Mean High Water Line, whichever is further from land. NPS has authority and protections that meet or exceed those of GFNMS, so there is no reason for joint jurisdiction.

Response: The MBNMS and GFNMS contain a Northern Management Plan Cross-Cutting Action Plan to provide consistent management of the resources. NOAA is fixing the GFNMS boundaries in Tomales Bay to the coordinates established during the original designation of the Sanctuary in 1981 to avoid confusion and allow for accurate mapping. The boundaries would return to the mean high water line except in the Point Reyes National Seashore (PRNS) where the GFNMS boundary follows the seaward extent of the PRNS. Establishing fixed points for the boundaries of the GFNMS in Tomales Bay would not affect the National Park Service's authority to extend the PRNS boundaries into the Sanctuary. Fixing the boundaries to a set coordinate avoids confusion of affected agencies and the public. Having National Seashore and National Marine Sanctuary protection strengthens the safeguards for resources in the area. If the National Park Service proposes to remove a shoreline parcel from its boundaries, the NMSP may conduct the appropriate review for inclusion in the Sanctuary.

Comment: The management of the San Mateo coast by the GFNMS should be made permanent.

Response: The management of sanctuary waters off San Mateo County (and San Francisco and Marin County) will remain as defined by the NMSP Director in 2004. The GFNMS will be the lead for most issues, including those related to enforcement of MBNMS regulations. The MBNMS will be the lead to implement the Water Quality Protection Program. Both sanctuaries' staff and the NMSP West Coast Regional Office coordinate closely in this management regime.

Depositing and Discharging Activities

Desalination

Comment: Consideration of whether or not desalination facilities may provide for environmental enhancement, such as restoring coastal stream flows or overdrafted groundwater basins (and appropriate regulatory mechanisms) should be added to the list of comprehensive potential impacts.

Response: NOAA recognizes desalination technologies potentially address water shortages and may, in some cases, be a preferred alternative to further overdrafting of groundwater basins or damming of coastal streams. This consideration is added to the list in Activity 2.3 of the Desalination Action Plan in the MBNMS Management Plan.

Comment: A comprehensive water resource management plan should be included as an information requirement under Activity 4.2 of the Desalination Action Plan.

Response: A water resource management plan may be necessary for other agency review of a potential desalination project. However, at this time, NOAA believes the existing list of submittal requirements is adequate to review a project for potential impacts on sanctuary resources and qualities. If additional information is necessary, NOAA may request information from the project applicant.

Comment: NOAA should provide exemptions to MBNMS prohibitions on exploring for, developing, or producing oil, gas or minerals within the Sanctuary and drilling, dredging or otherwise altering submerged lands to allow for desalination exploration and construction, repair, or maintenance of seawater desalination systems.

Response: NOAA will continue to work with desalination plant owners and operators as well as other relevant management authorities to consider projects on a case-by-case basis. NOAA is concerned with negative effects of desalination activities, both individually and cumulatively, on the health of the ecosystem and will continue to review projects for impacts from discharges, alterations of the seabed, and the taking of marine mammals, turtles, and seabirds.

Comment: We understand MBNMS has proposed changes that refer to ''beach wells'' as an alternative source of water for new desalination plants. We object to the MBNMS proposals to consider, support, recommend, or approve beach wells for the purposes of desalination and exporting groundwater from our Salinas Valley groundwater aquifers to the Monterey Peninsula. The MBNMS has no authority to advocate, support, promote or adopt policies, or grant approval of any project that relies on the illegal taking of groundwater that belongs to the overlying landowners of the Marina/Castroville/Moss Landing areas.

Response: NOAA did not make reference to or recommendations regarding beach wells as a source of water for desalination facilities in the proposed rule or DEIS/draft management plan.

Comment: NOAA should develop regional oversight and guidelines for proposed desalination plants to eliminate piecemeal and inconsistent reviews.

Response: There is a need to take a regional approach to reviewing the need for and siting of desalination facilities. The MBNMS Desalination Action Plan includes a strategy to encourage development of a regional program.

Comment: The Desalination Action Plan should not apply to previously submitted applications for desalination projects.

Response: The Desalination Action Plan outlines NOAA's role within the regulatory framework—the plan does not include additional regulations. NOAA's review of any application for desalination projects will include, but not be limited to: (1) Pipeline construction on the seabed; (2) degradation of water quality from chemicals in the discharge brines and their potential impacts on the resources and qualities of the sanctuary; and (3) discharge treatment methods utilized to reduce the injury to sanctuary resources and qualities.

Comment: Reductions in urban runoff and increased use of porous surfaces, retention ponds and cisterns would reduce the need for desalination facilities.

Response: The GFNMS and MBNMS Management Plans include water quality programs encouraging reductions in urban runoff.

Dredged Material Disposal/Ocean Dumping

Comment: Several agencies and organizations oppose or do not understand NOAA's involvement, oversight or regulation of disposal of dredged material in the MBNMS.

Response: NOAA reviews the composition of the sediment, volumes, grain size, and contaminant load to determine if the dredged sediments are appropriated for disposal in the MBNMS and comply with the provisions of the National Marine Sanctuaries Act. NOAA works closely with the Army Corps of Engineers and Environmental Protection Agency to determine the need for additional measures in the regulatory program necessary to ensure protection of sanctuary resources and qualities. The Harbors and Dredge Disposal Action Plan includes a more complete description of the role of the MBNMS in regulating discharges of dredged material and resulting disturbance of the seabed. In 1992, the designation of the MBNMS prohibited use of new ocean dredged material disposal sites within the Sanctuary.

Comment: Beneficial use / beach nourishment sites are recognized at Santa Cruz, Moss Landing and possibly Pillar Point. We urge NOAA to be open to future beach nourishment sites. Loss of sand and beach value is a national issue, as well as a California issue. Opportunities of all types should be recognized and nurtured.

Response: NOAA does not regulate disposal of matter above the mean high water line on beaches adjacent to the sanctuary, except as regards discharges that enter the sanctuary and injure a sanctuary resource. NOAA has included a strategy in the MBNMS Management Plan (HDD–5) to address alternatives to ocean disposal, particularly beneficial uses such as beach nourishment. NOAA deleted language in this strategy regarding the lack of need for additional beach nourishment sites in response to comments.

Comment: California Coastal Commission staff notes the increasing number of incremental requests for changing permitted harbor dredging operations in the region. NOAA and the Commission should work with the harbors and require them to conduct a more systematic and longer review of their operation needs and materials management. Commission staff recommends additional text for Strategy HDD–5 Alternative Disposal Methods to explore a long-term approach with harbors and deletion of text that characterized a lack of need for additional beach nourishment sites within the MBNMS since this characterization may be premature.

Response: NOAA has also received requests to increase amounts of dredged material to be disposed in the MBNMS. NOAA is considering a variety of potential modifications in the approach to dredged material disposal, including additional use of multiyear authorizations, an ongoing interagency workgroup to review permits and a small relocation of one of the designated disposal sites at Moss Landing. NOAA also considers various means to reduce dredging requirements through source reduction or bypasses, and options for potential beneficial uses. NOAA has added additional language to the MBNMS Management Plan to reflect the need for long term planning, similar to the approach to coastal armoring, and has deleted the language in Strategy HDD–5 regarding lack of need for additional beach nourishment sites.

Comment: EPA guidelines do not state that dredged material for ocean disposal must be at least 80 percent sand.

Response: The Clean Water Act guidelines for disposal of dredged material state that material should be ''predominantly'' sand for the purpose of applying the testing exclusion criteria of the ocean dumping regulations in Section 404. The EPA has provided guidance stating ''predominantly'' should be interpreted as 80%.

Marine Debris

Comment: The sanctuaries need stronger comprehensive action plans and implementation to halt marine debris and litter, including more staffing. Also, there is a concern that none of the water quality platforms deal with the prevalence of marine debris in the MBNMS. Marine debris is a separate important facet of urban run off. NOAA should ask restaurants to use biodegradable take-out containers, employ more cleanup crews, and install more recycling bins (e.g., there are no recycling bins on Fisherman's Wharf in Monterey). Other recommended measures include: installing filters for all the drains to the bay, in order to catch large debris; employing crews to clean up the marine environment like on the highways; working with companies to change the shape of items that become debris so that the items don't look so much like food that animals eat; and educating the population about the dangers of marine debris, regarding ingestion, entanglement, etc. There are laws requiring public outreach and education regarding storm drains, but very little effort/attention is given to this important issue.

Response: NOAA will work closely with the State to address issues identified in the February 2007 resolution passed by the Ocean Protection Council to reduce and prevent marine debris. There are also opportunities to partner with the recently created NOAA Marine Debris Program to address issues related to marine debris in sanctuaries. The NOAA Marine Debris Program has awarded grants to reduce and remove marine debris from the sanctuaries on the central California coast. NOAA has incorporated monitoring of marine debris into monthly monitoring activities to better understand sources and timing of debris in sanctuaries. This information will help NOAA design targeted outreach and education messages to reduce marine debris. The MBNMS's existing Urban Runoff Water

Quality Action Plan addresses the problem of land based runoff including ''marine debris.'' NOAA has also developed restoration projects to remove submerged entanglement hazards and debris from the MBNMS.

Radioactive Waste

Comment: There is nuclear waste sitting on the ocean floor of GFNMS. Please do something about the nuclear waste.

Response: The GFNMS Management Plan includes Strategy RP–11 (Radioactive Waste Dump) to evaluate the condition of, and actual impacts on, sanctuary resources and qualities from the Farallon Islands radioactive waste dump site.

Comment: The GFNMS Resource Protection Action Plan strategy for radioactive waste should begin year one instead of year four. Also this strategy should include a proposal for the designation and demarcation of the approximate area of the dump site on the nautical charts.

Response: GFNMS Management Plan Strategy RP–11 (Radioactive Waste Dump) has been amended to seek to include an update to the NOAA nautical charts of the known area with radioactive waste containers. The timeline has been modified to implement strategy RP–11 starting in Year 1.

Use of Dispersants

Comment: A coordinated sanctuary emergency plan should include coordination and decision-making responsibilities on use of dispersants.

Response: Any sanctuary emergency response plan will include identification of decision-making responsibilities on use of dispersants. Use of dispersants in national marine sanctuaries is discussed in the Sector San Francisco Oil Spill Area Contingency Plans for northern and central California coastal counties.

Water Quality

Comment: Ensure that the final management plans contain strong goals, regulations and implementation strategies for improving water quality in our oceans, particularly regarding the land-sea connection.

Response: The Water Quality Protection Program Implementation Action Plan in the MBNMS Management Plan summarizes five action plans developed through a collaborative stakeholder process to address a variety of water quality issues related to the land-sea connection, including urban and agricultural runoff, microbial contamination of beaches, and regional monitoring. The GFNMS Management Plan also contains a water quality Action Plan with an emphasis on watershed and water quality issues affecting bays and estuaries. These plans contain a wide range of implementation strategies including management measures, improved monitoring, and outreach and education. In addition, existing regulations for MBNMS prohibit discharges from outside the boundary of the sanctuary that enter and injure a sanctuary resource or quality, and identical regulatory language is being implemented as a new regulation for GFNMS and as a modification of the existing CBNMS regulation.

Comment: Urban runoff needs to be addressed by reducing impervious surfaces. In that way, pollutants into the sanctuary would be minimized and groundwater could be recharged. This will reduce the need for desalinization plants and their detrimental environmental effects.

Response: NOAA promotes reduction of impervious surfaces in outreach and technical training programs, and also ensures these techniques are addressed in the National Pollutant Discharge Elimination System (NPDES) storm water management plans developed by local cities with the state's Regional Water Quality Control Boards. Cities are required as part of these state-regulated plans to implement best management practices reducing permeable surfaces at new construction sites as well as addressing water flowing off new developments. In addition, NOAA added a strategy to the MBNMS Water Quality Protection Program Implementation Plan addressing the need for more permeable surfaces in watersheds bordering the sanctuary. This strategy identifies measures to replace impermeable surfaces with permeable surfaces and to promote Low Impact Development strategies in new developments. These efforts will help to recharge ground water and improve the quality of water flowing to the sanctuary.

Comment: The San Lorenzo River has some water quality problems and is being tested, at great cost to the water company. There are several agencies involved, all specifying different things, which is not helping. The problems might be solved if a lead agency could work on this river and coordinate agency efforts.

Response: Several management plans have been developed and implemented in the San Lorenzo River watershed by local agencies and organizations; notably the 1979 San Lorenzo River Watershed Management Plan and the 1995 Wastewater Management Plan for the San Lorenzo River Watershed. Each of these plans contains detailed recommendations that address water supply, water quality, erosion and sedimentation, instream flows, fishery resources, and aquatic habitat, among many others. These programs have resulted in improvements in water quality of the San Lorenzo River and reductions in septic system failures and nitrate concentrations. More work remains, particularly for sediment reduction, and the Santa Cruz County Environmental Health Services Department is the lead on implementation of these plans. Specific concerns mentioned in the comment are best addressed by working directly with Santa Cruz County. In addition, NOAA has a long standing partnership with the County, as the County is an active participant on the Water Quality Protection Program's Committee.

Comment: The Monterey County Board of Supervisors wants to increase population by 50 percent within 20 years. Is this going to create more pollution in the ocean (e.g., more oil runoff)?

Response: Population projections in all counties adjacent to the three sanctuaries indicate that population growth will increase in the future. NOAA regulates discharges into all three sanctuaries through various prohibitions. The GFNMS and MBNMS Management Plans include Water Quality Action Plans addressing discharges through runoff from land-based sources. The NMSP will continue to work with local governments and government associations to reduce pollutant discharges.

Comment: The GFNMS may want to look beyond traditional pollutants and focus on emerging contaminants like pharmaceuticals, pesticides and chemicals that are found in treated and untreated wastewater and agricultural and urban runoff. Land based water quality problems are passed on to the oceans and the Sanctuary must vigorously advocate for aggressive study and regulation of all pollutants.

Response: Treated and untreated wastewater, agricultural and urban runoff, and various land based water quality issues are addressed in the Water Quality Action Plan of the GFNMS proposed Management Plan. Specific reference to pharmaceuticals and other micropollutants has been added to Activity 3.1 of the Water Quality Action Plan.

Comment: Beach closures and postings are also due to microbial contamination from wildlife in and around the ocean. The goal of the Beach Closure and Microbial Contamination

Action Plan should be modified to include ''eliminate beach closures by reducing microbial contamination *caused by human activities*.''

Response: Beaches are *closed* only when a known sewer spill has occurred. Beach *postings* are due to high *E. coli* and *Enterrococcus* concentrations from unknown sources. The Action Plan includes references to the fact there are many sources of microbial contamination that may trigger a posting. There are many contributors of microbial contamination in the ocean, of which anthropogenic sources are just one. The Beach Closure Action Plan explains the difficulty in distinguishing the source of the *E. coli*. The first three strategies address the use and need for new technology to both pinpoint sources of *E. coli* and to find alternative indicators identifying the pathogens causing harm to both humans and marine organisms.

Comment: Marine mammals and birds are a significant source of bacterial contamination yet this section is heavily biased toward sewers as the main source of the contamination. The City of Monterey has inspected all of the sewer lines and has not found any illicit connections.

Response: Because the Action Plan is intent on reducing beach *closures*, the discussion and strategies focus on the source of beach closures—known sewer spills or overflows. The reasons for potential overflows and the strategies to reduce them are discussed. NOAA is aware warm blooded animals contribute to microbial contamination in the environment. This is a natural phenomenon, and it is unfortunate the technology is not readily available to distinguish between the different sources. The Action Plan addresses this and the need to support research to find a real time indicator identifying contamination sources. NOAA values the City of Monterey's partnership and recognizes the leadership role it has taken in regard to proactive responses to water quality conditions flowing into the Bay. This Action Plan addresses the entire sanctuary including other urban areas that have not yet addressed these issues.

Comment: Is there local data to back up the assertion that public sanitary sewers are a significant source of anthropogenic bacterial contamination?

Response: Strategy 5 in the MBNMS Beach Closures Action Plan states that sewer systems, septic systems and urban runoff are a significant pathway of anthropogenic bacterial contamination. Sewers and septic systems carry bacteria. Because they carry sewage, which contains bacteria, they present a risk of discharge of bacteria into the environment. The plan includes strategies to minimize this risk.

Comment: Regarding the Beach Closure & Microbial Contamination Action Plan, since these are already required by the sewer system Waste Discharge Requirements (WDRs), how is the MBNMS going to encourage those of us with WDRs to do what is already mandated?

Response: NOAA will promote adequate ongoing maintenance of sewer systems with a diversity of approaches including assisting local jurisdictions whenever possible to access grant funding to implement the strategies that are identified in Strategy 5 of the Beach Closures Action Plan.

Comment: It is not clear what criteria for the certification of an approved vendor would be to address sewer system upsets. How would a voluntary lateral inspection program be encouraged?

Response: Currently, in certain cities on the Monterey Peninsula, plumbers that attend workshops designed to educate the industry on prevention of sewer spills are put on a list and are recommended by the public works department. This is one way to create an ''approved vendor list.'' Regarding the voluntary lateral inspection, there are cities on the peninsula already implementing a sewer lateral program. NOAA will look to those programs for guidance and to determine what incentives work.

Comment: Why are the coordination and outreach efforts only being aimed at the Phase II communities?

Response: Phase II communities were specifically identified because there is only one Phase I city within the Sanctuary watersheds and that city, while updating its SWMP, has had a plan in effect for over 5 years. The focus currently is on Phase II cities that are developing their plans and need more assistance for regional outreach coordination. However, reference to Phase I cities has been added to Activity 7.2 in the MBNMS Beach Closure Action Plan.

Comment: The sanctuary should work through the state to get notifications via the state's notification system. Notifying the sanctuary of all spills appears to be overly burdensome.

Response: Strategy 9 in the MBNMS Beach Closures Action Plan identifies the need to have a single 24 hour number to call for sewer spill emergencies. This number has been created for the Monterey Peninsula cities by calling 1–800–CLEANUP. The strategy does not require that the sanctuary be notified directly.

Comment: The Monterey Chapter of the Surfriders requests more money be allocated to water quality testing and offers their organization as a partner to develop a comprehensive educational program that increases the public's awareness of the issue.

Response: NOAA encourages Surfrider Foundation members to participate in the Citizen Watershed Monitoring Network volunteer monitoring programs. There is identified capacity to enhance these programs by adding monitoring sites or expanding the duration of the monitoring possibly into the winter months.

Comment: Do red tides in nearshore waters relate to the level of nutrients in urban runoff?

Response: Excess nutrients contribute to the formation of algal blooms that can be red in color. There are also recent laboratory studies that have been conducted at UCSC directly correlating the amount of urea to domoic acid in algal blooms. Urea is a form of nitrogen found in fertilizer and animal waste. Domoic acid is known to be harmful to both humans and marine organisms.

Comment: The sanctuaries need to pursue an aggressive, coordinated water quality program by working closely with the U.S. EPA and California State Water Resources Control Board. Also, the sanctuaries need to work closely with local, regional, state and federal agencies in rigorous monitoring regulation of all toxics and pathogens. These policies must be frequently revised in view of rapidly advancing scientific evidence of toxicity for many man-made chemistries that have heretofore not been adequately evaluated for biological impacts.

Response: NOAA and its partners created the MBNMS Water Quality Protection Program in 1994 with twenty-five federal, state and local agencies, public and private groups in order to protect and enhance water quality in the sanctuary and its watersheds. There is a long history of multiple agencies collaborating on water quality issues, and NOAA is also pursuing these same relationships for the watersheds of the Gulf of the Farallones and Cordell Bank NMS. Currently, the MBNMS is synthesizing and assessing major water quality monitoring programs within the sanctuary to determine the state of water quality, trends over time, effectiveness of management measures and appropriate recommendations to improve a regional monitoring program. To address emerging water quality issues associated with anthropogenic sources, the Beach Closure and

Microbial Contamination Action Plan in the MBNMS Management Plan identifies four activities to investigate indicators that provide real time information on pollutants, and to develop indicators that correspond directly to disease causing agents and are able to pinpoint sources of the pathogens.

Comment: The NMSP needs to partner with local water quality groups (e.g., Bodega Bay Watershed Council and others) to address the problem of runoff from erosion and sedimentation (non-point source pollution). The whole system needs to be evaluated to understand what is flowing into the estuaries, as the health is deteriorating. There is a need to look ''upstream'' to address the problem.

Response: It is important to investigate sources of pollution upstream and partner with local water quality groups and other agencies to address the problems.

Comment: Shouldn't there be one governmental authority that would be in charge of pollution on the beaches? Greater water quality monitoring is needed in the winter season, when runoff can most likely bring *E. coli* and toxins into the bay and surfing areas.

Response: California Assembly Bill 411, passed in 1997, gave responsibility to county environmental health departments along the coast to monitor at public beaches with more than 50,000 visitors a year and that are adjacent to storm drain outfalls. AB 411 also set uniform health standards for those monitoring programs and requires health officials to close beaches when pollution levels exceed the established limits. It also set up a hotline for beach closure information. Counties monitor pollution levels weekly from April through October and then monthly from November through March. In addition, the Beach Closures and Microbial Contamination Action Plan in the MBNMS Management Plan contains strategies to address microbial contamination on beaches throughout the sanctuary. These strategies include more real time detection, source tracking, infrastructure improvements, increased monitoring, enhanced notification, technical training, public outreach, enforcement and emergency response.

Comment: The sanctuaries are restricted in their ability to limit toxic runoff, and correct deficits in antiquated treatment systems. More effective regulation of pollution is still needed, especially where public health is often put at risk by bacterial contamination at beaches. The NMSP needs to look for authority to regulate runoff into the ocean from land-based sources, which is the source of a lot of pollution.

Response: The NMSP is able to address sources of water pollution through both regulatory and non-regulatory means, and partners with other federal, state and local agencies and organizations to address these issues (see above response). In addition, the Beach Closures and Microbial Contamination Action Plan in the MBNMS Management Plan contains multiple strategies to address microbial contamination at beaches.

Comment: NOAA should address cleaning storm drain runoff, which is the worst thing that is polluting our oceans.

Response: The Sanctuary Management Plans contain detailed Water Quality Action Plans that include provisions to address stormwater runoff. The Action Plans include many measures such as working with relevant jurisdictions to reduce contaminants in stormwater runoff and implementing extensive education programs. For additional details see the three Draft Management Plans. The NMSP has worked closely with local municipalities over the last ten years to implement these strategies.

Comment: The NMSP should evaluate the feasibility of creating a program in cooperation with the coastal cities and operators of proposed desalination facilities to bring one or two historic lakes (specifically Merritt and Espinosa Lakes, historic water bodies that are still surrounded by rural lands with large watersheds, both of which must be mechanically drained and which empty into the existing Tembladero Slough) and marsh lands back into existence adjacent to the MBNMS. These water bodies historically collected and filtered runoff.

Response: In recognition of the important roles of these types of water bodies, the Water Quality Protection Program Implementation Action Plan in the MBNMS Management Plan includes a recommendation to develop a new plan focused on protection of wetland and riparian corridors. It addresses the need for wetland inventory, assessment and restoration. The Action Plan includes a strategy to identify historic wetlands that might be restored and used for multiple benefits such as ground water recharge, water quality improvements and possibly water reuse.

Comment: The NMSP needs to expand the non-point source pollution water quality issue into pathogen pollution and address the land/sea connection (e.g., feral cats and the parasite being shed by cats into the watershed and sanctuary, which kills otters). Pathogen pollution and non-point source pollution are going to become more critical as the landscape continues to be used by humans.

Response: The NMSP is very concerned about the decline of the Southern Sea Otter population. Research has shown nearly 40 percent of sea otter deaths were due to protozoal parasites and bacteria spread by fecal contamination of nearshore marine waters by terrestrial animals or humans. The Beach Closure and Microbial Contamination Action Plan in the MBNMS Management Plan includes numerous strategies to address this issue. NOAA also has a long term program monitoring bacterial contamination discharging from urban storm drains and works closely with cities to identify sources of the bacteria.

Comment: There needs to be horse manure management education. A lot of manure is not composted or managed and there is nitrogen and sediment going into the creeks.

Response: The Water Quality Protection Program Action Plan in the MBNMS Management Plan contains various strategies to educate ranchers and rural homeowners about best management practices that can be implemented on ranches and ranchettes to improve water quality. NOAA coordinates with partners such as the Natural Resources Conservation Service, the Resource Conservation Districts and local Farm Bureaus to implement the agricultural aspects of the plan through numerous strategies such as improved communications among ranchers, provision of technical expertise, and funding incentives. These partners identify specific ranches having manure management issues and help them mitigate sources of manure entering local streams.

Comment: The management plans should address acid pollution effects on marine life, as research indicates that crustaceans will be harmed to the point of extinction in about 25 years, if acidification continues. The main source of acid pollution in the area is woodburning—fireplaces and fire pits.

Response: In its response to comments regarding global warming and in the implementing additions to the Management Plan action plans, NOAA will continue to evaluate and address global warming impacts on a number of factors including ocean chemistry, including acidification as the key chemical change being projected. The management actions at this time, however, do not address the sources the commenter mentions. NOAA believes this type of point source pollution is out of its scope of authority, better managed

by relevant federal, state, and local authorities.

Comment: The ''enter and injure'' discharge rule should be worded to include discharge from land-based sources, thus allowing similar prosecution and enforcement.

Response: The regulation includes material or other matter from land-based sources. The prohibition is broad and includes discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the sanctuary and injures a sanctuary resource or quality including land-based sources of discharge.

Comment: The Sanctuary needs an ''enter and injure'' clause to its regulations to protect the Sonoma coast from pollution and mining discharges. There was also concern expressed about proposed and current mining operations in Sonoma County causing sedimentation, siltation, a need for dredging in Bodega Harbor, and damage to fish from dynamite blasting.

Response: NOAA's regulations prohibit discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injures a Sanctuary resource or quality. (This regulation is already in effect for the MBNMS.) Although this regulation by itself would not prevent activities beyond the Sanctuary boundary (e.g., coastal development, dredging, mining or other resource extraction activities) including in Bodega Harbor, it can be used to prevent injury to sanctuary resources from these activities.

Vessel Abandonment

Comment: The proposed prohibition against abandoning a vessel would make it a federal penalty to leave: ''* * * a vessel at anchor when its condition creates potential for a grounding, discharge, or deposit, and the owner/operator fails to secure the vessel in a timely manner.'' This language does not make sense. The regulation states that the vessel in question would be anchored. Normally, if a vessel is anchored, it is secured. Thus, the phrase ''secure the vessel in a timely manner'' would not be germane in this situation. NOAA should re-write this section for clarity. Also, the phrase ''potential for grounding'' is overly broad and would be subject to arbitrary law enforcement standards.

Response: There have been many situations in the sanctuaries where a vessel has been either left adrift, left partially submerged at anchor, or is dragging anchor in such a way as to create an imminent threat of a grounding or sinking. Previously, NOAA had to wait until these imperiled vessels went aground or sank in order to take action, as no discharge or disturbance of the seabed had yet occurred. This regulation allows NOAA to be more proactive in preventing harm to marine resources. The regulation clearly states that an anchored vessel is not considered secure if it is in such a state that it creates the potential for a grounding, discharge, or deposit and the owner/operator fails to remedy the situation. NOAA believes the regulation as drafted provides sufficient guidance to enforcement personnel to assess environmental threats and scale their response to the circumstances in a given incident.

Comment: The proposed prohibition regarding deserted vessels lacks clear standards and is too broad. The Coast Guard should be consulted on this issue. The standard for issuing a civil penalty of any size should be spelled out and should only be issued for a condition that everyone agrees is grossly negligent and imminently dangerous. The protocols established by the sanctuary must include consultation with the Coast Guard and any applicable local port authority. With a lack of a complete network of harbors of refuge, a sailboat with an outboard engine with two gallons of gasoline could sink and be fined for failing to salvage the vessel. Also, a vessel adrift from a boating accident should not be penalized, especially when the occupants may have lost their lives due to a disastrous situation beyond their control.

Response: The definition for ''deserting'' a vessel lists clear and specific qualifying standards, including the physical state of the vessel, notification protocols, specific time requirements, and required hazard remediation actions. The U.S. Coast Guard has had an opportunity to review the draft regulation and has forwarded no objections or comments to NOAA regarding this issue. Coast Guard regulations about vessel abandonment primarily center on obstruction of navigable waterways and public safety issues, so the Coast Guard's definition and timelines for addressing abandoned vessels are designed for an intent other than natural resource protection. The sanctuary definition for a deserted vessel is designed to address the risk of natural resource injury from an unattended vessel through its potential grounding, sinking, discharging of hazardous materials and marine debris. Thus, a deserted vessel presents a more immediate concern to natural resource managers tasked with protecting marine habitat and wildlife. NOAA civil penalties are assessed based upon Federal law and the particular facts of a case, including aggravating and mitigating circumstances. The regulation would in no way limit the authority of the Coast Guard or local port districts to manage the marine waters within their jurisdictions. NOAA enforcement officials consider aggravating circumstances and mitigating circumstances in all vessel casualty incidents and assess penalties appropriately.

Comment: Local and state enforcement agencies should be the point of contact regarding deserted vessels.

Response: Deserted vessels that pose a threat to sanctuary resources and qualities require immediate attention before being rapidly destroyed by open ocean forces. State and local enforcement agencies have limited resources and mandates to address derelict vessels on short notice or to compel immediate corrective action by a vessel owner/operator. State and local jurisdictions overlay less than 20% of sanctuary waters. Also, State and local governments must often give first priority to derelict vessel removal from inland waterways due to navigational obstruction issues or constituent concerns. Vessel casualties can present a significant threat anywhere in the Sanctuaries and at any time. The MBNMS and GFNMS need consistent regulations that compel immediate action by vessel operators/owners to remediate threats to protected national resources.

Comment: The proposed prohibition regarding deserted vessels could be a detriment to safety of life at sea, in that the threat of penalty may cause a master to delay abandonment of a sinking vessel beyond what is prudent. This regulation should be much more narrowly drafted to allow for a master's judgment in extremis.

Response: Sanctuary regulations include exceptions for otherwise prohibited activities when conducted in response to an emergency threatening life, property, or the environment. Thus evacuation of crew members whose lives are in immediate danger would constitute an exception to the prohibition. A vessel master's primary duty is to safeguard the lives of his/her crew and passengers, in all circumstances. Further, NOAA considers mitigating circumstances when reviewing vessel casualty incidents for potential legal action. However, the prohibition against deserting a vessel could apply, for example, where the crew has been

removed to safety and the vessel owner or operator fails to take immediate action to prevent environmental damage from a vessel casualty or where other circumstances warrant such application.

Vessel Discharges

Note: For the purposes of the responses below, ''discharge'' is intended also to encompass ''deposit.''

Comment: The regulations for the MBNMS should prohibit large cargo vessels from operating within Areas of Special Biological Significance (ASBSs).

Response: The ASBSs in the MBNMS are nearshore and do not need protection from transiting cargo ships. Vessel traffic lanes were established in offshore waters of the MBNMS for the movement of cargo vessels through the sanctuary. These lanes are well outside of ASBS areas. The ASBSs within the MBNMS are protected by the same sanctuary discharge prohibitions that apply throughout the Sanctuary.

Comment: The proposed cross-cutting vessel discharge regulations, which allow the discharge of ''biodegradable effluent incidental to vessel use and generated by an operable Type I or II marine sanitation device * * *'' regardless of the size of the vessel, may be inconsistent with State law. Recently enacted State regulations (SB 771, Ch. 588 of the Statutes of 2005, titled ''The California Clean Coast Act of 2005'') prohibit sewage and graywater discharges (including oily bilgewater, hazardous waste and other waste—photographic, dry-cleaning and medical waste) from vessels of 300 gross registered tons or more if vessels have holding tank capacity (rather than allowing discharge from Type II MSD). NOAA should consider whether it is appropriate to change the management plans and regulations to reflect these State standards or if this current proposal can be complementarily implemented with the State standards.

Response: The regulations prohibit discharging any matter from a cruise ship other than clean engine or generator cooling water, clean bilge water, and anchor wash. For vessels other than cruise ships, the regulations clarify that discharges/deposits allowed from marine sanitation devices apply only to Type I and Type II marine sanitation devices, and vessel operators are required to lock all marine sanitation devices in a manner that prevents discharge of untreated sewage. In response to the comment, the NMSP revised its regulations to prohibit sewage and graywater discharges from vessels of 300 gross tons or more, consistent with SB771. Similar to the State regulation, the prohibition only applies if vessels have sufficient holding tank capacity when in sanctuary waters.

Comment: MARPOL Annexes should provide a benchmark for ''minimum'' standards for compliance by vessels operating within a national marine sanctuary.

Response: MARPOL Annexes are the original minimum standards for compliance for vessels operating in a national marine sanctuary. The national marine sanctuaries include additional regulations and higher standards for discharges and use of marine sanitation devices, which are desirable to protect sanctuary resources and qualities from marine pollution. The regulations are enforced in accordance with international law.

Comment: The need and intent of the proposed regulation for locking marine sanitation devices are not entirely clear. The proposal to lock all sanitation devices on small vessels in sanctuary waters has neither a factual basis nor extensive analysis.

Response: The MBNMS regulations have included a prohibition against discharge of untreated sewage from vessels since 1992; however, detection and identification of unlawful sewage discharges from vessels at sea and/or underway has proven to be impractical. The requirement that MSDs be locked in a manner that prevents overboard discharges (e.g., locking closed an overboard discharge valve) provides a practical compliance element for enforcing this prohibition and helps prevent both intentional and unintentional overboard discharges of untreated sewage within the MBNMS.

Comment: Vessels 300 GRT or greater with insufficient holding capacity for treated sewage from a Type I or II MSD may not be able to ''lock'' the system, yet would still only discharge treated sewage above and beyond their holding capacity. NOAA should substitute the term ''operate'' for the term ''lock'' to avoid confusion and provide protection sought by the regulation.

Response: The intention of the regulation for restricting discharges of treated sewage from vessels 300 GRT or greater is to minimize discharges from these large vessels while in the sanctuary. If the vessel does not have sufficient holding capacity while operating in the sanctuary, the vessel may discharge sewage treated by a Type I or II MSD. The term ''lock'' only refers to ensuring the device is operational and not in a mode bypassing the treatment device. NOAA understands the determination as to whether a vessel has sufficient holding tank capacity to provide for no discharge of treated sewage or graywater will vary depending on a number of factors and must be determined by each vessel at the time it enters the boundaries of the National Marine Sanctuary. A vessel with adequate holding capacity must retain those discharges to the extent possible in designated waters. Vessels without holding capacity, either because of a lack of holding tanks or lack of excess capacity within their tanks, may discharge treated sewage and graywater in designated waters.

Comment: Adequate education about these discharge restrictions will ensure the ocean going fleet retains all discharges to the greatest extent possible within these sanctuaries.

Response: NOAA will continue to educate vessel operators about existing and new regulations regarding discharge of matter in National Marine Sanctuaries. NOAA will also seek assistance from the various marine shipping representatives such as the World Shipping Council and Pacific Merchant Shipping Association to educate its member companies about operational restrictions in National Marine Sanctuaries.

Comment: More consideration and discussion should be devoted to the need to control microbial pathogens from anthropogenic onshore sources that may affect the marine habitat, as well as from vessel discharges. These are highly significant water quality problems that are expected to increase with population growth and increases in vessel traffic. This issue needs more explicit attention in order to plan for the protection of both humans visiting the sanctuaries as well as the veterinary medical implications of current research in the survival of waterborne microbial pathogens in marine ecosystems. Viruses are a concern due to their high survival rates in marine waters and their capacity for causing infection in much lower doses than are generally required in the case of bacterial pathogens. They can pose both a public health hazard and veterinary medical hazard to various species, as implicated in various studies. Some of the implications of these findings strongly suggest that current federal performance standards for MSDs, based as they are on fecal coliforms, are insufficiently protective of both human water-contact activities and marine mammals. Graywater discharges from vessels are generally untreated, yet may also contain a similar range of microbial pathogens, in particular those associated with galley waste (e.g., Salmonella), hand-washing facilities, laundry services, and bathing facilities. NOAA should prohibit discharges of graywater and treated

sewage from vessels in each sanctuary in the following areas: All State waters, other locations where there are resident colonies of protected marine mammals, shellfish beds, and areas in which the public has significant contact with either marine waters and/or resources harvested in the sanctuaries, and other locations which NOAA determines there is a significant likelihood that wildlife, fisheries, and/or the public could be harmed from exposure to microbial pathogens.

Response: NOAA recognizes microbial contamination is a significant issue for health of living marine resources. These contaminants from anthropogenic land based sources and from vessels are addressed in the management plans and regulations. As such, this rule prohibits discharge of sewage and graywater from cruise ships and vessels 300 gross tons or more in all three sanctuaries. Discharge of sewage from other types of vessels is prohibited except for effluents free from harmful matter and incidental to vessel use and generated by an operable Type I or Type II marine sanitation device. Discharge of graywater from other types of vessels is prohibited under regulations in GFNMS and CBNMS, while the new regulations for MBNMS allow the discharge of graywater only if it does not contain harmful matter. For land-based sources of microbial contamination, the MBNMS Beach Closures and Microbial Contamination Action Plan includes strategies for working with partners improving analyses and reducing microbial contamination, including enhanced research and monitoring, notification programs, source control, technical training, public outreach and enforcement. In addition, NMSP staff review, comment on and authorize National Pollutant Discharge Elimination System (NPDES) permits ensuring sewage treatment plants and municipal stormwater systems are adequately addressing microbial contamination.

Comment: What benefit would be gained from a prohibition on discharges from small vessels (with small crew or passenger loads) through all of the sanctuary waters, given both the *de minimus* impact of such discharges on water quality and the vast size of the combined waters of the three sanctuaries? That a transiting recreational boater unfamiliar with sanctuary regulations would be subject to fairly considerable penalties for using a non-biodegradable cleaning agent while washing his deck or dishes demonstrates the unfortunate consequences of excessive regulation.

Response: The purpose of requiring deck wash down and graywater to be biodegradable was to prevent boaters from washing their decks down with solvents, or discharging harmful chemicals in their graywater. However, NOAA agrees use of the term ''biodegradable'' potentially raises enforcement and compliance issues. It is not a term that has a recognized legal definition and products are labeled as ''biodegradable'' without reference to a fixed set of standards. NOAA could define the term; however, it would not be reasonable to expect a boater to know which of the wide spectrum of products labeled as ''biodegradable'' meet NOAA's definition. For all three sanctuaries, NOAA replaced the requirement that deck wash down and graywater be ''biodegradable'' with the requirement that they be free of detectable levels of ''harmful matter'' as defined in the regulations. This facilitates compliance by providing boaters a definition of what is prohibited, and will be more focused on the type of contaminants that pose the greatest threat to water quality.

Comment: The DEIS frequently cites recreational boating as a source of water contamination, which presumably underlies its proposed requirements with respect to graywater, bilge, deck wash and sewage discharges. Yet, the DEIS provides little in the way of specific data regarding the extent of potential water contamination associated with recreational boating or the impact such contamination would have on marine life.

Response: The changes to the discharge regulations with respect to use of marine sanitation devices on vessels are meant to clarify existing prohibitions. The FEIS does not distinguish discharges from commercial or recreational vessels, only a vessel's size and the material or other matter discharged. Discussions of those discharges and impacts on marine life are discussed in the Biological Resources section of the FEIS. New prohibitions with respect to cruise ships and vessels 300 gross tons or more address impacts associated with discharges from large vessels.

Comment: The proposed rule that prohibits discharge or depositing of any material or other matter from beyond the boundary of the Sanctuary that subsequently enters the sanctuary should be deleted. It is absurd to the extreme for the NMSP to seek to impose its civil and criminal authorities to activities conducted outside of any sanctuary boundaries.

Response: Activities taking place beyond sanctuary boundaries are only subject to this regulation if the discharge injures a sanctuary resource or quality within the sanctuary. This is not a new regulation for MBNMS, where it has been in place since 1993. This final rule does not change the boundaries of the sanctuary except for the addition of the Davidson Seamount to the MBNMS. The regulation has two additive elements. In order for a violation to occur, the material discharged or deposited from beyond the boundary of the sanctuary subsequently entering the sanctuary must also injure a sanctuary resource or quality, except for the exclusions listed in the regulations.

Comment: The proposed cruise ship discharge prohibition should be extended to all ocean-going vessels. While the volume of discharge is considerably smaller per ship, relative to cruise ships, the total volume has the potential to harm sanctuary resources. Under the proposed regulations, ''biodegradable'' graywater and vessel deck wash, and ''clean'' bilge water could be discharged, but the regulations do not define biodegradable, and provide no means for actually enforcing these limitations. Graywater can contain pollutants such as oil, grease, ammonia, detergents, metals, and pesticides. Even in minuscule amounts, oil in bilge water or graywater has the potential to harm sanctuary resources. The best way to ensure that sanctuary resources are protected is to prohibit discharges completely. Without significant enforcement efforts, the ability to distinguish ''clean'' discharge from harmful effluent is nearly impossible. In addition, the sanctuaries should implement an education, monitoring and enforcement program similar to those proposed for cruise ships.

Response: Regulations for each of the sanctuaries prohibit the discharge of most matter; however, prohibiting discharges completely would be nearly impossible given the size of the sanctuaries, use of the sanctuaries by commercial and recreational vessels, and proximity to coastal development. NOAA included additional regulations restricting treated waste and graywater discharges from vessels 300 gross registered tons or greater with sufficient holding capacity while in the sanctuary. See the response in this section regarding graywater and the term ''biodegradable.''

Comment: Discharge from advance wastewater purification (AWP) systems on cruise ships should be permitted. These systems provide tertiary treatment resulting in an effluent quality cleaner than a Type II MSD and a majority of shoreside treatment facilities. Extensive study in Alaska has

shown these systems to be acceptable for discharge and the U.S. EPA is evaluating these systems. NOAA should consult closely with the EPA and Alaska Department of Environmental Conservation as they have both done substantive work on this issue.

Response: The DEIS evaluated an alternative regulation allowing cruise ships to discharge from advanced wastewater systems (see DEIS Section 2.2.1 for a description of this alternative). NOAA is aware of the work done by EPA and the Alaska Department of Environmental Conservation regarding AWP systems. The program adopted in Alaska is a complex arrangement requiring issuance of a permit, prior demonstration that the ships can meet water quality standards based on independent contractor evaluation, environmental compliance fees, wastewater sampling and testing protocols, record keeping and reporting protocols, on-board observers, and a tax per passenger to fund the administration of the program. Such a program is inherently difficult to monitor and enforce, and the NMSP has no mechanism in place for recouping the necessary funds needed to administer it (see below for additional information regarding the Alaska regulations). Also, the EPA studies indicate that although AWPs remove most of the priority pollutants of concern, they do not adequately reduce discharge of ammonia and metals.

Comment: The DEIS analyzes an ''alternative prohibition'' that would allow discharge from AWP systems on cruise ships, in compliance with minimum effluent water quality standards established by the Coast Guard in Alaska at 33 CFR 159. There are serious concerns about the feasibility of administering, monitoring and enforcing such a program. The Alaska regulations have been widely recognized to lack adequate monitoring and enforcement prohibitions and the Alaska program has significant administrative costs. The DEIS does not provide this important information about recent changes to the Alaska regulations. The new Alaska regulations prohibit the discharge of any treated sewage, graywater, or other wastewater from a large passenger vessel unless the owner or operator obtains a permit and discharges may not violate any applicable effluent limits or standards under state or federal law. Unlike Alaska, the NMSP does not have a mechanism in place to recover the administration costs. The alternative prohibition is not feasible, is inconsistent with state law, and should not be adopted.

Response: The EIS has been revised to reflect the current cruise ship regulations in Alaska, as summarized in the comment. See FEIS Section 3.5.4. The referenced alternative prohibition that would allow discharge from AWPs was analyzed in the DEIS, but it is not NOAA's preferred alternative.

Comment: The Cruise Ship Discharges Action Plan's stated goal ''to prevent impacts * * * from cruise ship discharges'' is not consistent with proposed regulations. The proposed regulation prohibits any discharge. Ships have been outfitted with treatment units that convert all black and graywater into potable water, which can then be discharged. Several ships that visited Monterey with advanced treatment systems spent approximately 5 million dollars per ship to install such a system. There is no scientific basis to prohibit all discharges and no reason why material from this advanced treatment could not be discharged.

Response: By only allowing certain types of discharge from a cruise ship, NOAA has in effect targeted the discharges that have the potential to be harmful to sanctuary resources. Effluent monitoring would be cost prohibitive and infeasible, particularly for vessels underway. Additionally, ship discharge audits often reveal a discharge occurred but do not contain information on contaminant levels. Advanced waste water treatment systems (AWPs) on cruise ships do not always function properly and when they do, they may not effectively remove all contaminants. Therefore NOAA believes prohibiting discharge with specified exceptions is the most effective and enforceable regulation.

Comment: Didn't the California Governor recently sign a bill to prevent all cruise ship dumping?

Response: California law imposes restrictions on cruise ships operating in state waters or calling on state ports. These restrictions prohibit the burning of wastes and the discharging of graywater and sewage. However the national marine sanctuaries off of central California are predominantly federal waters (beyond 3 nautical miles) and not protected by the State's laws. The regulations implemented by this final rule are complementary to the State's laws and provide comprehensive protection from the threat of cruise ship discharges throughout the three national marine sanctuaries.

Comment: Anchor wash and cooling water for all engines, whether main propulsion or electrical power generation should be permitted in GFNMS and CBNMS. This change will match the MBNMS regulation, which contains exemptions for vessel engine cooling water, vessel generator cooling water, or anchor wash.

Response: NOAA has incorporated revised wording in the final regulations allowing discharge of clean cooling water for engines and generators and anchor wash in all three sanctuaries.

Comment: Prohibiting discharge of any material from a cruise ship, other than the noted exceptions, could be interpreted to prohibit deck runoff during a rainstorm or high seas.

Response: The regulations implemented in this final rule do not prohibit routine runoff of rainwater or ocean spray/water from vessels.

Comment: The preamble discussion in the proposed rule affecting cruise ships states that ''* * * such discharged effluent associated with cruise ships may not adequately disperse to avoid harm to marine resources.'' This statement is inaccurate and misleading and is not supported by scientific evaluation. Numerous studies of discharged effluent dispersion from cruise ships indicate that both the near-field and far-field dispersion of discharged effluent is significantly high when a ship is underway at moderate speed. Please see the U.S. EPA report on Cruise Ship Plume Tracking Survey (July 30, 2001). This report concludes that ''* * * discharges from cruise ships undergo a dilution that is much greater than the initial dilution predicted by a model * * * Measure dilutions ranged from 195,000:1 to 666,000:1. Secondary dilution, as the effluent passes through the propellers is an important factor when considering the ambient concentrations of discharge effluents, as the effluent will undergo a dramatic and rapid dilution after mixing with ambient water in the prop wash. See additional studies by the State of Alaska, the U.S. Navy and M. Rosenblatt and Sons. These studies should be fully evaluated before enacting the proposed prohibition. The drafters of the proposed regulations consider the dilution from a moving source that is mixing its effluent in the propellers as inadequate and completely ignore fixed point discharges from municipal waste water treatment plants.

Response: Dilution may help reduce impacts; however, dilution rates vary with the speed of a vessel, and dilution does not change the volume of sewage, graywater, and bilge water discharged from the vessel. The NMSP also addresses discharges from wastewater treatment plants. These facilities are regulated by the state's Regional Water Quality Control Boards under the National Pollutant Discharge Elimination System (NPDES). The

NMSP tracks and evaluates NPDES permit applications for these facilities, coordinates with the State on development of appropriate permit and monitoring conditions to ensure protection of sanctuary resources, and—for MBNMS—issues a sanctuary authorization of the permit. The NMSP coordinates with State and local agencies to track and follow up on spills or other compliance violations at these facilities.

Comment: The proposed rule affecting cruise ships states, ''Due to their sheer size and passenger capacity, cruise ships can cause serious impacts to the marine environment.'' It goes on to state that cruise ships generate sewage (blackwater), graywater from showers and sinks, oily bilge, hazardous waste, solid waste, toxic waste from dry cleaning and photo processing laboratories, and millions of gallons of ballast water containing potentially invasive species. The next sentence implies to the reader and public that cruise ships discharge all these byproducts and waste from a ''single source'' that is not regulated. This is misleading at best. Waste onboard cruise ships is fully regulated and very carefully handled. Hazardous waste is carefully segregated, packaged onboard and discharged ashore in accordance with very stringent Resource Conservation and Recovery Act requirements. Other waste is disposed of as permitted by law and regulation. The preamble should be rewritten to accurately reflect cruise industry environmental management practices and procedures.

Response: NOAA recognizes many cruise ship waste products are regulated, and has added clarifying language to the FEIS Section 2.2.1 and the three management plans indicating that many cruise ship discharges are regulated in some form by state or federal law and/or by international treaties.

Comment: Discharge from Type II MSD units onboard cruise ships should be permitted.

Response: NOAA is not allowing discharge from Type II MSD units for cruise ships because Type II MSDs can fail to meet applicable federal standards. Also see section 3.5 of the FEIS, which contains a discussion of sewage and other discharges from cruise ships. Further, allowing Type II MSD discharge would be inconsistent with State of California discharge law for cruise ships.

Comment: Cruise ships should be permitted to discharge effluent oil content at 15 parts per million with no visible sheen.

Response: To ensure a heightened level of protection for the resources and qualities of the national marine sanctuaries, the oil discharge prohibition for all vessels is more restrictive than standards for areas outside of national marine sanctuaries.

Fishing Activities

Bottom Trawling

Comment: Trawling indiscriminately takes all ages and species in the trawl nets' paths, as well as damaging/destroying habitat. Bottom trawling should be prohibited in the three national marine sanctuaries.

Response: Bottom trawling is currently banned, with limited exceptions, in State waters. With the implementation of Amendment 19 to the Pacific Coast Groundfish Fishery Management Plan, NOAA provided a program to describe and protect essential fish habitat (EFH) for Pacific Coast Groundfish. The measures include fishing gear restrictions and prohibitions, areas that are closed to bottom trawling, and areas that are closed to all fishing that contacts the bottom.

Comment: Because bottom trawling impacts are in no way limited to the MBNMS, the MBNMS Bottom Trawling Action Plan should be made cross-cutting and apply to all three central coast sanctuaries. Some of the strategies described under the MB Action Plan are currently underway in GFNMS and CBNMS. Also, this Action Plan should include a more definitive commitment to pursue additional regulation of bottom trawling within sanctuary waters because bottom trawling is a destructive fishing practice that is inconsistent with the primary objective of the NMSP of resource protection.

Response: While the GFNMS and the CBNMS do not have an action plan focused specifically on the effects of bottom trawling on benthic habitats, they have plans that more broadly address the impacts from fishing on the ecosystem. In addition, NOAA has prohibited bottom trawling in waters less than 50 fathoms on Cordell Bank and in several areas within the sanctuary(50 CFR Part 660). If NOAA determines additional regulations are necessary to prevent harm to the ecosystem from trawling, it will work with fishery managers and industry to develop regulations under the authority of the Magnuson Stevens Fishery Conservation and Management Act, the National Marine Sanctuaries Act, or both, as appropriate.

Comment: Commercial harvesting heavily impacts many species of fish. The sanctuary managers must have strong statutory authority to protect endangered fish stocks. Similarly, the sanctuaries should have strong voice in the supervision and enforcement in international fishing treaties as well as local regulation of both commercial and sport harvesting.

Response: The National Marine Sanctuaries Act provides strong authority to address and manage all sanctuary resources and qualities, including endangered fish stocks that are important to the health of a sanctuary ecosystem. NOAA's Ocean Service, National Marine Fisheries Service, Office of Law Enforcement and Office of International Affairs coordinate supervision and enforcement of international fishing treaties as well as local fishing activities affecting national marine sanctuaries.

Exceptions for Lawful Fishing Activities

Comment: NMSP should use the word 'lawful fishing' as opposed to 'traditional fishing' in the proposed discharge and seabed disturbance regulatory exceptions for MBNMS in order to be consistent with language in the GFNMS and CBNMS regulations.

Response: To use consistent terminology and avoid unnecessary confusion, NOAA has incorporated the term 'lawful fishing' into the regulations for all three national marine sanctuaries. This change does not affect the environmental impact analysis in the EIS, although references in the EIS to traditional fishing have been changed.

Fishing Gear

Comment: There is a problem with the use and definition of the term ''bottom contact gear'' in the alternative CBNMS seabed protection prohibition. Any fishing line with a weight at the end could be considered as bottom contact gear. A weighted line is necessary even for fishing off the bottom, as occurs with salmon or schooling rockfish and thus the prohibition would prevent commercial or recreational hook-and-line fishing. Also, the definition of bottom contact gear does not include pot or trap gear. Even though the definition is not meant to be inclusive, traps and pots constitute a primary gear type and should be added.

Response: For consistency, NOAA used the definition for bottom contact gear developed by the Pacific Fishery Management Council (PFMC) in Amendment 19 (Essential Fish Habitat) of the Pacific Coast Groundfish Fishery Management Plan. NOAA has inserted additional language in the EIS from the PFMC definition for clarification of this

alternative. Additional EIS language states: ''Other gear, midwater trawl gear for example, although it may occasionally make contact with the sea floor during deployment, is not considered a bottom contact gear because the gear is not designed for bottom contact, is not normally deployed so that it makes such contact, nor is such contact normally more than intermittent. Similarly, vertical hook-and-line gear that during normal deployment is not permanently in contact with the bottom, would not be considered bottom-contact gear. NOAA has added pots and trap gear to the list of prohibited gear types for clarity.''

Comment: Evidence from recent submersible surveys document a prevalence of entangled fishing gear on Cordell Bank suggests that additional prohibitions targeting longlines on Cordell Bank may also be warranted; NOAA is urged to address this issue.

Response: CBNMS staff completed a three-year process working with the Pacific Fishery Management Council and NMFS to address gear impacts and determined additional regulations targeting longlines are not necessary at this time.

Comment: The proposed rule may impact commercial and recreational fishing through loss of fishing area within the 50-fathom isobath surrounding Cordell Bank. The exception for fishing is not well defined. As written, the proposed action may be misinterpreted to indicate that fishing in a location that is not regularly fished is not ''normal fishing operations.'' A more clear definition is needed.

Response: The wording has been revised for the Benthic Habitat Protection prohibition. See FEIS Section 2.2.2 and Table 2–1.

Comment: An official large whale disentanglement team should be established in Monterey Bay to respond to accidental entanglement in fishing gear or other entanglement. There is such a program developed by the Center for Coastal Studies on the East Coast.

Response: NMFS' Large Whale Disentanglement Network has been active in the Sanctuaries since the early 1980's. In the fall of 2006 and spring of 2008, NOAA offered public outreach events and conducted trainings in whale rescue techniques in conjunction with other partners to demonstrate techniques and gear used to disengage large whales from fishing gear and non-fishery equipment and marine debris. Training efforts were extended to a group of invited professionals who received special instruction consisting of classroom sessions and vessel-based training and exercises. Two new disentanglement teams have been formed to respond to large whale disentanglements from Monterey County through the San Francisco Bay area and offshore of the Farallon Islands. Next steps would include formalizing the large whale disentanglement team network through agreements with NOAA. NOAA has added this as an action item to the Wildlife Disturbance: Marine Mammal, Seabird and Turtle Action Plan under Strategy MMST–4.

Comment: Make sure that the current regulations closing sanctuary waters to drift gillnetting during the fall each year remain in place to protect the endangered Pacific leatherback sea turtles. Federal fishery managers are seriously considering reopening the area to drift gillnetters. MBNMS waters are among the most important on the west coast to turtle feeding. MBNMS managers have the authority and responsibility to protect endangered species in sanctuary waters regardless of what management measures are put into place by others.

Response: In past consultations with the NMFS on proposals to reopen drift gillnet fishing off coastal California, the NMSP has expressed concern for the incidental take (as bycatch) of leatherback sea turtles and other species often associated with this gear type. The NMSP also expressed these concerns during recent consultation with NMFS on a proposal for an Exempted Fishing Permit for a single permittee to deploy shallow set long line in the current leatherback closure area. The NMSP remains concerned about the incidental take of leatherback sea turtles within national marine sanctuaries and throughout the Pacific, as the nesting populations of these animals in the Pacific region are in decline. The NMSP will continue to work closely with NMFS to ensure that any permitted drift gillnet or shallow set long line fishery do not pose a threat to leatherback sea turtles, and other endangered species and birds in the Sanctuary. The NMSP will also continue to work with NMFS on the development and use of gear types to eliminate the take of these endangered or protected species.

Fishing Regulations

Comment: It was guaranteed in writing—known as 'the promise'—in the original designation documents that there would be no regulation governing fishing coming from the sanctuaries.

Response: The comment misunderstands and misstates the statement provided by NOAA in the 1992 MBNMS FEIS and Management Plan (FEIS/MP) and in similar documents for other national marine sanctuaries. In a response to comments published at page F–41 of the 1992 FEIS/MP, NOAA stated the sanctuary was not regulating fishing at that time but added that if sanctuary fishing regulations were necessary later to protect sanctuary resources and qualities, NOAA would take the steps required by section 304(a)(5) of the NMSA and applicable law. At page F–42 of the same document, NOAA explicitly stated certain fish species in the Sanctuary may eventually need to be regulated. NOAA did not and would not publish a statement promising not to ever use resource protection authority that Congress had provided.

Comment: Clarification is necessary on the term 'resource', which by definition could include fish species in Article IV. Scope of Regulations, Part D & F of the MBNMS designation document. Clarification is also necessary regarding the scope of these proposed regulations and whether or not they apply to fish species and/or the closure of federally regulated or state managed fisheries.

Response: The term ''resource,'' as it is used in the terms of designation for MBNMS, includes the fish and other living and non-living resources of the sanctuary. The regulations do not, however, restrict the take of fish species as part of legal fishing activities. If in the future, NOAA determines additional sanctuary fishing regulations are necessary, it would follow the promulgation and coordination processes required by Section 304(a)(5) of the NMSA.

Comment: The proposed fishing regulations, as written, would have the dire effect of destroying the commercial fishing industry which is the economic life blood of the Monterey peninsula.

Response: The regulations do not contain prohibitions directly affecting or targeting fishing activities. Specific fisheries are also managed by other agencies, including the California Fish and Game Commission and NMFS in consultation with PFMC. See also previous responses to comment regarding fishing regulations.

Comment: The Sanctuary Program should remain vigilant and continue to work with PFMC to ensure that fishing regulations are not modified or eliminated in the future to the detriment of protection of the Cordell Bank. If such changes do occur, we urge the NMSP to act expeditiously to adopt regulations, as authorized under section 304(a)(5) of NMSA, to protect the Bank from bottom contact fishing gear.

Response: The NMSP will continue to work with NMFS and PFMC on the

Cordell Bank EFH closure area and all other closures in National Marine Sanctuaries affecting fishing activities. If in the future existing EFH protections for Cordell Bank from bottom contact fishing gear are modified, NMSP would examine potential impacts to the CBNMS environment relative to its goals and objectives. NOAA would determine if additional closures are warranted under either MSA and NMSA or a combination of both authorities. The JMPR EIS analyzes an alternative seabed protection regulation, in which bottom contact fishing gear is prohibited. This alternative was developed and evaluated in the event regulations protecting the seabed from bottom-contact fishing gear were not implemented through the MSA or did not meet the Sanctuaries' goals and objectives for protection of the Bank.

Fishery Management

Comment: NMSP should draft an integrated fishery management plan that addresses the San Francisco Bay and perimeters of the Sanctuary.

Response: NMSP works with NMFS, the Pacific Fishery Management Council (PFMC) and the California Fish and Game Commission when appropriate to help meet sanctuary goals and objectives. San Francisco Bay, while providing important hydrologic and ecological connections to the sanctuaries, is not within any national marine sanctuary.

Marine Reserves/Marine Protected Areas

Comment: NOAA should pursue marine protected areas (MPAs) action plans in CBNMS and GFNMS similar to the MBNMS MPAs action plan. The sanctuaries must address marine protected areas as a management tool to achieve sanctuary goals related to ecosystem protection and research. Sanctuaries have both the legal authority and legal obligation to review changed conditions and adopt management plan changes, as necessary.

Response: NOAA does not believe there is a need for separate action plans to address MPAs in CBNMS and GFNMS. CBNMS Management Plan strategy EP–4 addresses impacts on sanctuary resources and area-based restrictions are proposed as one of the potential management actions, if needed in the future. The GFNMS Management Plan contains action plans on Impacts from Fishing Activities (Strategy FA–4) and Ecosystem Protection (Strategy EP–1), addressing the need to provide special areas of protection for sensitive habitats, living resources, and other unique sanctuary features. It considers a variety of tools, including area-based restrictions, to protect sanctuary resources.

Comment: NMSP should not be involved in creating no-take marine reserves. Fishing regulations should only be promulgated by the Pacific Fishery Management Council and State authorities. The Sanctuary designation documents should not be changed to allow fishing regulations.

Response: NOAA did not propose to create any no-take MPAs as part of this rulemaking. NOAA has two relevant statutory authorities, the National Marine Sanctuaries Act (NMSA) and the Magnuson-Stevens Fishery Conservation and Management Act (MSA). NOAA considers both the NMSA and MSA as tools that can be used exclusively or in conjunction to regulate fishing activities to meet sanctuary goals and objectives. Regulatory options are evaluated by NOAA on a case by case basis to determine the most appropriate regulatory approach to meet the stated goals and objectives of a sanctuary.

Comment: The use of an MPA working group would be appropriate to evaluate the utility of MPAs if the working group process was fairly constituted and science-based. However, it is the perception of the fishing community that the current MBNMS MPA working group is seriously flawed as a public/science-based process.

Response: The working group meeting from 2002–2007 included a broad mix of stakeholders including recreational and commercial fishermen, divers, scientists, environmentalists, and agency personnel. The working group includes preeminent local MPA scientists who help provide scientific guidance to the working group during deliberations. NOAA's decisions regarding if and where to create new MPAs will be grounded in the best available information and science.

Comment: There is lack of specificity in the strategies and associated activities in the MBNMS MPA Action Plan. There will be a rush by the sanctuaries to do something without a clear understanding of all the habitats within such a large coastal area, nor the ability to develop an integrated and adaptive management system.

Response: The MBNMS MPA Action Plan is intended to be a framework document that outlines the general types of evaluations, criteria, and programs for considering and effectively implementing MPAs. This framework identifies the areas where specific information will need to be developed, such as in habitat characterization, research and monitoring, enforcement, and education and outreach. The consideration of MPAs has been ongoing for five years and continues to move forward in a very deliberate and informed manner.

Comment: Monterey Bay should not close waters off for anadromous or pelagic fishing. These species cannot be protected by closing off one area or another to fishing, except where they spawn. And, the continuation of long-term sustainable fishing in the region requires that no marine reserves should be placed in areas important to the salmon fishery, the crab fishery and certain types in the rockfish fishery.

Response: NOAA did not propose to create any marine reserves as part of this rulemaking. However, the Management Plan for the MBNMS includes an action plan with strategies for the consideration of new MPAs in the Sanctuary. This MPA Action Plan recognizes the value of full no-take MPAs. It also recognizes that allowing certain types of ''take'' within an MPA may be appropriate depending on the location and the objectives of the site.

Comment: The NMSP should adopt MPAs, including no-take reserves, within federal waters of the sanctuaries to complement the efforts of the State of California. The NMSP should move forward on creating MPAs in federal waters using NMSA if necessary.

Response: NOAA believes additional MPAs are needed in federal waters of the MBNMS to address ecosystem objectives, possibly including no-take marine reserves. As such, NOAA has initiated a process to consider how best to address this need through a collaborative public process that involves all affected stakeholders. NOAA has not determined there is a need for additional no-take marine reserves in the federal waters of CBNMS or GFNMS at this time. NOAA may take action in the future if there is a determination additional fishing regulations, possibly including no-take marine reserves, are necessary to protect sanctuary resources.

Comment: Limitations on noise should be included in the definition of an MPA.

Response: The Management Plan for the MBNMS includes strategies to reduce the threat of acoustic impacts on marine mammals and other species but not as part of the regulatory scheme for MPAs addressing fishing activities. See responses to comments in ''Noise Impacts'' section.

Comment: The proposed MPA Action Plan timeline is too slow. The plan should make implementation of marine protected areas—specifically fully

protected marine reserves—much higher priority, and give it a more ambitious timeline.

Response: As is true with many community based initiatives, the process for considering and potentially siting MPAs in the MBNMS takes time. This does not mean that the issue is not a priority for NOAA. While the management plan review process has been progressing, NOAA convened a multi-stakeholder group to consider new MPAs.

Spearfishing

Comment: Do not prohibit free-dive spearfishing.

Response: NOAA is not regulating spearfishing at this time. Other regulatory authorities, including California Fish and Game Commission, have regulations prohibiting spearfishing in certain zones in State waters of the MBNMS and are developing regulations for zones that could affect spearfishing in the GFNMS. See also responses to comments regarding fishing regulations.

Working With Fishing Community

Comment: The National Marine Sanctuary Program should consider a larger role for the fishing community whose goodwill is important to long-term support for sanctuary programs and whose livelihoods depend on the protection of the sanctuary's resources.

Response: The fishing community is important and provides opportunities for involvement in Sanctuary research, education, and resource protection activities. The NMSP recognizes the economic importance of local fishing and waterfront businesses, including the infrastructures that support them.

Moreover, NOAA believes appropriate fisheries within a national marine sanctuary are an indication of a healthy ecosystem protected by that Sanctuary. The Cordell Bank, Gulf of the Farallones, and Monterey Bay National Marine Sanctuaries Joint Management Plan Cross-cutting Maritime Heritage Action Plan states ocean-based commerce and industries (e.g., fisheries) are important to the maritime history, the modern economy, and the social character of this region. The Action Plan states ''there is the potential to cultivate partnerships with local, state, and federal programs and identified communities and that these partnerships could aid in the design and implementation of studies of living maritime heritage and folk life to help educate the public about traditional cultures and practices including fishermen and economic activities reflecting historic human interaction with the ocean.'' The MBNMS Management Plan includes the Fishing Related Education and Research Action Plan, whose goal is to involve fishermen in research activities to add to the body of research available for fishery-related decision-making processes. The GFNMS Management Plan includes strategy FA–5: Develop public awareness about the value and importance of the historical and cultural significance of maritime communities and their relationship and reliance on healthy sanctuary waters. The recreational and commercial fishing communities also hold seats on the advisory councils for the sanctuaries and provide input into education, research and resource protection activities.

Comment: The plan allowing fishermen to participate in fisheries research may be a conflict of interest.

Response: Allowing fishermen to participate in research activities adds to the body of research available to decision-makers and increases the fishing community's understanding of ongoing research projects. In many cases, fishermen possess experience and knowledge that can be particularly helpful in research activities.

Comment: Consider the impacts on fishermen. There is a lack of compassion for fisher folk; get them jobs on the water, or buy their boats and offer them jobs.

Response: This rulemaking does not include regulation of fishing activities; however, the management plans include activities to involve fisherman in research and outreach programs. See the previous response for ways the management plans involve fishermen in sanctuary activities.

Introduced Species

Agency Coordination

Comment: It appears that the sanctuary wishes to grant itself unlimited authority to accomplish the task of preventing and managing the spread of introduced species. Regulations, permit requirements, or other enforcement oriented actions associated with the Introduced Species Action Plan affecting public agencies should be coordinated with, and agreed to by those agencies before they become federal law.

Response: NOAA considers the threat of introduced species to be a high priority. The strategies in the management plans to address this issue include research, education, and enforcement activities each including coordination with federal, state and local agencies. The regulation of introduced species involves various agencies, and NOAA is adopting a comprehensive program coordinated throughout the three sanctuaries in northern and central California.

Definition and Regulation

Comment: The proposed Introduced Species prohibition would prohibit any new leases for the Pacific oyster, which would impact the mariculture industry in Tomales Bay. NOAA states that there hasn't been interest in additional leases, but that's due to the existing regulatory framework, which is very restrictive and cumbersome.

Response: This final rule restricts new leasing of areas to native species but would not impact any existing mariculture activities in Tomales Bay. Introduced species currently allowed by the State of California as of the date of this regulation, including Pacific Oysters, may continue to be farmed.

Comment: Will a list be provided of native species in each Sanctuary to allow the Sanctuary to determine if in fact a species introduced is non-native?

Response: NOAA does not have a comprehensive inventory of species introduced into the sanctuaries. If a species is documented as native to the ecosystem, it would not be considered an introduced species.

Comment: The proposed Introduced Species prohibition would prevent the introduction of genetically modified species (DEIS page 3–51), but there is no definition provided. Triploid oysters are commonly used by Tomales Bay oyster growers to avoid the oysters spawning, and thus avoid the resultant poor condition of oysters for sale. Would this proposed rule ban these oysters which are a more desirable nonnative, due to their lack of spawning, versus normal oysters which spawn but do not successfully establish?

Response: This rule does not prohibit triploid oysters currently used by Tomales Bay oyster growers and cultivation of them would be allowed to continue. Future leasing of undeveloped lands in Tomales Bay would be restricted to oysters not meeting the definition of an introduced species (i.e., where altered genetic matter or genetic matter from another species, has been transferred in order that the host organism acquires the genetic traits of the transferred genes).

Comment: Currently the gross leased mariculture areas authorized by CDFG are 10–20% net usable for mariculture. New growing techniques and/or new CDFG policies could expand the size of the area currently under cultivation out to the boundary of the lease area, which would result in a 500%–1,000% net increase. The area under cultivation

should be limited to the current net usable footprint. Consideration should be made for the possibility of Drake Bay Oyster Company moving into Tomales Bay.

Response: NOAA acknowledges an increase in mariculture activities could occur within existing leases since most of the leases are not fully developed. The new regulation for introduced species does not prohibit mariculture operations in Tomales Bay conducted pursuant to an existing valid lease, permit, license or other authorization issued by the State of California. The regulation does not prohibit the transfer of current valid leases in Tomales Bay to new owners within existing lease areas or future leasing of areas in Tomales Bay provided the new leased areas do not include introducing a species not native to the ecosystem.

Comment: The exceptions would not allow existing leases to fully utilize lease acreage for which they pay the State to the degree authorized by their lease, Army Corps permit, and their Coastal Development permit. The prohibition conflicts with State policy and limits the existing authority of the CDFG to engage in additional bivalve shellfish aquaculture leases, with existing state environmental impact review in place. To address these concerns, the designation documents and proposed Introduced Species prohibition exceptions for all three sanctuaries should be revised to allow mariculture and research pursuant to a valid lease, permit, license or other authorization issued by the State of California.

Response: The restrictions on introduced species do not restrict any areas currently leased by the State of California so long as the species were being cultivated in those areas prior to the new prohibition taking effect. See previous responses to comments regarding the scope of this regulation. A complete exception is not provided for mariculture of introduced species and associated research activities because NOAA cannot accurately predict impacts that might result from introduced species that have not been previously cultivated in these areas. Please see the response to the next comment below.

Comment: The basis for the proposed Introduced Species prohibition cites information that is more related to finfish culture and net-pen culture than shellfish mariculture. These issues do not relate to shellfish mariculture in terms of the way it's conducted now or with existing CDFG regulations, which should be acknowledged (CDFG Title 24 regulations). The industry is heavily scrutinized in terms of seed pathogens; five years of pathology and cytology go into the CDFG review. Increasing the footprint is not going to increase potential impacts. Science has proven that there are more positive impacts (e.g., sustainability) than negative impacts from shellfish mariculture.

Response: There are some positive impacts from shellfish mariculture, and this regulation would not restrict mariculture of native species and would allow cultivation of introduced species currently authorized under State of California law in existing leases. However, past introduction of foreign shellfish has brought diseases, parasites, and predators that have damaged ecosystems and associated native species. Moreover, the potential exists ecologically for non-native shellfish to be accidentally released and established in sanctuary ecosystems.

Comment: The civil penalty of up to $100,000 is too onerous for a recreational boater who could unintentionally or unknowingly violate the proposed Introduced Species prohibition by releasing a nonnative seaweed or barnacle. This prohibition should be deleted and attention should be focused on education and on major sources of introduction such as ballast water exchange. Education is a more appropriate tool to address invasive species; NOAA could partner with Department of Boating and Waterways to educate boaters about precautions.

Response: The National Marine Sanctuaries Act establishes a limit on the maximum civil penalties that can be charged for violations of sanctuary regulations and law. Currently, that limit is set at $130,000 per day for any continuing violation. However, the act does not require application of the maximum allowable penalty in any enforcement case. The amount of any penalty is generally determined by the nature of a violation and a variety of aggravating/mitigating circumstances, such as gravity of the violation, prior violations, harm to protected resources, value of protected resources, violator's conduct, and degree of cooperation. NOAA prosecutors generally scale proposed penalties to fit the nature of a particular violation. Recreational boating is a common method for spread of non-native species in California. However, this prohibition extends beyond small-scale introduction by a recreational boater. Introduced species could be discharged into a sanctuary on a large-scale, systematic basis through many vectors, such as commercial shipping, aquaculture, aquaria, or fishing operations. Further, there are circumstances in which introduced species could be willfully and intentionally discharged with full knowledge of the potential negative consequences. In such instances, education alone could not address the problem. Education is an important part of this issue and NOAA has included education components in its Action Plans regarding Introduced Species. NOAA coordinates with the California Department of Boating and Waterways already, and welcomes expanded interagency cooperation to reduce movement and introduction of non-native species from recreational boating.

Comment: The broad nature of the Introduced Species Action Plan may result in controls on the fishing fleet that would require all vessels to be inspected and cleaned before every trip in sanctuary waters. Vessels routinely enter and exit sanctuary waters. There is no scientific evidence that this activity has caused any environmental problem regarding non-resident species. Additional regulations, without any basis and without any evaluation of the pros and cons, should not be adopted.

Response: The Action Plan does not mandate vessel inspections and cleaning before every entry to the sanctuary, and such activities are not required by the regulation. Multiple studies document the spread of non-native species by recreational and commercial vessels (e.g., Zebra mussels and quagga mussels). NOAA is also concerned about the spread of invasive algaes such as *Undaria* which have been found in the Santa Barbara Harbor and Monterey Harbor and could easily be transmitted by vessels as they transit the coastline.

Use of an Introduced Species as Bait

Comment: Bait used while fishing is an exception to the discharge rule but often times bait can be an introduced species, so the discharge exception needs to be clarified.

Response: Under this action, the exception for the bait used in or resulting from lawful fishing activities from the prohibition on discharge of materials or other matter does not exempt the activity from the prohibition on the introduction of non-native species. Specific exceptions in one prohibition do not except the activity from other regulations. There is no need to further clarify this in the regulations as NOAA's intent in this matter is clearly articulated.

Motorized Personal Watercraft

Action Plan Review

Comment: There needs to be some mechanism for periodic review of the

MBNMS MPWC Action Plan to allow the action plan to be periodically adjusted according to the effectiveness of the program.

Response: The National Marine Sanctuaries Act requires NOAA to review the management plans and action plans therein every five years.

Agency Coordination

Comment: NOAA should work with state and local jurisdictions with authority to regulate uses or activities causing concern rather than creating new authorities.

Response: NOAA has regulated MPWC use in the MBNMS since 1993 and in GFNMS since 2001. State and local jurisdictions overlay less than 20% of MBNMS waters. Local governments have no mandates or authority to issue MPWC regulations throughout State and Federal waters of the MBNMS. Where local marine jurisdictions exist, they seldom extend seaward of the 60-ft depth line and are geographically constrained. In addition, regulation of MPWC is often inconsistent between local jurisdictions within the MBNMS. State and local regulations pertaining to MPWC are usually designed primarily for public safety purposes, not natural resource conservation purposes. MPWC operations present unique threats to marine resources of the sanctuary due to their relative size and weight. See the MBNMS Motorized Personal Watercraft Action Plan for a description of uniqueness and subsequent impacts. By limiting use of the MPWC to certain areas, NOAA can ensure uniform and consistent management of this activity to minimize threats to protected national resources throughout the MBNMS.

Comment: NOAA should clarify what agency will enforce the provisions of the proposed regulations.

Response: Primary law enforcement responsibilities for NOAA regulations are assigned to NOAA's Office for Law Enforcement (OLE). Other federal and state agencies are also capable of enforcing NOAA regulations. For a complete description of enforcement responsibilities and partnerships see the responses to comments under the heading ''Sanctuary Management—Enforcement.''

Economic Impacts

Comment: The new definition of MPWC for MBNMS will have significant negative economic impacts.

Response: NOAA's socioeconomic assessment in the Draft and Final EIS found that the changes to the definition of MPWC for the MBNMS have both beneficial and adverse socioeconomic impacts, and it concluded that overall negative socioeconomic impacts would be less than significant.

Prohibition and Exceptions

Comment: The proposed MPWC definition change to include ''any other vessel that is less than 20 feet as manufactured, and is propelled by a water jet pump or drive'' is very vague and significantly over-broad.

Response: The revisions to the definition provide readily visual cues for determining if a vessel qualifies as an MPWC, and focus on a very specific group of small, powered vessels. The agency has been specific in describing the vessels of concern and believes the proposed definition is sufficiently clear to identify them.

Comment: NOAA should consider alternative regulatory language such as that used by the State of Hawaii which requires training and certification and a fixed speed of 5 miles per hour when within 300–1,000 feet of the shoreline.

Response: Vessel training curricula and certification requirements are boating safety and registration issues which are more appropriately managed by State and Federal boat licensing agencies. NOAA is not proposing licensing requirements. Rules implemented by the State of Hawaii to regulate MPWC were developed specifically to resolve boater safety and user conflict issues that had arisen in state coastal waters. The rules were amended in 1994 to make provisions for tow-in surfing activities and resolve mounting conflicts between traditional and tow-in surfing interests. The Hawaii rules were not developed in response to natural resource protection threats, nor are they specifically designed to ensure protection of nationally significant marine resources or sensitive habitat areas. No environmental studies were conducted as part of the rulemaking process for Hawaii MPWC regulations. Further, NOAA is not proposing a change to the MPWC regulation itself, but rather a revision to the definition.

Comment: NOAA should develop a program to allow MPWC use in designated areas for tow-surfing activities.

Response: NOAA considered a permit program in the MBNMS Draft Management Plan and concluded no MPWC recreational activity could meet the required criteria for issuance of a Special Use Permit (see 15 CFR Sec. 922.133). NOAA will continue to allow MPWC use for all activities in four designated MPWC use zones, plus, per the final regulation (i.e., the FEIS preferred alternative), an additional zone specifically designed to accommodate big wave tow-in surfing.

During NOAA public scoping meetings in 2001, NOAA received comments that the Mavericks surf break at Half Moon Bay was a unique big wave tow-in surfing location in the continental United States, accessible only by MPWC tow-in techniques and should be given special consideration for MPWC access. Based upon the evidence that Mavericks was such a special national sporting venue, NOAA investigated whether allowing MPWC operations at that location could be accomplished in a manner compatible with the Sanctuary's primary goal of marine resource protection. As a result of the review, this final rule establishes a new MPWC zone off Pillar Point Harbor that will allow for recreational access via MPWC to the Mavericks surf break during National Weather Service high surf warnings issued for San Mateo County during December, January, and February. During the course of management plan development, NOAA also received public comment requesting that MPWC access be granted for big wave tow-in surfing at a surf break known as Ghost Trees, located off Pescadero Point in Carmel Bay. NOAA examined this venue, but due to several factors (including sensitive wildlife resources, distant launch sites and lengthy transit corridors, and impacts on marine protected areas), determined that authorization of MPWC activity at this location would not be consistent with the sanctuary's primary goal of resource protection. NOAA also received public comments that broad access to sanctuary waters should be granted to MPWC to support tow-in surfing at virtually any location within the sanctuary and under any surf conditions. Thus, in this final rule, NOAA has made a limited provision for MPWC assisted tow-in surfing at the unique big wave site known as Mavericks, but would continue to prohibit MPWC use outside of the designated riding zones that have been in place since 1993. Many professional and recreational surfers access breaking surf up to 20 feet in height within the sanctuary without the use of MPWC and have done so for decades.

Comment: The existing MPWC zones are not used and should be removed.

Response: The existing MPWC zones are used in some areas of the MBNMS, although the volume of use is currently low. As the definition of MPWC is extended to encompass larger MPWC models currently in use within the sanctuary, the larger models of MPWC not currently regulated will be restricted to the five zones. Therefore, use of

sanctuary MPWC operating zones is expected to increase. NOAA is not closing any zones at this time. See above for additional discussion of zones.

Comment: NOAA should allow MPWC use for emergencies such as rescue operations or vessel assistance and provide a method for emergency response training.

Response: NOAA continues to allow use of MPWC for emergency response purposes. The prohibitions listed in the regulations at 15 CFR Section 922.132(a)(2)–(11) do not apply to any activity necessary to respond to an emergency threatening life, property, or the environment. NOAA has made provisions in the final management plan to support MPWC rescue and training operations by government search and rescue agencies operating within the MBNMS. Search and rescue personnel specialize in public safety, and their training and operations are primarily focused on that mission priority. Prior to issuing any permits or authorizations for MPWC search and rescue training operations, NOAA will coordinate with government agency partners to ensure that training operations are conducted in a manner, and at times and locations, that minimize risk of disturbance or harm to protected resources and habitats within the Sanctuary.

User Conflicts

Comment: The MPWC issue is a user conflict between traditional paddle surfers and those who engage in tow-in and or tow-at surfing. NOAA should not discriminate between recreational activities.

Response: NOAA has regulated MPWC within the MBNMS since 1993, prior to any significant use of MPWC by surfers within the sanctuary. NOAA is not regulating surfing activity and does not promote one style of surfing over another. NOAA is concerned with threats posed by current and future MPWC activity within the sanctuary (not surfing) and is updating an existing 15-year-old restriction of MPWC to specific areas in the sanctuary. In response to comments and staff analysis of various alternatives, this final rule adds a new zone to allow use of MPWC at Pillar Point (Mavericks) due to the unique geographic, oceanographic, and seasonal characteristics of that site. The zone would be in effect during National Weather Service high surf warnings issued for San Mateo County in December, January, and February.

Wildlife Disturbance

Comment: NOAA should update the MBNMS MPWC definition to protect wildlife and reduce user conflicts consistent with the original intent of the regulation.

Response: MPWC have special maneuver, thrust, and buoyancy capabilities distinguishing them from other watercraft, enabling sustained intrusion by MPWC into wildlife areas. See the response immediately below regarding protective measures by NOAA.

Comment: MPWC should be regulated in the same manner as other small vessels.

Response: MPWC have several characteristics distinguishing them from other small vessels. MPWC are small, fast, and highly maneuverable craft that possess unconventionally high thrust capability and horsepower relative to their size and weight. This characteristic enables them to make sharp turns at high speeds and alter direction rapidly, while maintaining controlled stability. Their small size, shallow draft, instant thrust, and ''quick response'' enable them to operate closer to shore and in areas that would commonly pose a hazard to conventional craft operating at comparable speeds. Many can be launched across a beach area, without the need for a launch ramp. Most MPWC are designed to shed water, enabling an operator to roll or swamp the vessel without serious complications or interruption of vessel performance. The ability to shunt water from the load carrying area exempts applicable MPWC from Coast Guard safety rating standards for small boats. MPWC are often designed to accommodate sudden separation and quick remount by a rider. MPWC are not commonly equipped for night operation and have limited instrumentation and storage space compared to conventional vessels. MPWC propelled by a directional water jet pump do not commonly have a rudder and must attain a minimum speed threshold to achieve optimal maneuverability. Most models have no steerage when the jet is idle.

These characteristics enable MPWC to conduct sustained operations in sensitive habitat areas where other vessels cannot routinely operate, thus posing serious disturbance threats to marine wildlife in those areas. In addition, NOAA has received comments that operation of these craft in a manner that optimizes their design characteristics (i.e., normal operation) poses unique threats to other human uses of Sanctuary nearshore areas. Further, see the 1995 U.S. Court of Appeals decision unanimously upholding NOAA's regulation of MPWC in the MBNMS, *Personal Watercraft Industry Association* v. *Department of Commerce, 48 F.3d. 540.*

Comment: NOAA lacks adequate data regarding endangerment or harassment to wildlife from MPWC.

Response: Local observations and documentation of MPWC disturbance of marine birds and mammals elsewhere, provide sufficient information identifying the risks of MPWC. The regulation of MPWC within the Sanctuary in 1993 stemmed partially from complaints of endangerment and harassment of marine mammals, including highly publicized claims that a MPWC operator was observed running over a sea otter, a species protected under the Endangered Species Act, near Monterey. Again, the adequacy of NOAA's administrative record for regulation of MPWC has already been upheld in court. (See previous responses.) NOAA has received written and oral reports of MPWC users harassing sea otters, harbor seals, porpoise, dolphin and other wildlife in various areas of the sanctuary since implementation of the regulation in 1993. Sometimes, due to high surf conditions, operators are unaware of their impacts on wildlife. For example, sea otter biologists have observed MPWC/sea otter interactions during high surf events. In the first incident, a sea otter biologist observed an MPWC tow a skier across the course of an otter swimming perpendicular to them in Stillwater Cove. Due to high swell conditions, the MPWC team never saw or responded to the otter as it crossed their path. In a second incident, Monterey Bay Aquarium volunteers observed an MPWC drive directly through a group of otters at Otter Point in Monterey Bay during high surf conditions. U.S. Fish and Wildlife Service biologists also report flushing of Common Murres from the Devil's Slide Common Murre restoration project due to MPWC use. Scientific research and studies across the United States (e.g., California, New Jersey, Florida) have produced strong evidence that MPWC present a significant and unique disturbance to marine mammals and birds different from other watercraft. Though some other studies have found few differences between MPWC and small motor-powered boats, they have not presented evidence to invalidate the studies detecting significant impacts.

In 1994, NOAA commissioned a review of recreational boating activity in the MBNMS. The review provided statistics on MPWC use and operating patterns in the Sanctuary at the time and identified issues of debate from the research community regarding MPWC impacts on wildlife, but it made no

formal conclusion or recommendation. A poll of Sanctuary harbormaster offices by NOAA in 2003 provided updated estimates on MPWC use in the Sanctuary that are discussed in the JMPR DEIS.

Comment: Improvements in MPWC technology have reduced pollution and noise.

Response: NOAA acknowledges that MPWC technology has improved to reduce noise and pollution. However, MPWC have also become larger, faster, and more powerful, with extended ranges, and retain the maneuverability characteristics that increase the potential for disturbance of wildlife, including acute turns at high speeds, rapid course alterations, and ability to operate closer to shore and in areas that would commonly pose a hazard to conventional craft operating at comparable speeds. Though newer MPWC are quieter than older models under normal displacement conditions, such improvements are largely irrelevant when MPWC launch into the air off of waves or breaking surf. Also, lower sound intensity (decibel level) does not equally reduce the effects of oscillating sound caused by persistent throttling (revving) of the engine during repeated acceleration/deceleration within the surf zone (which is often necessary to avoid capsizing and pitch polling). Research and observations have shown that this frequent oscillating sound pattern of irregular intensities can be particularly disruptive to wildlife and humans. This is the very sound pattern that often elicits complaints from coastal residents and beachgoers. Many newer MPWC models have 4-stroke engine technology or cleaner 2-stroke engine technology required to meet increased governmental emissions standards. While cleaner emissions are welcomed, this improvement has little bearing on the primary reasons for regulating MPWC within the MBNMS.

User Education

Comment: NOAA should work with the MPWC industry to develop user education programs.

Response: The MBNMS Management Plan includes *Strategy MPWC–3: Conduct Educational Outreach to MPWC Community*, which identifies the Personal Watercraft Industry Association and American Watercraft Association as potential education and outreach partners. These organizations, as well as agencies such as the California Department of Boating and Waterways, conduct user education programs throughout the State. NOAA will continue to work with these agencies and organizations to increase understanding of MPWC etiquette as well as the regulations regarding MPWC use in a national marine sanctuary.

Noise Impacts

Comment: Provisions in the MBNMS Marine Mammal, Seabird and Turtle Disturbance Action Plan regarding Acoustics (Strategy MMST–6) should be expanded and addressed in all three sanctuary management plans. Increased use of military high-intensity active sonar systems, undersea warfare training zones, shipping lanes, and increases in large vessel traffic can be expected to result in substantial levels of anthropogenic noise impacts. Also, a different branch of NOAA is currently funding geologic mapping of the coastal seabed, including the sanctuaries, the primary purpose of which is to determine the presence of oil deposits. This mapping uses an air concussion with underwater sound impact not unlike Low Frequency Active Sonar which has been blamed for dozens of whale beachings. Action plans might contain the following components: analyze noise sources, develop monitoring programs, address stranding issues and determine appropriate management responses.

Response: Additional provisions have been added to all three sanctuary Management Plans in response to this comment. See the MBNMS Marine Mammal, Seabird and Turtle Disturbance Action Plan regarding Acoustics, the CBNMS Ecosystem Protection Action Plan (Strategy EP–7), and the GFNMS Wildlife Disturbance Action Plan (Strategy WD–3). In addition, this rule prohibits the ''taking'' of any marine mammal, sea turtle or seabird in or above the Sanctuary, except as authorized by the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361 *et seq.*, the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 *et seq.* Use of military high-intensity active sonar systems, undersea warfare training zones, and geologic mapping of the coastal seabed within the sanctuaries typically require that the project proponents receive approval (likely in the form of an Incidental Take Authorization Letter or Letter of Authorization (LOA), or an Incidental Harassment Authorization (IHA) from NMFS. As stated in the MBNMS Strategy MMST–6.2, the NMSP intends to continue collaborating with the NMFS in evaluating individual proposals on a case-by-case basis to determine the impacts of such projects and whether they would be appropriate to conduct within the sanctuaries. The Minerals Management Service is also conducting geologic mapping of the coastal seabed, under provisions of the Energy Policy Act of 2005. A project of this sort would still be subject to the permitting and review provisions outlined above. See the Sanctuary Action Plans for additional activities related to addressing noise effects on wildlife. Although NMFS currently addresses and evaluates potential impacts on marine mammals resultant from acoustic sources under the Marine Mammal Protection Act, the NMSP will continue to coordinate with NMFS to evaluate acoustic impacts within sanctuaries. Increasing research efforts, such as those recommended within the National Academies' National Research Council's recent reports on the impacts of noise on marine mammals, will assist NOAA in continuing to evaluate the agency's management responses to this issue.

NMFS has a stranding response network of external partners that coordinates with sanctuary staff as appropriate on all marine mammal (with the exception of sea otter) and sea turtle standings. Sea otter standing are investigated by the California Department of Fish and Game through an agreement with the United States Fish and Wildlife Service. Responses and investigations, including postmortem examination and diagnostics when feasible, are conducted whether or not anthropogenic acoustic or blast trauma is suspected.

Comment: Acoustic impacts should be divided into two categories and addressed in sanctuary management plans: impacts of noise on birds and pinnipeds above the water (e.g., from aircraft, boat traffic and MPWC), and the impacts of underwater noise (e.g., ship propulsion noise, active sonars and seismic airgun exploration) on fish, turtles, marine mammals and marine invertebrates.

Response: The physical characteristics of air-based and water-based sound sources are different (decibel levels, physics, attenuation, etc) and thus have different potential impacts on sanctuary species. Impacts on marine species from sound sources both above and below the water surface have been studied, and such data are available for management decision-making. Due to the importance of accounting for possible cumulative effects from exposure of sanctuary resources to multiple noise source types, sources are not divided into categories. Instead, each source's propagation is modeled individually

and then considered additively (if necessary) to estimate total levels of ensonification over various spatial/temporal scales. Currently, NMFS addresses potential acoustic impacts on marine mammals in accordance with its mandates under the MMPA. The NMSP is increasingly interested in issues of noise impact on marine species. The NMSP will continue to work closely with NMFS and other research partners to help identify critical subject areas needing additional study and evaluation. Based on the results of these future studies, the NMSP will develop reasonable management approaches to responding to the issue. No additional changes to the EIS are needed.

Comment: There should be a permanent ban or rejection of any request of the Navy in regard to sonar testing experiments, which harm marine life, especially whales and dolphins.

Response: The U.S. Navy must consult with NOAA when its actions, including sonar testing, trigger consultation requirements under the NMSA, MMPA, ESA, or MSA. Under the NMSA, this consultation is triggered when the action is likely to injure, cause the loss of, or destroy sanctuary resources. Once consultation is initiated, NOAA will recommend alternatives to the Navy to protect sanctuary resources. Please also see response to comments on Sanctuary Management: Military Exemption for more information on this issue.

Comment: Modify the DEIS to analyze suggested noise regulations.

Response: NOAA did not propose new regulations on noise in the sanctuaries in the proposed rule. The proposed Management Plans included provisions for addressing noise and additional provisions have been included in the wildlife disturbance action plans, based on public comments. None of the changes in the sanctuary regulations would result in significant increased noise impacts on wildlife in the sanctuaries. Noise has been added to the list of impacts found to be not significant in Section 5.5 of the EIS.

Comment: The sanctuaries should take a leadership role and establish noise level criteria and regulations to reduce or eliminate harmful anthropogenic noise impacts on marine life. Sanctuary management plans should allow for a time in the near future when an acceptable Ocean Noise Criteria system emerges. Until that time, precaution should inform decisions about introducing or permitting new, unusual, or loud human generated sounds into the sanctuaries. Knowing that we are already starting with a noisy acoustical environment should not stop us from moving ahead with informed regulations and a policy framework.

Response: NOAA recognizes the concern about potential negative impacts on marine mammals from a variety of acoustic disturbances (e.g., noise from ships, aircraft, research boats, and military and industrial activities). Noise can cause direct physiological damage, mask communication, or disrupt important migration, feeding or breeding behaviors. Active-sonar, specifically low frequency (100–500 Hz) and mid-frequency (2.8–3.3 kHz) active sonar used in military activities by the U.S. and other nations are of particular concern. The impact of seismic testing for geological mapping and oil and gas exploration is also unknown. The MBNMS Management Plan includes Marine Mammal, Seabird and Turtle Disturbance Action Plan Strategy MMST–6: Assess Impacts from Acoustics, which recognizes that noise levels in the sanctuaries is increasing. The Strategy includes activities to expand research and monitoring of acoustics and to continue to evaluate individual projects with the potential to disturb wildlife. NOAA's Acoustics Program is investigating all aspects of marine animal acoustic communication, hearing, and the effects of sound on behavior and hearing in protected marine species.

For additional information, please see: *http://www.nmfs.noaa.gov/pr/acoustics/.*

Comment: NOAA should prohibit seismic exploration for resource extraction or even for ''asset surveys'' and other sources of sound that may mask biological sounds critical to the survival of marine animals. Noise from seismic surveys adjacent to the sanctuaries does not conform to the sanctuary boundary, thus setting sanctuary limitations on ''trans-boundary noise pollution'' will require coordination and cooperation with other jurisdictions.

Response: Within the sanctuaries, NOAA prohibits exploring for, development or production of oil, gas, or minerals. NOAA works with the Department of the Interior's Minerals Management Service and other agencies to manage potential impacts to sanctuary resources from seismic exploration activities outside of the sanctuary's boundary.

Sanctuary Management

Agency Coordination

Comment: The management plans should include language regarding compatibility with the National Park Service and other agencies' management plans.

Response: As a routine matter, NOAA coordinates management efforts with managers of adjacent protected areas. Other agencies often manage resources pursuant to mandates, polices, and priorities that may be different from NOAA's National Marine Sanctuaries Program or priorities set forth in the National Marine Sanctuaries Act. NOAA will continue coordination with the National Park Service and other agencies to ensure compatibility, to the maximum extent practicable, with other agencies management plans.

Comment: The commenter disagrees with the findings under the Executive Order 13132 (which refers to regulations, legislative comments or proposed legislation, and other policy statements or actions 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) and request the background material that allowed said findings to be made.

Response: See discussion of Executive Order 13132 under Section V, Miscellaneous Rulemaking Requirements.

Budget

Comment: We can't do a better job of conservation without spending some money. I hope the Sanctuary Program will fight for appropriate funding and staffing.

Response: NOAA recognizes resource limitations and necessary program and partner developments may limit implementation of all of the activities in the various management plans. NOAA will continue to work with the Department of Commerce, Office of Management and Budget, and Congress in developing supporting justifications when preparing budget submissions.

Emergency Regulations

Comment: Consistency does not exist between the three sanctuaries on the use of emergency regulations. CBNMS establishes a 120-day maximum and the others do not.

Response: NOAA will consider this issue as part of a separate rulemaking process that will propose to make conforming modifications to all sanctuary regulations to achieve an appropriate level of consistency, including the authority for emergency regulations.

Enforcement

Comment: NOAA should clarify what agency will enforce the provisions of the proposed regulations.

Response: Primary law enforcement responsibilities for NOAA regulations are assigned to the NOAA Office for Law Enforcement (OLE). An enforcement officer conducts investigations into violations of the *National Marine Sanctuaries Act* and *regulatory prohibitions* in coordination with State, local and other Federal law enforcement counterparts. In addition, a cooperative enforcement agreement was signed between NOAA and the State of California to deputize State Fish and Game Wardens and State Park Rangers as Federal Sanctuary enforcement officers. State peace officers work together with NOAA to conduct patrols and investigate potential violations. In addition to the cooperative assistance by the State, the U.S. Coast Guard conducts air and sea surveillance within sanctuaries and has broad Federal enforcement authority. NOAA OLE also works with the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency, and the Federal Bureau of Investigations (FBI) to investigate violations of environmental laws within national marine sanctuaries. More information about enforcement of NOAA regulations can be found at *http://www.nmfs.noaa.gov/ole/index.html.*

Comment: New regulations and increasing the size of sanctuaries significantly impacts the fisheries enforcement staff of the California Department of Fish and Game. The staff work under a Joint Enforcement Agreement with NOAA. CDFG can only provide limited enforcement effort without additional staff and funding to successfully carry out expanded enforcement activities.

Response: NOAA understands the resource limitations of our partners in enforcement. However, the revised regulations and management plans make only one significant boundary modification—the addition of Davidson Seamount, which is in federal waters, to the MBNMS. This addition should not create an additional enforcement burden for the CDFG. NOAA acknowledges and appreciates the efforts of CDFG in assisting with enforcement of NMSP regulations. NOAA will continue to work with CDFG to seek additional resources to mitigate workload impacts.

Global Warming

Comment: The sanctuary management plans should address potential changes resulting from global warming, including monitoring, education and management responses. More specifically, NOAA should infuse the increasing body of scientific data, ranging from ocean acidification to rising sea temperatures and levels, as well as their causes, effects, and the huge potential ecosystem changes that they portend, into each of the appropriate action plan strategies.

Response: NOAA agrees global warming trends and impacts on ocean ecosystems have become important issues in recent years and should be addressed in the management plans. Language has been inserted into the emerging issues section of all three sanctuaries' management plans recommending several steps: (a) Identifying and coordinating with partners for evaluating and addressing global warming impacts on sanctuaries; (b) enhancing scientific understanding of existing and future changes in temperature, rainfall and runoff, oceanographic patterns, ocean chemistry (including acidification), sea level, species composition, seasonal shifts, etc.; (c) evaluating impacts of global warming on the other issues and strategies in management plans, including nonpoint runoff, beach erosion, tidepool protection, fisheries and MPAs, etc. and developing modifications as needed to these plans to reflect global warming concerns; (d) implementing appropriate modifications to sanctuary facilities and operations ensuring the program minimizes its contribution to global warming; and (e) developing and incorporating messages and recommendations about global warming and ocean impacts into outreach programs.

Military Exemptions

Comment: The U.S. Coast Guard requests the management plans and proposed regulations for each sanctuary include language exempting the U.S. Coast Guard and Department of Defense activities from all prohibitions, similar to provisions applicable to the Northwestern Hawaiian Islands Marine National Monument.

Response: Each of the regulations for the national marine sanctuaries include specific exceptions for activities carried out by the Department of Defense (DOD). In the sanctuaries, activities carried by the DOD prior to date of designation are generally exempted from the prohibitions contained in the regulations. Additional activities initiated after designation can be exempted after consultation between NOAA and DOD. The referenced exemption for the Northwestern Hawaiian Islands Marine National Monument were crafted to address the unique circumstances surrounding that area including its remote location, its large size, and the strategic military importance of the area as identified by DOD during interagency consultation on the regulations for the area. Nevertheless, the Proclamation establishing the Monument (Proclamation 8031) and the implementing regulations promulgated by NOAA and the Fish and Wildlife Service (50 CFR part 404) require the Armed Forces (including the Coast Guard) to carry out all activities in a manner that avoids, to the extent practicable and consistent with operational requirements, adverse impacts on monument resources and qualities. In addition, in the event of a threatened or actual destruction of, loss of, or injury to a Monument resource or quality resulting from an incident, including but not limited to spills or groundings, caused by a component of the Department of Defense or the Coast Guard, the cognizant component shall promptly coordinate with the Secretaries of Commerce and the Interior for the purpose of taking appropriate actions to respond to and mitigate the harm and, if possible, restore or replace the monument resource or quality. See 50 CFR 404.9 (c) and (d).

Maritime Heritage

Comment: The GFNMS has significant maritime heritage resources. GFNMS needs to more explicitly address the individual and cumulative significance of shipwrecks, and the importance of revisiting the recommendations contained in the Submerged Cultural Resource Assessment of 1989 by doing a basic assessment and site survey. The program should consider a joint initiative with the Office of Exploration, and partner with NPS in regard to enhancing the interpretation of the submerged maritime heritage in the parks, and at the San Francisco Maritime NHP.

Response: NOAA has added additional discussion of the individual and cumulative significance of the shipwrecks in the GFNMS Management Plan's Maritime Heritage Cross-cutting Action Plan. Basic assessment and site survey of significant wrecks has been added as well as the need for establishing a baseline for further monitoring to ensure their protection. Additional information has also been added to the Gulf of the Farallones Administration Action Plan to include restoration, education, outreach, and exhibits about the historic Fort Point Coast Guard Station. The NMSP has also

added NOAA's Office of Exploration and the National Park Service as partners.

Performance Measures

Comments: NOAA should review its proposals for measuring implementation success of each action plan to ensure that all desired outcomes and their corollary performance measures have been identified. For example, it appears that only a portion of the Monterey Bay Water Quality Program Action Plans has been covered.

Response: NOAA considers performance measurement an essential component of management responsibilities. All Action Plans have performance measures selected for their ability to indicate overall performance of the action plans or strategies. NOAA limited the number of performance measures to correlate with the resources available for program review.

Research and Monitoring

Comment: NOAA should include Coastal Commission and other Resource Agency partners in the execution of the research and monitoring strategies.

Response: NOAA considers the Coastal Commission a critical partner in management of sanctuary resources and will include the Coastal Commission in research and monitoring activities. California Resources Agency staff (including Coastal Commission and California Department of Fish and Game) are also members of the Sanctuary Advisory Councils and MBNMS Research Activity Panel helping guide implementation of research activity in the sanctuaries.

Permitting

Comment: It is unclear from the proposed language changes if currently authorized activities will still be permitted in the future. How would the proposed regulation changes impact currently permitted activities and similar future activities?

Response: Individuals with currently effective permits will be allowed to continue permitted activities under the terms and conditions of their permit. The new regulations will apply for new permits issued (and applications received) on or after the effective date of the new regulations.

Resource Protection

Comment: Please vacate failed plans to create so-called marine sanctuaries off California. All Management Plans should be withdrawn because they are discriminatory, out of touch, abusive; some of the animals the plan intends to protect are destructive over-populated pests such as the sea lion. Entire U.S. industries and companies will be adversely affected by this Plan; jobs will be lost; and taxpayers will be denied access to U.S. waterways.

Response: The JMPR process updates existing management plans for existing marine sanctuaries; it does not create new sanctuaries. The proposed management plans are revisions to existing management plans and were developed with input from stakeholders, local and state agencies, and the general public. The commenter does not specify which parts of the management plans are flawed. Adverse impacts, including socioeconomic effects, associated with implementing the JMPR update are addressed in the FEIS. No significant impacts on businesses or jobs were identified in the FEIS. Taxpayers will not be denied access to the marine sanctuaries, although specific types of activities that pose risk of harm to sanctuary resources would be prohibited or restricted.

Comment: The Sanctuary should have very limited alteration and remain in its natural current state.

Response: The intent of the sanctuary management plans and regulations is to protect sanctuary resources. Existing sanctuary regulations include prohibitions on numerous activities that would alter or otherwise impact sanctuary resources. The changes to regulations and management plans are consistent with the intent to limit adverse effects on sanctuary resources.

Sanctuary Visibility

Comment: NOAA's National Marine Sanctuary Program needs to be more visible in the public eye including additional exposure on TV and radio.

Response: Please see the education, outreach and constituent building components of the site specific and cross-cutting action plans (contained within each Sanctuary's Management Plan), which include strategies to increase public education including the use of various forms of media.

Sanctuary Advisory Councils and Management Plan Review Process

Comment: There are problems in the structure and representation of the MBNMS Sanctuary Advisory Council and therefore the MBNMS Management Plan does not represent the public's priorities.

Response: The Monterey Bay National Marine Sanctuary Advisory Council's twenty voting members represent a variety of local user groups, as well as the general public, plus seven local and state governmental jurisdictions. The Sanctuary Advisory Council adequately represents the public and specific stakeholders. In the past several years, the NMSP has worked with the Association of Monterey Bay Area Governments to make improvements to the selection process for councilmembers. People who apply for seats are reviewed by a subgroup of the existing Sanctuary Advisory Council, are appointed competitively by NOAA, and serve three-year terms after which they are readvertised for selection. Local and state governmental jurisdiction representatives are chosen by their respective agencies. The recruitment of Sanctuary Advisory Council members is widely advertised throughout the state and the public is welcomed to comment or provide letters of support for applicants.

Furthermore, NOAA has taken extraordinary steps, above and beyond the advisory council, to repeatedly and regularly involve the general public in addressing the priority issues in the Management Plan. The process used by the NMSP is a very inclusive public process. Development of the MBNMS Management Plan included more than 120 public meetings including Advisory Council, Working Group, Scoping and Public Comment meetings. 223 individuals participated in working groups to develop the action plans for the MBNMS and the NMSP received over 30,000 comments during the review of the management plans.

Comment: NOAA should have issued the various draft management plans for public comment and following the inclusion of those comments released proposed changes to both the designation documents and regulations.

Response: The review of the management plans began in 2001, with scoping meetings requesting comments on potential changes to the management plans, regulations, and designation documents. In 2003, the Sanctuary Advisory Councils for each Sanctuary held public meetings taking comment from the public on the action plans, which make up the substantive programmatic direction in the management plan. This process occurred prior to release of any regulations and the public was encouraged to provide comments on any program including regulations and designation documents. After consideration of the comments received from the public and Sanctuary Advisory Councils, NOAA's release of the proposed rules and management plans in 2006 provided over 90 days for public comment.

Seagrass Protection

Anchoring

Comment: Eel grass bed protections should be strengthened to preclude both commercial and recreational uses that would further disturb these essential resources. Measures should include prohibitions of anchoring or mooring in the beds and prohibitions against shallow-draft motor boats that disturb root systems.

Response: The regulation of anchoring in seagrass zones in Tomales Bay is designed to prevent damage from vessel anchors. NOAA will monitor the seagrass protection zones for effectiveness and use a model of adaptive management to make appropriate adjustments to the zones. The use of shallow-draft motor boats will be monitored. A re-evaluation of the zones will include an assessment of all the effects of vessels on seagrass.

Comment: The creation of the no-anchor zones in Tomales Bay, though well intended, is ill considered because it prohibits an activity that never occurs, or only occurs to a truly insignificant and immaterial extent. At the very least, NOAA should consider putting a ''sunset'' provision on this requirement, so that it can be reevaluated to determine its need.

Response: NOAA has added language about the biology of seagrass and the effects from anchoring has been added to the FEIS to document the need for the prohibition. Seagrass, including eelgrass, can grow in water depths up to 20 feet in Tomales Bay. The location and extent of the no-anchoring zones are based upon seagrass data provided by California Department of Fish and Game from 1992, 2000, 2001 and 2002. The no-anchoring seagrass protection zones include some areas where seagrass coverage is extensive and other areas where coverage is discontinuous and patchy. All zones extend to the shoreward Mean High Water Line (MHWL) boundary.

Vessels have been observed through California department of Fish and Game aerial photographs within current and historic eelgrass beds throughout Tomales Bay. The State regulation that states no eel grass, surf grass or sea palm may be cut or disturbed does not specifically prohibit anchoring. The seagrass protection zone regulation is intended to complement existing State regulation. These zones would be more enforceable and facilitate specific types of vessel usage. The seagrass protection zones would prevent the risk of harm to seagrass beds before the damage occurs. The regulation of anchoring in seagrass zones in Tomales Bay is designed to prevent damage from vessel anchors. NOAA will monitor the seagrass protection zones for effectiveness and use a model of adaptive management to make appropriate adjustments to the zones. The use of shallow-draft motor boats will be monitored. A re-evaluation of the zones will include an assessment of all the effects of vessels on seagrass.

Comment: Is there any evidence that any anchoring activities in Tomales Bay have caused any damage to the seagrass? If so, what is the relative impact of anchoring activities that would continue to be permitted as compared to the remote possibility of recreational boat anchoring? In the GFNMS MP and DEIS, the only basis was reference to a discussion at a meeting (DEIS page 2–17) of a technical committee formed to address boating impacts in Tomales Bay.

Response: Additional background information has been included in the FEIS regarding the number and types of vessels that use and anchor in Tomales Bay. NOAA has also added information about the effects of anchoring on seagrass. Although there have been no studies on the damage to seagrass beds from anchoring in Tomales Bay, studies in California, studies on similar types of seagrass in coastal Florida, and on seagrasses in other parts of the world have found that boat propellers, anchors and mooring lines can damage the underground root and rhizome system of seagrass (Milazzo, M., *et al.*, 2002; Walker *et al.*, 1989; Kentworthy *et al.*, 2006).

Comment: What is the history of enforcement actions under the current regulations that would prevent anchoring in seagrass beds (Cal. Admin. Code Section 30.10) which has been in effect since 1984? Have law-enforcement organizations in Tomales Bay been asked for reports of any problems in enforcing this law? Why not direct the law enforcement agencies to create a high priority for enforcement of this law?

Response: Establishing specific seagrass zones and demarcating these zones with buoys would create an enforceable regulation that is easy for boaters to follow and understand, and is likely to result in protection of the seagrass beds. The State regulation on disturbing or cutting eel grass, surf grass, or sea palm does not specifically prohibit anchoring. As such, the seagrass protection zone regulation is intended to complement existing State regulation. These zones are more enforceable and facilitate specific types of vessel usage. The seagrass protection zones would prevent the risk of harm to seagrass beds before the damage occurs.

Comment: The DEIS states that the Tomales Bay Vessel Management Plan, currently being developed, would provide ''positive effects on marine transportation and would offset any minor adverse effects of the seagrass anchoring prohibition,'' and that the implementation of the boating Management Plan would result in a ''slight net positive cumulative effect on marine transportation.'' (DEIS p. 3–167, 3–184) How was this plan that is in development evaluated for its positive effect on marine transportation, and where can the public obtain a copy of the draft plan so that they can evaluate the ''net positive cumulative effect''?

Response: Additional information about the Tomales Bay Vessel Management Plan has been added to the FEIS (see Section 3.10.8). This plan is part of a multi-agency effort to streamline future vessel-related management activities. Only approximately 22% of Tomales Bay is currently being zoned as a no-anchor area. The seagrass protection zones avoid navigation channels and other shallow, sheltered areas of Tomales Bay are still available for anchoring; including areas near boat launch ramps, marinas, and docks. Copies of the plan can be obtained from NOAA or by visiting the GFNMS Web site at: *http://farallones.noaa.gov/ecosystemprotection/protect_tomalesbay.html.*

Comment: What consideration has been given to the health and safety implications of requiring vessels to anchor in less protected areas than where they currently anchor?

Response: NOAA considered and identified safe anchorages when designing the proposed seagrass protection zones. Shallow, sheltered areas of Tomales Bay would still be available for anchoring, including areas near boat launch ramps, marinas, and docks. Also, see additional text in FEIS Section 3.10.8.

Comment: In order that the public can fairly evaluate the true impact of the no-anchoring plan, there should be temporary buoy fields set up marking the proposed zones. Why not consider simply referring to the area within 2-fathom (12 feet) line, which follows the actual contours of the bottom and is clearly shown on the nautical charts in both paper and electronic form?

Response: NOAA will mark the seagrass zones with buoys to provide clear direction to boaters. The location and area of the zones were identified based on California Department of Fish and Game seagrass surveys in 1992, 2000, 2001, and 2002. NOAA considered using depth contours to as

the boundaries for the seagrass zones, but has determined depth contours to be unreliable as permanent boundaries and thus difficult to enforce.

Comment: Why do the no-anchoring zones extend into and encroach on private property? The proposed Zone 3 of Tomales Bay covering the Marshall area extends easterly to the mean high water line. That is across the boundary of the typical Marshall property line, which extends into the Bay to the mean low tide line, typically by referent to Tide Land Survey No. 145 Marin County.

Response: These submerged lands are part of the GFNMS and are subject to management actions of the sanctuary.

Comment: The proposed GFNMS prohibition of anchoring in designated seagrass protection zones in Tomales Bay should provide an exemption for research activities.

Response: Rather than provide a blanket exemption for research activities, NOAA has decided to consider allowing research activities on a case-by-case basis through its permitting system. The GFNMS Superintendent has the authority to issue permits for activities that further research or monitoring related to Sanctuary resources and qualities. This will allow NOAA to compare the relative benefits of the research with the impacts of the activity and to include special conditions to prevent harm to Sanctuary resources. The permitting system also allows NOAA to track research activities on a national level through a permitting database and on a regional level through the SIMoN Web site as part of an outreach tool to the public and the science community.

Taking of Marine Mammals, Seabirds and Turtles

Disturbance by Vessels

Comment: The MBNMS should prohibit vessels from coming within a quarter mile of areas where seabirds and mammals aggregate for feeding and/or breeding, especially those areas not protected under the State's Marine Life Protection Act.

Response: Preventing disturbance to marine mammals and seabirds is a primary focus of both the sanctuary regulations and its education and outreach programs. Sanctuary wildlife disturbance regulations complement the MMPA, ESA and MBTA by prohibiting unauthorized take of marine mammals and seabirds. ''Take'' is defined in § 922.3 of the regulations for the National Marine Sanctuary Program to include operating a vessel in a way that ''results in the disturbance or molestation of any marine mammal, sea turtle or seabird.'' The NMSP believes this approach of prohibiting unauthorized take wherever it occurs is a better approach with regard to general vessel traffic and is more functional than fixed distance regulations.

Disturbance by Overflights

Comment: The regulations for the MBNMS should prohibit aircraft from flying below 1000 feet above a state designated Area of Special Biological Significance (ASBS).

Response: The existing overflight zones in the MBNMS are focused on areas where seabirds and marine mammals are likely to be flushed by low flying aircraft. They overlap with the ASBSs off of Ano Nuevo and Big Sur. The air space around the Monterey Peninsula contains flight paths for the Monterey Peninsula Airport and overflight restrictions are not practicable.

Comment: I have observed aircraft flying low over Ano Nuevo Island in violation of Sanctuary regulations. It is my understanding that pilots are not informed about overflight restrictions in the Sanctuary. NOAA should work with the Federal Aviation Administration (FAA) to ensure that pilots are aware of federal regulations.

Response: NOAA has an outreach program to pilots to help ensure that they are aware of the restrictions. The NOAA Office for Law Enforcement routinely contacts pilots when aircraft are identified flying below 1000 feet within restricted overflight zones of the Sanctuary. However, the overflight restrictions in Sanctuary regulations are not accurately reflected on FAA aeronautical charts. NOAA will continue its efforts to work with FAA to update the charts.

Comment: GFNMS should change its overflight regulation to be consistent with MBNMS. Specifically, GFNMS should adopt the prohibition of flying motorized aircraft at less than 1000 feet, and remove the additional clause of disturbing seabirds or marine mammals.

Response: NOAA is not changing the overflight regulation for GFNMS or MBNMS at this time. NOAA is in conversations with the Federal Aviation Administration regarding the regulation of aircraft operations over national marine sanctuaries and may make modifications as part of a separate regulatory process if determined appropriate following those conversations. The public will be provided with an opportunity to provide input into any such process.

Lighting

Comment: Given the high seabird density, NOAA should further consider the potential effects of high intensity lights on sensitive species, including night foraging seabirds, within the GFNMS and CBNMS Management Plans. The use of high powered, high intensity lights (e.g., squid fishing vessels) may pose a risk to sensitive resources.

Response: Currently the Market Squid Fishery Management Plan adopted in 2004 by the California Fish and Game Commission established a seabird closure restricting the use of attracting lights for commercial purposes in any waters of the GFNMS.

Regulations

Comment: In relation to the proposed prohibition on the ''take'' of marine mammals, birds and sea turtles, the NMSP should not grant itself expanded authority to impose severe criminal and civil penalties that far exceed those penalties as provided in the MMPA, ESA and Migratory Bird Treaty Act.

Response: The National Marine Sanctuaries Act establishes a limit on the maximum civil penalties (there are essentially no criminal penalties) that can be charged for violations of Sanctuary regulations and law. Currently, that limit is set at $130,000 per day for any continuing violation. However, the act does not require application of the maximum allowable penalty in any enforcement case. The amount of any penalty is determined by the nature of a violation and a variety of aggravating/mitigating circumstances, such as gravity of the violation, prior violations, harm to protected resources, value of protected resources, violator's conduct, and degree of cooperation. NOAA prosecutors scale penalties to fit the nature of a particular violation, and courts oversee penalty settlements to ensure penalties are appropriate.

While marine mammals, seabirds and endangered and threatened species are protected under other legislation, NOAA believes the higher penalties under the NMSA will provide a stronger deterrent.

Comment: The NMSP should continue to support research into the causes of endangerment of the elusive leatherback sea turtle and to try to create further protection. They're in a 90 percent decline over the last 30 years.

Response: Sanctuary regulations prohibit the unauthorized take of leatherback sea turtles. Additionally, the MBNMS management plan has strategies in its Wildlife Disturbance Action Plan to address disturbance to

turtles from harassment and marine debris by working with NMFS's Office of Protected Resources. The Plan also addresses the need for research to more fully understand the life history characteristics of the turtles and the threats that they face. NOAA will continue its efforts to better understand and protect this endangered species.

White Shark Attraction

Prohibition

Comment: The proposed GFNMS prohibition on attracting white sharks should include an exemption for chumming conducted in the course of lawful fishing. Also, the Designation Document language, which allows the regulation of ''attracting or approaching any animal'' (page B–83), must be clarified to be specific to white sharks and not include chumming for lawful fishing.

Response: The prohibition against attracting white sharks is intended to address harassment and disturbance related to human interaction from shark diving programs known generally as adventure tourism, or from recreational visitors who may opportunistically approach a white shark after a feeding event. NOAA concluded these activities can degrade the natural environment, impacting the species as a whole, as well as individual sharks that may be impacted from repeated encounters with humans and boats. A similar prohibition against attracting great white sharks was promulgated for the MBNMS in 1996 and has not affected lawful fishing activities.

The terms of designation for national marine sanctuaries (as defined in the NMSA (16 U.S.C. 1434(a)(4))) list the types of activities that they may be subject to regulation under sanctuary. Listing does not necessarily mean that a type of activity will be regulated. If a type of activity is not listed, it may not be regulated, except on an emergency basis, unless the terms of designation are amended to include the type of activity. NOAA must follow the same procedures by which the original designation was made to modify the terms of designation of any national marine sanctuary. In this case, the authority to regulate attraction or approach of any animal is only being applied with respect to white sharks. No regulations are being considered regarding attracting or approaching other animals at this time. Retaining the authority in the terms of designation to regulate attracting or approaching other animals will maintain flexibility to respond in the future, as necessary, to similar resource issues involving the attraction of other animals. It is important to note that, although it would not be necessary to amend the terms of designation to promulgate such regulations, NOAA would still be required to engage in a rulemaking process before any additional regulations could be issued. This would include, among other things, consultations with other governmental entities, public notice and comment of any proposed action, and compliance with all applicable laws such as the National Environmental Policy Act (NEPA).

Comment: The proposed GFNMS prohibition on attracting white sharks should be clarified to apply specifically to intentional approaching.

Response: The prohibition against approaching a white shark within the GFNMS is intended to apply to vessels that approach a white shark once it has been identified in the water. A white shark feeding event generally takes place at or near the surface of the water, and can be easily spotted. The regulation is not intended to apply to persons who are already near a white shark when it surfaces but would prohibit them from approaching closer.

Comment: Ecotourism should be allowed to continue at South East Farallon Island with educational permits. NOAA should establish a permit process to avoid curtailing traditional, legitimate, and first-hand education that does not require a Ph.D. in order to participate.

Response: NOAA will consider applications to conduct educational and research activities that would violate the regulation on attracting white sharks in the GFNMS on a case-by-case basis and will use the guidelines developed and approved by the SAC to help draft permit conditions. The Management Plan outlines the approaches that will be taken through the Wildlife Disturbance Action Plan, Strategy WD–5 and the Conservation Science Action Plan CS–1. In 2006, NOAA launched a pilot research program to assess current white shark viewing practices by adventure tourism operators, private boaters and researchers, which will also be used as a guide to developing permit conditions. NOAA will continue to conduct research to guide permit conditions for new white shark viewing and assess effectiveness of new regulations.

Comment: White shark attraction should be prohibited in all sites.

Response: This final rule prohibits white shark attraction throughout MBNMS and GFNMS. NOAA has determined that at this time there is no need for a regulation prohibiting white shark attraction within CBNMS. CBNMS is entirely offshore and, unlike the Gulf of the Farallones, there are no seal or sea lion haul outs to attract sharks. Without aggregations of seals and sea lions to prey on, there is no draw for sharks to congregate or patrol within CBNMS.

V. Miscellaneous Rulemaking Requirements

National Marine Sanctuaries Act

Section 301(b) of the National Marine Sanctuaries Act (16 U.S.C. 1434) provides authority for comprehensive and coordinated conservation and management of national marine sanctuaries in coordination with other resource management authorities. Section 304(a)(4) of the National Marine Sanctuaries Act requires the procedures specified in section 304 for designating a national marine sanctuary be followed for modifying any term of designation. Because this action revises the sanctuary designation documents (e.g., scope of regulations and boundaries), NOAA must comply with the requirements of section 304. All necessary requirements have been completed.

National Environmental Policy Act

NOAA has prepared a Supplemental Draft Environmental Impact Statement (SDEIS) to evaluate the revisions to the discharge/deposit regulations analyzed in the DEIS. Copies are available at the address and Web site listed in the Address section of this rule. Responses to comments received on the proposed rule are also published in the Final Environmental Impact Statement, which is similarly available.

Executive Order 12866: Regulatory Impact

This final rule has been determined to be not significant within the meaning of Executive Order 12866.

Executive Order 13132: Federalism Assessment

For the provisions related to the CBNMS, NOAA has concluded this regulatory action does not have federalism implications, as that term is defined in Executive Order 13132, sufficient to warrant preparation of a federalism assessment. NOAA consulted with a number of entities within the State which participated in development of this final rule, including but not limited to, the California Coastal Commission, California Regional Water Quality Control Board, California Department of Fish and Game, and California Resources Agency.

For the provisions related to the GFNMS and MBNMS, NOAA has

concluded that this regulatory action falls within the definition of ''policies that have federalism implications'' within the meaning of Executive Order 13132. The changes will not preempt State law, but will simply complement existing State authorities. In keeping with the intent of the Executive Order, the NOAA consulted with a number of entities within the State which participated in development of the rule, including but not limited to, the California Department of Boating and Waterways, the California State Lands Commission, the California Department of Fish and Game, and the California Resources Agency.

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification appears in the proposed rules and is not repeated here. Comments received on the economic impacts of this rule are summarized and responded to in the Response to Comments section. The comments received did not impact the factual basis for the certification. As a result, a final regulatory flexibility analysis was not required and none was prepared.

Paperwork Reduction Act

This rule involves an existing information collection requirement previously approved by OMB (OMB# 0648–0141) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* The rule will not require any change to the currently approved OMB approval and would not result in any change in the public burden in applying for and complying with NMSP permitting requirements. The public reporting burden for these permit application requirements is estimated to average 1.00 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The revised permit regulations would require the Director of the NMSP to consider the proposed activity for which a permit application has been received. The modifications to the permit procedures and criteria (15 CFR 922.133) further refine current requirements and procedures of the general National Marine Sanctuary Program regulations (15 CFR 922.48(a) and (c)). The modifications also clarify existing requirements for permit applications found in the Office of Management and Budget approved applicant guidelines (OMB Control Number 0648–0141). The revised permit regulations add language about: the qualifications, finances, and proposed methods of the applicant; the compatibility of the proposed method with the value of the Sanctuary and the primary objective of protection of Sanctuary resources and qualities; the necessity of the proposed activity; and the reasonably expected end value of the proposed activity.

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 Paperwork Reduction Act, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Boats and boating safety, Coastal zone, Education, Environmental protection, Fish, Harbors, Marine mammals, Marine pollution, Marine resources, Marine safety, Natural resources, Penalties, Recreation and recreation areas, Reporting and recordkeeping requirements, Research, Water pollution control, Water resources, Wildlife.

Dated: November 12, 2008.

William Corso,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

■ Accordingly, for the reasons set forth above, 15 CFR part 922 is amended as follows:

PART 922—NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS

■ 1. The authority citation for part 922 continues to read as follows:

Authority: 16 U.S.C. 1431 *et seq.*

■ 2. Subpart H of part 922 is revised to read as follows:

Subpart H—Gulf of the Farallones National Marine Sanctuary

Sec.

Subpart H—Gulf of the Farallones National Marine Sanctuary

§ 922.80 Boundary.

The Gulf of the Farallones National Marine Sanctuary (Sanctuary) boundary encompasses a total area of approximately 966 square nautical miles (nmi) of coastal and ocean waters, and submerged lands thereunder, surrounding the Farallon Islands (and Noonday Rock) off the northern coast of California. The northernmost extent of the Sanctuary boundary is a geodetic line extending westward from Bodega Head approximately 6 nmi to the northern boundary of the Cordell Bank National Marine Sanctuary (CBNMS). The Sanctuary boundary then turns southward to a point approximately 6 nmi off Point Reyes, California, where it then turns westward again out towards the 1,000-fathom isobath. The Sanctuary boundary then extends in a southerly direction adjacent to the 1,000-fathom isobath until it intersects the northern extent of the Monterey Bay National Marine Sanctuary (MBNMS). The Sanctuary boundary then follows the MBNMS boundary eastward and northward until it intersects the Mean High Water Line at Rocky Point, California. The Sanctuary boundary then follows the MHWL north until it intersects the Point Reyes National Seashore (PRNS) boundary. The Sanctuary boundary then approximates the PRNS boundary, as established at the time of designation of the Sanctuary, to the intersection of the PRNS boundary and the MHWL in Tomales Bay. The Sanctuary boundary then follows the MHWL up Tomales Bay and Lagunitas Creek to the Route 1 Bridge where the Sanctuary boundary crosses the Lagunitas Creek and follows the MHWL until it intersects its northernmost extent near Bodega Head. The Sanctuary boundary includes Bolinas Lagoon, Estero de San Antonio (to the tide gate at Valley Ford Franklin School Road) and Estero Americano (to the bridge at Valley Ford Estero Road), as well as Bodega Bay, but not Bodega Harbor. Where the Sanctuary boundary crosses a waterway, the Sanctuary boundary excludes these waterways shoreward of the Sanctuary boundary line delineated by the coordinates provided. The precise seaward boundary coordinates are listed in Appendix A to this subpart.

§ 922.81 Definitions.

In addition to those definitions found at § 922.3, the following definitions apply to this subpart:

Areas of Special Biological Significance (ASBS) are those areas designated by California's State Water Resources Control Board as requiring protection of species or biological communities to the extent that alteration of natural water quality is undesirable. ASBS are a subset of State Water Quality Protection Areas established pursuant to California Public Resources Code section 36700 *et seq.*

Attract or attracting means the conduct of any activity that lures or may lure any animal in the Sanctuary by using food, bait, chum, dyes, decoys (e.g., surfboards or body boards used as decoys), acoustics or any other means, except the mere presence of human beings (e.g., swimmers, divers, boaters, kayakers, surfers).

Clean means not containing detectable levels of harmful matter.

Cruise ship means a vessel with 250 or more passenger berths for hire.

Deserting means leaving a vessel aground or adrift without notification to the Director of the vessel going aground or becoming adrift within 12 hours of its discovery and developing and presenting to the Director a preliminary salvage plan within 24 hours of such notification, after expressing or otherwise manifesting intention not to undertake or to cease salvage efforts, or when the owner/operator cannot after reasonable efforts by the Director be reached within 12 hours of the vessel's condition being reported to authorities; or leaving a vessel at anchor when its condition creates potential for a grounding, discharge, or deposit and the owner/operator fails to secure the vessel in a timely manner.

Harmful matter means any substance, or combination of substances, that because of its quantity, concentration, or physical, chemical, or infectious characteristics may pose a present or potential threat to Sanctuary resources or qualities, including but not limited to: fishing nets, fishing line, hooks, fuel, oil, and those contaminants (regardless of quantity) listed pursuant to 42 U.S.C. 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act at 40 CFR 302.4.

Introduced species means any species (including, but not limited to, any of its biological matter capable of propagation) that is non-native to the ecosystems of the Sanctuary; or any organism into which altered genetic matter, or genetic matter from another species, has been transferred in order that the host organism acquires the genetic traits of the transferred genes.

Motorized personal watercraft means a vessel which uses an inboard motor powering a water jet pump as its primary source of motive power and which is designed to be operated by a person sitting, standing, or kneeling on the vessel, rather than the conventional manner of sitting or standing inside the vessel.

Routine maintenance means customary and standard procedures for maintaining docks or piers.

Seagrass means any species of marine angiosperms (flowering plants) that inhabit portions of the submerged lands in the Sanctuary. Those species include, but are not limited to: *Zostera asiatica* and *Zostera marina.*

§ 922.82 Prohibited or otherwise regulated activities.

(a) The following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted within the Sanctuary:

(1) Exploring for, developing, or producing oil or gas except that pipelines related to hydrocarbon operations adjacent to the Sanctuary may be placed at a distance greater than 2 nmi from the Farallon Islands, Bolinas Lagoon and Areas of Special Biological Significance (ASBS) where certified to have no significant effect on Sanctuary resources in accordance with § 922.84.

(2) Discharging or depositing from within or into the Sanctuary, other than from a cruise ship, any material or other matter except:

(i) Fish, fish parts, or chumming materials (bait) used in or resulting from lawful fishing activity within the Sanctuary, provided that such discharge or deposit is during the conduct of lawful fishing activity within the Sanctuary;

(ii) For a vessel less than 300 gross registered tons (GRT), or a vessel 300 GRT or greater without sufficient holding tank capacity to hold sewage while within the Sanctuary, clean effluent generated incidental to vessel use by an operable Type I or II marine sanitation device (U.S. Coast Guard classification) that is approved in accordance with section 312 of the Federal Water Pollution Control Act, as amended (FWPCA), 33 U.S.C. 1322. Vessel operators must lock all marine sanitation devices in a manner that prevents discharge or deposit of untreated sewage;

(iii) Clean vessel deck wash down, clean vessel engine cooling water, clean vessel generator cooling water, clean bilge water, or anchor wash; or

(iv) Vessel engine or generator exhaust.

(3) Discharging or depositing, from within or into the Sanctuary, any material or other matter from a cruise ship except clean vessel engine cooling water, clean vessel generator cooling water, clean bilge water, or anchor wash.

(4) Discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injures a Sanctuary resource or quality, except for the exclusions listed in paragraphs (a)(2)(i) through (iv) and (a)(3) of this section.

(5) Constructing any structure other than a navigation aid on or in the submerged lands of the Sanctuary; placing or abandoning any structure on or in the submerged lands of the Sanctuary; or drilling into, dredging, or otherwise altering the submerged lands of the Sanctuary in any way, except:

(i) By anchoring vessels (in a manner not otherwise prohibited by this part (see § 922.82(a)(16));

(ii) While conducting lawful fishing activities;

(iii) The laying of pipelines related to hydrocarbon operations in leases adjacent to the Sanctuary in accordance with paragraph (a)(1) of this section;

(iv) Routine maintenance and construction of docks and piers on Tomales Bay; or

(v) Mariculture activities conducted pursuant to a valid lease, permit, license or other authorization issued by the State of California.

(6) Operating any vessel engaged in the trade of carrying cargo within an area extending 2 nmi from the Farallon Islands, Bolinas Lagoon or any ASBS. This includes but is not limited to tankers and other bulk carriers and barges, or any vessel engaged in the trade of servicing offshore installations, except to transport persons or supplies to or from the Islands or mainland areas adjacent to Sanctuary waters or any ASBS. In no event shall this section be construed to limit access for fishing, recreational or research vessels.

(7) Operation of motorized personal watercraft, except for the operation of motorized personal watercraft for emergency search and rescue missions or law enforcement operations (other than routine training activities) carried out by the National Park Service, U.S. Coast Guard, Fire or Police Departments or other Federal, State or local jurisdictions.

(8) Disturbing birds or marine mammals by flying motorized aircraft at less than 1000 feet over the waters within one nmi of the Farallon Islands,

Bolinas Lagoon, or any ASBS except to transport persons or supplies to or from the Islands or for enforcement purposes.

(9) Possessing, moving, removing, or injuring, or attempting to possess, move, remove or injure, a Sanctuary historical resource.

(10) Introducing or otherwise releasing from within or into the Sanctuary an introduced species, except:

(i) Striped bass (*Morone saxatilis*) released during catch and release fishing activity; or

(ii) Species cultivated by mariculture activities in Tomales Bay pursuant to a valid lease, permit, license or other authorization issued by the State of California and in effect on the effective date of the final regulation.

(11) Taking any marine mammal, sea turtle, or bird within or above the Sanctuary, except as authorized by the Marine Mammal Protection Act, as amended, (MMPA), 16 U.S.C. 1361 *et seq.*, Endangered Species Act (ESA), as amended, 16 U.S.C. 1531 *et seq.*, Migratory Bird Treaty Act, as amended, (MBTA), 16 U.S.C. 703 *et seq.*, or any regulation, as amended, promulgated under the MMPA, ESA, or MBTA.

(12) Possessing within the Sanctuary (regardless of where taken, moved or removed from), any marine mammal, sea turtle, or bird taken, except as authorized by the MMPA, ESA, MBTA, by any regulation, as amended, promulgated under the MMPA, ESA, or MBTA, or as necessary for valid law enforcement purposes.

(13) Attracting a white shark in the Sanctuary; or approaching within 50 meters of any white shark within the line approximating 2 nmi around the Farallon Islands. The coordinates for the line approximating 2 nmi around the Farallon Islands are listed in Appendix B to this subpart.

(14) Deserting a vessel aground, at anchor, or adrift in the Sanctuary.

(15) Leaving harmful matter aboard a grounded or deserted vessel in the Sanctuary.

(16) Anchoring a vessel in a designated seagrass protection zone in Tomales Bay, except as necessary for mariculture operations conducted pursuant to a valid lease, permit or license. The coordinates for the no-anchoring seagrass protection zones are listed in Appendix C to this subpart.

(b) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to the prohibitions in this section. The exemption of additional activities shall be determined in consultation between the Director and the Department of Defense.

(c) The prohibitions in paragraph (a) of this section do not apply to activities necessary to respond to an emergency threatening life, property, or the environment, or except as may be permitted by the Director in accordance with § 922.48 and § 922.83.

§ 922.83 Permit procedures and issuance criteria.

(a) A person may conduct an activity prohibited by § 922.82 if such activity is specifically authorized by, and conducted in accordance with the scope, purpose, terms and conditions of, a permit issued under § 922.48 and this section.

(b) The Director, at his or her discretion, may issue a National Marine Sanctuary permit under this section, subject to terms and conditions as he or she deems appropriate, if the Director finds that the activity will:

(1) Further research or monitoring related to Sanctuary resources and qualities;

(2) Further the educational value of the Sanctuary;

(3) Further salvage or recovery operations; or

(4) Assist in managing the Sanctuary.

(c) In deciding whether to issue a permit, the Director shall consider factors such as:

(1) The applicant is qualified to conduct and complete the proposed activity;

(2) The applicant has adequate financial resources available to conduct and complete the proposed activity;

(3) The methods and procedures proposed by the applicant are appropriate to achieve the goals of the proposed activity, especially in relation to the potential effects of the proposed activity on Sanctuary resources and qualities;

(4) The proposed activity will be conducted in a manner compatible with the primary objective of protection of Sanctuary resources and qualities, considering the extent to which the conduct of the activity may diminish or enhance Sanctuary resources and qualities, any potential indirect, secondary or cumulative effects of the activity, and the duration of such effects;

(5) The proposed activity will be conducted in a manner compatible with the value of the Sanctuary, considering the extent to which the conduct of the activity may result in conflicts between different users of the Sanctuary, and the duration of such effects;

(6) It is necessary to conduct the proposed activity within the Sanctuary;

(7) The reasonably expected end value of the proposed activity to the furtherance of Sanctuary goals and purposes outweighs any potential adverse effects on Sanctuary resources and qualities from the conduct of the activity; and

(8) Any other factors as the Director deems appropriate.

(d) Applications.

(1) Applications for permits should be addressed to the Director, Office of National Marine Sanctuaries; ATTN: Superintendent, Gulf of the Farallones National Marine Sanctuary, 991 Marine Dr., The Presidio, San Francisco, CA 94129.

(2) In addition to the information listed in § 922.48(b), all applications must include information to be considered by the Director in paragraph (b) and (c) of this section.

(e) The permittee must agree to hold the United States harmless against any claims arising out of the conduct of the permitted activities.

§ 922.84 Certification of other permits.

A permit, license, or other authorization allowing: the laying of any pipeline related to hydrocarbon operations in leases adjacent to the Sanctuary and placed at a distance greater than 2 nmi from the Farallon Islands, Bolinas Lagoon, and any ASBS must be certified by the Director as consistent with the purpose of the Sanctuary and having no significant effect on Sanctuary resources. Such certification may impose terms and conditions as deemed appropriate to ensure consistency. In considering whether to make the certifications called for in this section, the Director may seek and consider the views of any other person or entity, within or outside the Federal government, and may hold a public hearing as deemed appropriate. Any certification called for in this section shall be presumed unless the Director acts to deny or condition certification within 60 days from the date that the Director receives notice of the proposed permit and the necessary supporting data. The Director may amend, suspend, or revoke any certification made under this section whenever continued operation would violate any terms or conditions of the certification. Any such action shall be forwarded in writing to both the holder of the certified permit and the issuing agency and shall set forth reason(s) for the action taken.

Appendix A to Subpart H of Part 922—Gulf of the Farallones National Marine Sanctuary Boundary Coordinates

Coordinates listed in this Appendix are unprojected (Geographic) and based on the North American Datum of 1983.

Point ID No.	Latitude	Longitude
Sanctuary Boundary		
1	38.29896	−123.05989
2	38.26390	−123.18138
3	38.21001	−123.11913
4	38.16576	−123.09207
5	38.14072	−123.08237
6	38.12829	−123.08742
7	38.10215	−123.09804
8	38.09069	−123.10387
9	38.07898	−123.10924
10	38.06505	−123.11711
11	38.05202	−123.12827
12	37.99227	−123.14137
13	37.98947	−123.23615
14	37.95880	−123.32312
15	37.90464	−123.38958
16	37.83480	−123.42579
17	37.76687	−123.42694
18	37.75932	−123.42686
19	37.68892	−123.39274
20	37.63356	−123.32819
21	37.60123	−123.24292
22	37.59165	−123.22641
23	37.56305	−123.19859
24	37.52001	−123.12879
25	37.50819	−123.09617
26	37.49418	−123.00770
27	37.50948	−122.90614
28	37.52988	−122.85988
29	37.57147	−122.80399
30	37.61622	−122.76937
31	37.66641	−122.75105

Appendix B to Subpart H of Part 922—2 nmi From the Farallon Islands Boundary Coordinates

Coordinates listed in this Appendix are unprojected (Geographic) and based on the North American Datum of 1983.

Point ID No. (2 nmi from the Farallon Islands Boundary)	Latitude	Longitude
0	37.77670	−123.14954
1	37.78563	−123.14632
2	37.79566	−123.13764
3	37.80296	−123.12521
4	37.80609	−123.11189
5	37.80572	−123.09847
6	37.80157	−123.08484
7	37.79776	−123.07836
8	37.79368	−123.06992
9	37.78702	−123.06076
10	37.77905	−123.05474
11	37.77014	−123.05169
12	37.76201	−123.05151
13	37.75758	−123.05248
14	37.76078	−123.04115
15	37.76151	−123.02803
16	37.75898	−123.01527
17	37.75267	−123.00303
18	37.74341	−122.99425
19	37.73634	−122.99017
20	37.73036	−122.97601
21	37.72042	−122.96548
22	37.70870	−122.95890
23	37.69737	−122.95720
24	37.68759	−122.95882
25	37.67768	−122.96469
26	37.66905	−122.97427
27	37.66352	−122.98478
28	37.66037	−122.99741
29	37.66029	−123.00991
30	37.66290	−123.02133
31	37.67102	−123.03830
32	37.67755	−123.04612
33	37.68844	−123.05334
34	37.69940	−123.05567
35	37.71127	−123.06858
36	37.72101	−123.07329
37	37.73167	−123.07399
38	37.73473	−123.07340
39	37.73074	−123.08620
40	37.73010	−123.09787
41	37.73265	−123.11296
42	37.73685	−123.12315
43	37.74273	−123.13124
44	37.74725	−123.13762
45	37.75467	−123.14466
46	37.76448	−123.14917
47	37.77670	−123.14954

Appendix C to Subpart H of Part 922—No-Anchoring Seagrass Protection Zones in Tomales Bay

Coordinates listed in this Appendix are unprojected (Geographic) and based on the North American Datum of 1983.

Table C–1: Zone 1:

Zone 1 is an area of approximately 39.9 hectares offshore south of Millerton Point. The eastern boundary is a straight line that connects points 1 and 2 listed in the coordinate table below. The southern boundary is a straight line that connects points 2 and 3, the western boundary is a straight line that connects points 3 and 4 and the northern boundary is a straight line that connects point 4 to point 5. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

Zone 1 Point ID	Latitude	Longitude
1	38.10571 ..	−122.84565
2	38.09888 ..	−122.83603
3	38.09878 ..	−122.84431
4	38.10514 ..	−122.84904
5	Same as 1	Same as 1.

ZONE 2: Zone 2 is an area of approximately 50.3 hectares that begins just south of Marconi and extends approximately 3 kilometers south along the eastern shore of Tomales Bay. The eastern boundary is the mean high water (MHW) line from point 1 to point 2 listed in the coordinate table below. The southern boundary is a straight line that connects point 2 to point 3. The western boundary is a series of straight lines that connect points 3 through 6 in sequence and then connects point 6 to point 1. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

Zone 2 Point ID	Latitude	Longitude
1	38.14071 ..	−122.87440
2	38.11386 ..	−122.85851
3	38.11899 ..	−122.86731
4	38.12563 ..	−122.86480
5	38.12724 ..	−122.86488
6	38.13326 ..	−122.87178
7	Same as 1	Same as 1.

ZONE 3: Zone 3 is an area of approximately 4.6 hectares that begins just south of Marshall and extends approximately 1 kilometer south along the eastern shore of Tomales Bay. The eastern boundary is the mean high water (MHW) line from point 1 to point 2 listed in the coordinate table below. The southern boundary is a straight line that connects point 2 to point 3, the western boundary is a straight line that connects point 3 to point 4, and the northern boundary is a straight line that connects point 4 to point 5. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

Zone 3 Point ID	Latitude	Longitude
1	38.16031 ..	−122.89442
2	38.15285 ..	−122.88991
3	38.15250 ..	−122.89042
4	38.15956 ..	−122.89573
5	Same as 1	Same as 1.

ZONE 4: Zone 4 is an area of approximately 61.8 hectares that begins just north of Nicks Cove and extends approximately 5 kilometers south along the eastern shore of Tomales Bay to just south of Cypress Grove. The eastern boundary is the mean high water (MHW) line from point 1 to point 2 listed in the coordinate table below. The southern boundary is a straight line that connects point 2 to point 3. The western boundary is a series of straight lines that connect points 3 through 9 in sequence. The northern boundary is a straight line that connects point 9 to point 10. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

Zone 4 Point ID	Latitude	Longitude
1	38.20073 ..	−122.92181
2	38.16259 ..	−122.89627
3	38.16227 ..	−122.89650
4	38.16535 ..	−122.90308
5	38.16869 ..	−122.90475
6	38.17450 ..	−122.90545
7	38.17919 ..	−122.91021
8	38.18651 ..	−122.91404
9	38.18881 ..	−122.91740
10	Same as 1	Same as 1.

ZONE 5: Zone 5 is an area of approximately 461.4 hectares that begins east of Lawsons Landing and extends approximately 5 kilometers east and south along the eastern shore of Tomales Bay but

excludes areas adjacent (approximately 600 meters) to the mouth of Walker Creek. The boundary follows the mean high water (MHW) mark from point 1 and trends in a southeast direction to point 2 listed in the coordinate table below. From point 2 the boundary trends westward in a straight line to point 3, then trends southward in a straight line to point 4 and then trends eastward in a straight line to point 5. The boundary follows the mean high water line from point 5 southward to point 6. The southern boundary is a straight line that connects point 6 to point 7. The eastern boundary is a series of straight lines that connect points 7 to 9 in sequence and then connects point 9 to point 10. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

Zone 5 Point ID	Latitude	Longitude
1	38.23122 ..	−122.96300
2	38.21599 ..	−122.93749
3	38.20938 ..	−122.94153
4	38.20366 ..	−122.93246
5	38.20515 ..	−122.92453
6	38.20073 ..	−122.92181
7	38.19405 ..	−122.93477
8	38.20436 ..	−122.94305
9	38.21727 ..	−122.96225
10	Same as 1	Same as 1.

ZONE 6: Zone 6 is an area of approximately 3.94 hectares in the vicinity of Indian Beach along the western shore of Tomales Bay. The western boundary follows the mean high water (MHW) line from point 1 northward to point 2 listed in the coordinate table below. The northern boundary is a straight line that connects point 2 to point 3. The eastern boundary is a straight line that connects point 3 to point 4. The southern boundary is a straight line that connects point 4 to point 5. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

Zone 6 Point ID	Latitude	Longitude
1	38.13811 ..	−122.89603
2	38.14040 ..	−122.89676
3	38.14103 ..	−122.89537
4	38.13919 ..	−122.89391
5	Same as 1	Same as 1.

ZONE 7: Zone 7 is an area of approximately 32.16 hectares that begins just south of Pebble Beach and extends approximately 3 kilometers south along the western shore of Tomales Bay. The western boundary is the mean high water (MHW) line from point 1 to point 2 listed in the coordinate table below. The northern boundary is a straight line that connects point 2 to point 3. The eastern boundary is a series of straight lines that connect points 3 through 7 in sequence. The southern boundary is a straight line that connects point 7 to point 8. All coordinates are in the Geographic Coordinate System relative to the North American Datum of 1983.

Zone 7 Point ID	Latitude	Longitude
1	38.11034 ..	−122.86544
2	38.13008 ..	−122.88742
3	38.13067 ..	−122.88620
4	38.12362 ..	−122.87984
5	38.11916 ..	−122.87491
6	38.11486 ..	−122.86896
7	38.11096 ..	−122.86468
8	Same as 1	Same as 1.

■ 3. Subpart K of Part 922 is revised to read as follows:

Subpart K—Cordell Bank National Marine Sanctuary

Subpart K—Cordell Bank National Marine Sanctuary

§ 922.110 Boundary.

The Cordell Bank National Marine Sanctuary (Sanctuary) boundary encompasses a total area of approximately 399 square nautical miles (nmi) of ocean waters, and submerged lands thereunder, off the northern coast of California approximately 50 miles west-northwest of San Francisco, California. The Sanctuary boundary extends westward (approximately 250 degrees) from the northwestern most point of the Gulf of the Farallones National Marine Sanctuary (GFNMS) to the 1,000 fathom isobath northwest of Cordell Bank. The Sanctuary boundary then generally follows this isobath in a southerly direction to the western-most point of the GFNMS boundary. The Sanctuary boundary then follows the GFNMS boundary again to the northwestern corner of the GFNMS. The exact boundary coordinates are listed in Appendix A to this subpart.

§ 922.111 Definitions.

In addition to the definitions found in § 922.3, the following definitions apply to this subpart:

Clean means not containing detectable levels of harmful matter.

Cruise ship means a vessel with 250 or more passenger berths for hire.

Harmful matter means any substance, or combination of substances, that because of its quantity, concentration, or physical, chemical, or infectious characteristics may pose a present or potential threat to Sanctuary resources or qualities, including but not limited to: fishing nets, fishing line, hooks, fuel, oil, and those contaminants (regardless of quantity) listed pursuant to 42 U.S.C.

Introduced species means any species (including, but not limited to, any of its biological matter capable of propagation) that is non-native to the ecosystems of the Sanctuary; or any organism into which altered genetic matter, or genetic matter from another species, has been transferred in order that the host organism acquires the genetic traits of the transferred genes.

§ 922.112 Prohibited or otherwise regulated activities.

(a) The following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted within the Sanctuary:

(1)(i) Discharging or depositing from within or into the Sanctuary, other than from a cruise ship, any material or other matter except:

(A) Fish, fish parts, or chumming materials (bait), used in or resulting from lawful fishing activity within the Sanctuary, provided that such discharge or deposit is during the conduct of lawful fishing activity within the Sanctuary;

(B) For a vessel less than 300 gross registered tons (GRT), or a vessel 300 GRT or greater without sufficient holding tank capacity to hold sewage while within the Sanctuary, clean effluent generated incidental to vessel use and generated by an operable Type I or II marine sanitation device (U.S. Coast Guard classification) approved in accordance with section 312 of the Federal Water Pollution Control Act, as amended, (FWPCA), 33 U.S.C. 1322. Vessel operators must lock all marine sanitation devices in a manner that prevents discharge or deposit of untreated sewage;

(C) Clean vessel deck wash down, clean vessel engine cooling water, clean vessel generator cooling water, clean bilge water, or anchor wash; or

(D) Vessel engine or generator exhaust.

(ii) Discharging or depositing, from within or into the Sanctuary, any material or other matter from a cruise ship except clean vessel engine cooling water, clean vessel generator cooling water, clean bilge water, or anchor wash.

(iii) Discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injures a Sanctuary resource or quality, except as listed in paragraphs (a)(1)(i) and (a)(1)(ii) of this section.

(2) On or within the line representing the 50-fathom isobath surrounding Cordell Bank, removing, taking, or injuring or attempting to remove, take, or injure benthic invertebrates or algae located on Cordell Bank. This prohibition does not apply to use of bottom contact gear used during fishing activities, which is prohibited pursuant to 50 CFR part 660 (Fisheries off West Coast States). The coordinates for the line representing the 50-fathom isobath are listed in Appendix B to this subpart. There is a rebuttable presumption that any such resource found in the possession of a person within the Sanctuary was taken or removed by that person.

(3) Exploring for, or developing or producing, oil, gas, or minerals in any area of the Sanctuary.

(4)(i) On or within the line representing the 50-fathom isobath surrounding Cordell Bank, drilling into, dredging, or otherwise altering the submerged lands; or constructing, placing, or abandoning any structure, material or other matter on or in the submerged lands. This prohibition does not apply to use of bottom contact gear used during fishing activities, which is prohibited pursuant to 50 CFR part 660 (Fisheries off West Coast States). The coordinates for the line representing the 50-fathom isobath are listed in Appendix B to this subpart.

(ii) In the Sanctuary beyond the line representing the 50-fathom isobath surrounding Cordell Bank, drilling into, dredging, or otherwise altering the submerged lands; or constructing, placing, or abandoning any structure, material or matter on the submerged lands except as incidental and necessary for anchoring any vessel or lawful use of any fishing gear during normal fishing activities. The coordinates for the line representing the 50-fathom isobath are listed in Appendix B to this subpart.

(5) Taking any marine mammal, sea turtle, or bird within or above the Sanctuary, except as authorized by the Marine Mammal Protection Act, as amended, (MMPA), 16 U.S.C. 1361 *et seq.*, Endangered Species Act, as amended, (ESA), 16 U.S.C. 1531 *et seq.*, Migratory Bird Treaty Act, as amended, (MBTA), 16 U.S.C. 703 *et seq.*, or any regulation, as amended, promulgated under the MMPA, ESA, or MBTA.

(6) Possessing within the Sanctuary (regardless of where taken, moved or removed from), any marine mammal, sea turtle or bird taken, except as authorized by the MMPA, ESA, MBTA, by any regulation, as amended, promulgated under the MMPA, ESA, or MBTA, or as necessary for valid law enforcement purposes.

(7) Introducing or otherwise releasing from within or into the Sanctuary an introduced species, except striped bass (*Morone saxatilis*) released during catch and release fishing activity.

(b) The prohibitions in paragraph (a) of this section do not apply to activities necessary to respond to an emergency threatening life, property or the environment, or except as may be permitted by the Director in accordance with § 922.48 and § 922.113.

(c) All activities being carried out by the Department of Defense (DOD) within the Sanctuary on the effective date of designation that are necessary for national defense are exempt from the prohibitions contained in the regulations in this subpart. Additional DOD activities initiated after the effective date of designation that are necessary for national defense will be exempted by the Director after consultation between the Department of Commerce and DOD. DOD activities not necessary for national defense, such as routine exercises and vessel operations, are subject to all prohibitions contained in the regulations in this subpart.

(d) Where necessary to prevent immediate, serious, and irreversible damage to a Sanctuary resource, any activity may be regulated within the limits of the Act on an emergency basis for no more than 120 days.

§ 922.113 Permit procedures and issuance criteria.

(a) A person may conduct an activity prohibited by § 922.112 if such activity is specifically authorized by, and conducted in accordance with the scope, purpose, terms and conditions of, a permit issued under § 922.48 and this section.

(b) The Director, at his or her discretion, may issue a national marine sanctuary permit under this section, subject to terms and conditions, as he or she deems appropriate, if the Director finds that the activity will:

(1) Further research or monitoring related to Sanctuary resources and qualities;

(2) Further the educational value the Sanctuary;

(3) Further salvage or recovery operations in or near the Sanctuary in connection with a recent air or marine casualty; or

(4) Assist in managing the Sanctuary.

(c) In deciding whether to issue a permit, the Director shall consider such factors as:

(1) The applicant is qualified to conduct and complete the proposed activity;

(2) The applicant has adequate financial resources available to conduct and complete the proposed activity;

(3) The methods and procedures proposed by the applicant are appropriate to achieve the goals of the proposed activity, especially in relation to the potential effects of the proposed activity on Sanctuary resources and qualities;

(4) The proposed activity will be conducted in a manner compatible with the primary objective of protection of Sanctuary resources and qualities, considering the extent to which the conduct of the activity may diminish or enhance Sanctuary resources and qualities, any potential indirect, secondary or cumulative effects of the activity, and the duration of such effects;

(5) The proposed activity will be conducted in a manner compatible with the value of the Sanctuary, considering the extent to which the conduct of the activity may result in conflicts between different users of the Sanctuary, and the duration of such effects;

(6) It is necessary to conduct the proposed activity within the Sanctuary;

(7) The reasonably expected end value of the proposed activity to the furtherance of Sanctuary goals and purposes outweighs any potential adverse effects on Sanctuary resources and qualities from the conduct of the activity; and

(8) Any other factors as the Director deems appropriate.

(d) Applications.

(1) Applications for permits should be addressed to the Director, Office of National Marine Sanctuaries; ATTN: Superintendent, Cordell Bank National Marine Sanctuary, P.O. Box 159, Olema, CA 94950.

(2) In addition to the information listed in § 922.48(b), all applications must include information to be considered by the Director in paragraph (b) and (c) of this section.

(e) The permittee must agree to hold the United States harmless against any claims arising out of the conduct of the permitted activities.

Appendix A to Subpart K of Part 922—Cordell Bank National Marine Sanctuary Boundary Coordinates

Coordinates listed in this Appendix are unprojected (Geographic Coordinate System) and based on the North American Datum of 1983 (NAD83).

SANCTUARY BOUNDARY COORDINATES

Point ID No.	Latitude	Longitude
1	38.26390	−123.18138

SANCTUARY BOUNDARY COORDINATES—Continued

Point ID No.	Latitude	Longitude
2	38.13219	−123.64265
3	38.11256	−123.63344
4	38.08289	−123.62065
5	38.07451	−123.62162
6	38.06188	−123.61546
7	38.05308	−123.60549
8	38.04614	−123.60611
9	38.03409	−123.59904
10	38.02419	−123.59864
11	38.02286	−123.61531
12	38.01987	−123.62450
13	38.01366	−123.62494
14	37.99847	−123.61331
15	37.98678	−123.59988
16	37.97761	−123.58746
17	37.96683	−123.57859
18	37.95528	−123.56199
19	37.94901	−123.54777
20	37.93858	−123.54701
21	37.92288	−123.54360
22	37.90725	−123.53937
23	37.88541	−123.52967
24	37.87637	−123.52192
25	37.86189	−123.52197
26	37.84988	−123.51749
27	37.82296	−123.49280
28	37.81365	−123.47906
29	37.81026	−123.46897
30	37.80094	−123.47313
31	37.79487	−123.46721
32	37.78383	−123.45466
33	37.78109	−123.44694
34	37.77033	−123.43466
35	37.76687	−123.42694
36	37.83480	−123.42579
37	37.90464	−123.38958
38	37.95880	−123.32312
39	37.98947	−123.23615
40	37.99227	−123.14137
41	38.05202	−123.12827
42	38.06505	−123.11711
43	38.07898	−123.10924
44	38.09069	−123.10387
45	38.10215	−123.09804
46	38.12829	−123.08742
47	38.14072	−123.08237
48	38.16576	−123.09207
49	38.21001	−123.11913
50	38.26390	−123.18138

Appendix B to Subpart K of Part 922—Line Representing the 50-Fathom Isobath Surrounding Cordell Bank

Coordinates listed in this Appendix are unprojected (Geographic Coordinate System) and based on the North American Datum of 1983 (NAD83).

CORDELL BANK FIFTY FATHOM LINE

Point ID No.	Latitude	Longitude
1	37.96034	−123.40371
2	37.96172	−123.42081
3	37.99110	−123.44379
4	38.00406	−123.46443
5	38.01637	−123.46076
6	38.04684	−123.47920
7	38.07106	−123.48754

CORDELL BANK FIFTY FATHOM LINE—Continued

Point ID No.	Latitude	Longitude
8	38.07588	−123.47195
9	38.06451	−123.46146
10	38.07123	−123.44467
11	38.04446	−123.40286
12	38.01442	−123.38588
13	37.98859	−123.37533
14	37.97071	−123.38605

■ 4. Subpart M of Part 922 is revised to read as follows:

Subpart M—Monterey Bay National Marine Sanctuary

Subpart M—Monterey Bay National Marine Sanctuary

§ 922.130 Boundary.

The Monterey Bay National Marine Sanctuary (Sanctuary) consists of two separate areas. (a) The first area consists of an area of approximately 4016 square nautical miles (nmi) of coastal and ocean waters, and submerged lands thereunder, in and surrounding Monterey Bay off the central coast of California. The northern terminus of the Sanctuary boundary is located along the southern boundary of the Gulf of the Farallones National Marine Sanctuary (GFNMS) beginning at Rocky Point just south of Stinson Beach in Marin County. The Sanctuary boundary follows the GFNMS boundary westward to a point approximately 29 nmi offshore from Moss Beach in San Mateo County. The Sanctuary boundary then extends southward in a series of arcs, which generally follow the 500 fathom isobath, to a point approximately 27 nmi offshore of Cambria, in San Luis Obispo County. The Sanctuary boundary then extends eastward towards shore until it intersects the Mean High Water Line (MHWL) along the coast near Cambria. The Sanctuary boundary then follows the MHWL northward to the northern terminus at Rocky Point. The shoreward Sanctuary boundary excludes a small area between Point Bonita and Point San Pedro. Pillar Point Harbor, Santa Cruz Harbor, Monterey Harbor, and Moss Landing Harbor are all excluded from the Sanctuary shoreward from the points listed in Appendix A except for Moss Landing Harbor, where all of Elkhorn Slough east of the Highway One bridge, and west of the tide gate at Elkhorn Road and toward the center channel from the MHWL is included within the Sanctuary, excluding areas within the Elkhorn Slough National Estuarine Research Reserve. Exact coordinates for the seaward boundary and harbor exclusions are provided in Appendix A to this subpart.

(b) The Davidson Seamount Management Zone is also part of the Sanctuary. This area, bounded by geodetic lines connecting a rectangle centered on the top of the Davidson Seamount, consists of approximately 585 square nmi of ocean waters and the submerged lands thereunder. The shoreward boundary of this portion of the Sanctuary is located approximately 65 nmi off the coast of San Simeon in San Luis Obispo County. Exact coordinates for the Davidson Seamount Management Zone boundary are provided in Appendix F to this subpart.

§ 922.131 Definitions.

In addition to those definitions found at 15 CFR 922.3, the following definitions apply to this subpart:

Attract or attracting means the conduct of any activity that lures or may lure any animal by using food, bait, chum, dyes, decoys, acoustics, or any other means, except the mere presence of human beings (e.g., swimmers, divers, boaters, kayakers, surfers).

Clean means not containing detectable levels of harmful matter.

Cruise ship means a vessel with 250 or more passenger berths for hire.

Davidson Seamount Management Zone means the area bounded by geodetic lines connecting a rectangle centered on the top of the Davidson Seamount, and consists of approximately 585 square nmi of ocean waters and the submerged lands thereunder. The shoreward boundary of this portion of the Sanctuary is located approximately 65 nmi off the coast of San Simeon in San Luis Obispo County. Exact coordinates for the Davidson Seamount Management Zone boundary

are provided in Appendix F to this subpart.

Deserting means leaving a vessel aground or adrift without notification to the Director of the vessel going aground or becoming adrift within 12 hours of its discovery and developing and presenting to the Director a preliminary salvage plan within 24 hours of such notification, after expressing or otherwise manifesting intention not to undertake or to cease salvage efforts, or when the owner/operator cannot after reasonable efforts by the Director be reached within 12 hours of the vessel's condition being reported to authorities; or leaving a vessel at anchor when its condition creates potential for a grounding, discharge, or deposit and the owner/operator fails to secure the vessel in a timely manner.

Federal Project means any water resources development project conducted by the U.S. Army Corps of Engineers or operating under a permit or other authorization issued by the Corps of Engineers and authorized by Federal law.

Hand tool means a hand-held implement, utilized for the collection of jade pursuant to 15 CFR 922.132(a)(1), that is no greater than 36 inches in length and has no moving parts (e.g., dive knife, pry bar, or abalone iron). Pneumatic, mechanical, electrical, hydraulic, or explosive tools are, therefore, examples of what does not meet this definition.

Harmful matter means any substance, or combination of substances, that because of its quantity, concentration, or physical, chemical, or infectious characteristics may pose a present or potential threat to Sanctuary resources or qualities, including but not limited to: Fishing nets, fishing line, hooks, fuel, oil, and those contaminants (regardless of quantity) listed pursuant to 42 U.S.C. 9601(14) of the Comprehensive Environmental Response, Compensation and Liability Act at 40 CFR 302.4.

Introduced species means: Any species (including but not limited to any of its biological matter capable of propagation) that is non-native to the ecosystems of the Sanctuary; or any organism into which altered genetic matter, or genetic matter from another species, has been transferred in order that the host organism acquires the genetic traits of the transferred genes.

Motorized personal watercraft (MPWC) means any vessel, propelled by machinery, that is designed to be operated by standing, sitting, or kneeling on, astride, or behind the vessel, in contrast to the conventional manner, where the operator stands or sits inside the vessel; any vessel less than 20 feet in length overall as manufactured and propelled by machinery and that has been exempted from compliance with the U.S. Coast Guard's Maximum Capacities Marking for Load Capacity regulation found at 33 CFR Parts 181 and 183, except submarines; or any other vessel that is less than 20 feet in length overall as manufactured, and is propelled by a water jet pump or drive.

§ 922.132 Prohibited or otherwise regulated activities.

(a) Except as specified in paragraphs (b) through (e) of this section, the following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted:

(1) Exploring for, developing, or producing oil, gas, or minerals within the Sanctuary, except: Jade may be collected (meaning removed) from the area bounded by the 35.92222 N latitude parallel (coastal reference point: Beach access stairway at south Sand Dollar Beach), the 35.88889 N latitude parallel (coastal reference point: Westernmost tip of Cape San Martin), and from the mean high tide line seaward to the 90-foot isobath (depth line) (the ''authorized area'') provided that:

(i) Only jade already loose from the submerged lands of the Sanctuary may be collected;

(ii) No tool may be used to collect jade except:

(A) A hand tool (as defined at 15 CFR 922.131) to maneuver or lift the jade or scratch the surface of a stone as necessary to determine if it is jade;

(B) A lift bag or multiple lift bags with a combined lift capacity of no more than two hundred pounds; or

(C) A vessel (except for motorized personal watercraft) (see paragraph (a)(7) of this section) to provide access to the authorized area;

(iii) Each person may collect only what that person individually carries; and

(iv) For any loose piece of jade that cannot be collected under paragraphs (a)(1) (ii) and (iii) of this section, any person may apply for a permit to collect such a loose piece by following the procedures in 15 CFR 922.133.

(2)(i) Discharging or depositing from within or into the Sanctuary, other than from a cruise ship, any material or other matter, except:

(A) Fish, fish parts, chumming materials, or bait used in or resulting from lawful fishing activities within the Sanctuary, provided that such discharge or deposit is during the conduct of lawful fishing activities within the Sanctuary;

(B) For a vessel less than 300 gross registered tons (GRT), or a vessel 300 GRT or greater without sufficient holding tank capacity to hold sewage while within the Sanctuary, clean effluent generated incidental to vessel use by an operable Type I or II marine sanitation device (U.S. Coast Guard classification) approved in accordance with section 312 of the Federal Water Pollution Control Act, as amended (FWPCA), 33 U.S.C. 1322. Vessel operators must lock all marine sanitation devices in a manner that prevents discharge or deposit of untreated sewage;

(C) Clean vessel deck wash down, clean vessel engine cooling water, clean vessel generator cooling water, clean bilge water, or anchor wash;

(D) For a vessel less than 300 gross registered tons (GRT), or a vessel 300 GRT or greater without sufficient holding capacity to hold graywater while within the Sanctuary, clean graywater as defined by section 312 of the FWPCA;

(E) Vessel engine or generator exhaust; or

(F) Dredged material deposited at disposal sites authorized by the U.S. Environmental Protection Agency (EPA) (in consultation with the U.S. Army Corps of Engineers (COE)) prior to the effective date of Sanctuary designation (January 1, 1993), provided that the activity is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval existing on January 1, 1993. Authorized disposal sites within the Sanctuary are described in Appendix C to this subpart.

(ii) Discharging or depositing from within or into the Sanctuary any material or other matter from a cruise ship except clean vessel engine cooling water, clean vessel generator cooling water, clean bilge water, or anchor wash.

(iii) Discharging or depositing from beyond the boundary of the Sanctuary any material or other matter that subsequently enters the Sanctuary and injures a Sanctuary resource or quality, except those listed in paragraphs (a)(2)(i)(A) through (E) and (a)(2)(ii) of this section and dredged material deposited at the authorized disposal sites described in Appendix D to this subpart, provided that the dredged material disposal is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval.

(3) Possessing, moving, removing, or injuring, or attempting to possess, move, remove, or injure, a Sanctuary historical resource. This prohibition does not apply to, moving, removing, or injury resulting incidentally from kelp

harvesting, aquaculture, or lawful fishing activities.

(4) Drilling into, dredging, or otherwise altering the submerged lands of the Sanctuary; or constructing, placing, or abandoning any structure, material, or other matter on or in the submerged lands of the Sanctuary, except as incidental and necessary to:

(i) Conduct lawful fishing activities;

(ii) Anchor a vessel;

(iii) Conduct aquaculture or kelp harvesting;

(iv) Install an authorized navigational aid;

(v) Conduct harbor maintenance in an area necessarily associated with a Federal Project in existence on January 1, 1993, including dredging of entrance channels and repair, replacement, or rehabilitation of breakwaters and jetties;

(vi) Construct, repair, replace, or rehabilitate a dock or pier; or

(vii) Collect jade pursuant to paragraph (a)(1) of this section, provided that there is no constructing, placing, or abandoning any structure, material, or other matter on or in the submerged lands of the Sanctuary, other than temporary placement of an authorized hand tool as provided in paragraph (a)(1) of this section. The exceptions listed in paragraphs (a)(4)(ii) through (a)(4)(vii) of this section do not apply within the Davidson Seamount Management Zone.

(5) Taking any marine mammal, sea turtle, or bird within or above the Sanctuary, except as authorized by the Marine Mammal Protection Act, as amended, (MMPA), 16 U.S.C. 1361 *et seq.*, Endangered Species Act, as amended, (ESA), 16 U.S.C. 1531 *et seq.*, Migratory Bird Treaty Act, as amended, (MBTA), 16 U.S.C. 703 *et seq.*, or any regulation, as amended, promulgated under the MMPA, ESA, or MBTA.

(6) Flying motorized aircraft, except as necessary for valid law enforcement purposes, at less than 1,000 feet above any of the four zones within the Sanctuary described in Appendix B to this subpart.

(7) Operating motorized personal watercraft within the Sanctuary except within the five designated zones and access routes within the Sanctuary described in Appendix E to this subpart. Zone Five (at Pillar Point) exists only when a High Surf Warning has been issued by the National Weather Service and is in effect for San Mateo County, and only during December, January, and February.

(8) Possessing within the Sanctuary (regardless of where taken, moved, or removed from), any marine mammal, sea turtle, or bird, except as authorized by the MMPA, ESA, MBTA, by any regulation, as amended, promulgated under the MMPA, ESA, or MBTA, or as necessary for valid law enforcement purposes.

(9) Deserting a vessel aground, at anchor, or adrift in the Sanctuary.

(10) Leaving harmful matter aboard a grounded or deserted vessel in the Sanctuary.

(11) (i) Moving, removing, taking, collecting, catching, harvesting, disturbing, breaking, cutting, or otherwise injuring, or attempting to move, remove, take, collect, catch, harvest, disturb, break, cut, or otherwise injure, any Sanctuary resource located more that 3,000 feet below the sea surface within the Davidson Seamount Management Zone. This prohibition does not apply to fishing below 3000 feet within the Davidson Seamount Management Zone, which is prohibited pursuant to 50 CFR part 660 (Fisheries off West Coast States).

(ii) Possessing any Sanctuary resource the source of which is more than 3,000 feet below the sea surface within the Davidson Seamount Management Zone. This prohibition does not apply to possession of fish resulting from fishing below 3000 feet within the Davidson Seamount Management Zone, which is prohibited pursuant to 50 CFR part 660 (Fisheries off West Coast States).

(12) Introducing or otherwise releasing from within or into the Sanctuary an introduced species, except striped bass (*Morone saxatilis*) released during catch and release fishing activity.

(13) Attracting any white shark within the Sanctuary.

(14) Interfering with, obstructing, delaying, or preventing an investigation, search, seizure, or disposition of seized property in connection with enforcement of the Act or any regulation or permit issued under the Act.

(b) The prohibitions in paragraphs (a)(2) through (11) of this section do not apply to an activity necessary to respond to an emergency threatening life, property, or the environment.

(c)(1) All Department of Defense activities must be carried out in a manner that avoids to the maximum extent practicable any adverse impacts on Sanctuary resources and qualities. The prohibitions in paragraphs (a)(2) through (12) of this section do not apply to existing military activities carried out by the Department of Defense, as specifically identified in the Final Environmental Impact Statement and Management Plan for the Proposed Monterey Bay National Marine Sanctuary (NOAA, 1992). (Copies of the FEIS/MP are available from the Monterey Bay National Marine Sanctuary, 299 Foam Street, Monterey, CA 93940.) For purposes of the Davidson Seamount Management Zone, these activities are listed in the 2008 Final Environmental Impact Statement. New activities may be exempted from the prohibitions in paragraphs (a)(2) through (12) of this section by the Director after consultation between the Director and the Department of Defense.

(2) In the event of destruction of, loss of, or injury to a Sanctuary resource or quality resulting from an incident, including but not limited to discharges, deposits, and groundings, caused by a Department of Defense activity, the Department of Defense, in coordination with the Director, must promptly prevent and mitigate further damage and must restore or replace the Sanctuary resource or quality in a manner approved by the Director.

(d) The prohibitions in paragraph (a)(1) of this section as it pertains to jade collection in the Sanctuary, and paragraphs (a)(2) through (11) and (a)(13) of this section, do not apply to any activity conducted under and in accordance with the scope, purpose, terms, and conditions of a National Marine Sanctuary permit issued pursuant to 15 CFR 922.48 and 922.133 or a Special Use permit issued pursuant to section 310 of the Act.

(e) The prohibitions in paragraphs (a)(2) through (a)(8) of this section do not apply to any activity authorized by any lease, permit, license, approval, or other authorization issued after the effective date of Sanctuary designation (January 1, 1993) and issued by any Federal, State, or local authority of competent jurisdiction, provided that the applicant complies with 15 CFR 922.49, the Director notifies the applicant and authorizing agency that he or she does not object to issuance of the authorization, and the applicant complies with any terms and conditions the Director deems necessary to protect Sanctuary resources and qualities. Amendments, renewals, and extensions of authorizations in existence on the effective date of designation constitute authorizations issued after the effective date of Sanctuary designation.

(f) Notwithstanding paragraphs (d) and (e) of this section, in no event may the Director issue a National Marine Sanctuary permit under 15 CFR 922.48 and 922.133 or a Special Use permit under section 310 of the Act authorizing, or otherwise approve: the exploration for, development, or production of oil, gas, or minerals within the Sanctuary, except for the collection of jade pursuant to paragraph (a)(1) of this section; the discharge of primary-treated sewage within the Sanctuary (except by certification,

pursuant to 15 CFR 922.47, of valid authorizations in existence on January 1, 1993 and issued by other authorities of competent jurisdiction); or the disposal of dredged material within the Sanctuary other than at sites authorized by EPA (in consultation with COE) prior to January 1, 1993. Any purported authorizations issued by other authorities within the Sanctuary shall be invalid.

§ 922.133 Permit procedures and criteria.

(a) A person may conduct an activity prohibited by § 922.132(a)(1) as it pertains to jade collection in the Sanctuary, § 922.132(a)(2) through (11), and § 922.132(a)(13), if such activity is specifically authorized by, and conducted in accordance with the scope, purpose, terms, and conditions of, a permit issued under this section and 15 CFR 922.48.

(b) The Director, at his or her sole discretion, may issue a permit, subject to terms and conditions as he or she deems appropriate, to conduct an activity prohibited by § 922.132(a)(1) as it pertains to jade collection in the Sanctuary, § 922.132(a)(2) through (11), and § 922.132(a)(13), if the Director finds that the activity will have at most short-term and negligible adverse effects on Sanctuary resources and qualities and:

(1) Is research designed to further understanding of Sanctuary resources and qualities;

(2) Will further the educational, natural, or historical value of the Sanctuary;

(3) Will further salvage or recovery operations within or near the Sanctuary in connection with a recent air or marine casualty;

(4) Will assist in managing the Sanctuary;

(5) Will further salvage or recovery operations in connection with an abandoned shipwreck in the Sanctuary title to which is held by the State of California; or

(6) Will allow the removal, without the use of pneumatic, mechanical, electrical, hydraulic or explosive tools, of loose jade from the Jade Cove area under § 922.132(a)(1)(iv).

(c) In deciding whether to issue a permit, the Director shall consider such factors as:

(1) Will the activity be conducted by an applicant that is professionally qualified to conduct and complete the activity;

(2) Will the activity be conducted by an applicant with adequate financial resources available to conduct and complete the activity;

(3) Is the activity proposed for no longer than necessary to achieve its stated purpose;

(4) Must the activity be conducted within the Sanctuary;

(5) Will the activity be conducted using methods and procedures that are appropriate to achieve the goals of the proposed activity, especially in relation to the potential effects of the proposed activity on Sanctuary resources and qualities;

(6) Will the activity be conducted in a manner compatible with the primary objective of protection of Sanctuary resources and qualities, considering the extent to which the conduct of the activity may diminish or enhance Sanctuary resources and qualities, any potential indirect, secondary, or cumulative effects of the activity, and the duration of such effects;

(7) Will the activity be conducted in a manner compatible with the value of the Sanctuary as a source of recreation and as a source of educational and scientific information, considering the extent to which the conduct of the activity may result in conflicts between different users of the Sanctuary and the duration of such effects; and

(8) Does the reasonably expected end value of the activity to the furtherance of the Sanctuary goals and objectives outweigh any potential adverse effects on Sanctuary resources and qualities from the conduct of the activity.

(d) For jade collection, preference will be given for applications proposing to collect loose pieces of jade for research or educational purposes.

(e) The Director may consider such other factors as he or she deems appropriate.

(f) Applications.

(1) Applications for permits should be addressed to the Director, Office of National Marine Sanctuaries; ATTN: Superintendent, Monterey Bay National Marine Sanctuary, 299 Foam Street, Monterey, CA 93940.

(2) In addition to the information listed in 15 CFR 922.48(b), all applications must include information the Director needs to make the findings in paragraph (b) of this section and information to be considered by the Director pursuant to paragraph (c) of this section.

(g) In addition to any other terms and conditions that the Director deems appropriate, a permit issued pursuant to this section must require that the permittee agree to hold the United States harmless against any claims arising out of the conduct of the permitted activities.

§ 922.134 Notification and review.

(a) [Reserved]

(b)(1) NOAA has entered into a Memorandum of Agreement (MOA) with the State of California, EPA, and the Association of Monterey Bay Area Governments regarding the Sanctuary regulations relating to water quality within State waters within the Sanctuary.

With regard to permits, the MOA encompasses:

(i) National Pollutant Discharge Elimination System (NPDES) permits issued by the State of California under section 13377 of the California Water Code; and

(ii) Waste Discharge Requirements issued by the State of California under section 13263 of the California Water Code.

(2) The MOA specifies how the process of 15 CFR 922.49 will be administered within State waters within the Sanctuary in coordination with the State permit program.

Appendix A to Subpart M of Part 922—Monterey Bay National Marine Sanctuary Boundary Coordinates

[Coordinates in this appendix are unprojected (Geographic Coordinate System) and are calculated using the North American Datum of 1983]

Point ID No.	Latitude	Longitude
Seaward Boundary		
1	37.88163	−122.62788
2	37.66641	−122.75105
3	37.61622	−122.76937
4	37.57147	−122.80399
5	37.52988	−122.85988
6	37.50948	−122.90614
7	37.49418	−123.00770
8	37.50819	−123.09617
9	37.52001	−123.12879
10	37.45304	−123.14009
11	37.34316	−123.13170
12	37.23062	−123.10431
13	37.13021	−123.02864
14	37.06295	−122.91261
15	37.03509	−122.77639
16	36.92155	−122.80595
17	36.80632	−122.81564
18	36.69192	−122.80539
19	36.57938	−122.77416
20	36.47338	−122.72568
21	36.37242	−122.65789
22	36.27887	−122.57410
23	36.19571	−122.47699
24	36.12414	−122.36527
25	36.06864	−122.24438
26	36.02451	−122.11672
27	35.99596	−121.98232
28	35.98309	−121.84069
29	35.98157	−121.75634
30	35.92933	−121.71119
31	35.83773	−121.71922
32	35.72063	−121.71216
33	35.59497	−121.69030
34	35.55327	−121.63048

Point ID No.	Latitude	Longitude
35	35.55485	−121.09803
36	37.59437	−122.52082
37	37.61367	−122.61673
38	37.76694	−122.65011
39	37.81760	−122.53048
Harbor Exclusions		
40	37.49414	−122.48483
41	37.49540	−122.48576
42	36.96082	−122.00175
43	36.96143	−122.00112
44	36.80684	−121.79145
45	36.80133	−121.79047
46	36.60837	−121.88970
47	36.60580	−121.88965

Appendix B to Subpart M of Part 922—Zones Within the Sanctuary Where Overflights Below 1000 Feet are Prohibited

The four zones are:

(1) From mean high water out to three nautical miles (NM) between a line extending from Point Santa Cruz on a southwesterly heading bearing of 220° true and a line extending from 2.0 nmi north of Pescadero Point on a southwesterly heading bearing of 240° true;

(2) From mean high water out to three nmi between a line extending from the Carmel River mouth on a westerly heading bearing of 270° true and a line extending due west along latitude 35.55488° off of Cambria;

(3) From mean high water and within a five nmi arc drawn from a center point at the end of Moss Landing Pier as it appeared on the most current NOAA nautical charts as of January 1, 1993; and

(4) Over the waters of Elkhorn Slough east of the Highway One bridge to Elkhorn Road.

Appendix C to Subpart M of Part 922—Dredged Material Disposal Sites Within the Sanctuary

[Coordinates in this appendix are unprojected (Geographic Coordinate System) and are calculated using the North American Datum of 1983]

Point ID No.	Latitude	Longitude
Santa Cruz Harbor/Twin Lakes Dredge Disposal Site		
1	36.9625	−122.00056
2	36.9625	−121.99861
3	36.96139	−121.99833
4	36.96139	−122.00083
SF–12 Dredge Disposal Site		
1	36.80207	−121.79207
2	36.80157	−121.79218
3	36.80172	−121.79325
4	36.80243	−121.79295
SF–14 Dredge Disposal Site (circle with 500 yard radius)		
1	36.79799	−121.81907
Monterey Harbor/Wharf II Dredge Disposal Site		
1	36.60297	−121.88942
2	36.60283	−121.88787
3	36.60092	−121.88827
4	36.60120	−121.88978

Appendix D to Subpart M of Part 922—Dredged Material Disposal Sites Adjacent to the Monterey Bay National Marine Sanctuary

[Coordinates in this appendix are unprojected (Geographic Coordinate System) and are calculated using the North American Datum of 1983]

As of January 1, 1993, the U.S. Army Corps of Engineers operates the following dredged material disposal site adjacent to the Sanctuary off of the Golden Gate:

Point ID No.	Latitude	Longitude
1	37.76458	−122.56900
2	37.74963	−122.62281
3	37.74152	−122.61932
4	37.75677	−122.56482
5	37.76458	−122.56900

Appendix E to Subpart M of Part 922—Motorized Personal Watercraft Zones and Access Routes Within the Sanctuary

[Coordinates in this appendix are unprojected (Geographic Coordinate System) and are calculated using the North American Datum of 1983]

The five zones and access routes are:

(1) The approximately one [1.0] NM2 area off Pillar Point Harbor from harbor launch ramps, through harbor entrance to the northern boundary of Zone One:

Point ID No.	Latitude	Longitude
1 (flashing 5-second breakwater entrance light and horn located at the seaward end of the outer west breakwater)	37.49395	−122.48477
2 (bell buoy)	37.48167	−122.48333
3	37.48000	−122.46667
4	37.49333	−122.46667

(2) The approximately five [5.0] NM2 area off of Santa Cruz Small Craft Harbor from harbor launch ramps, through harbor entrance, and then along a 100 yard wide access route southwest along a true bearing of approximately 196° true (180° magnetic) to the whistle buoy at 36.93833N, 122.01000 W. Zone Two is bounded by:

Point ID No.	Latitude	Longitude
1	36.91667	−122.03333
2	36.91667	−121.96667
3	36.94167	−121.96667
4	36.94167	−122.03333

(3) The approximately six [6.0] NM2 area off of Moss Landing Harbor from harbor launch ramps, through harbor entrance, and then along a 100 yard wide access route west along a bearing of approximately 270° true (255° magnetic) due west to the eastern boundary of Zone Three bounded by:

Point ID No.	Latitude	Longitude
1	36.83333	−121.82167
2	36.83333	−121.84667
3	36.77833	−121.84667
4	36.77833	−121.81667
5 (bell buoy)	36.79833	−121.80167
6	36.81500	−121.80333

(4) The approximately five [5.0] NM2 area off of Monterey Harbor from harbor launch ramps to the seaward end of the U.S. Coast Guard Pier, and then along a 100 yard wide access route due north to the southern boundary of Zone Four bounded by:

Point ID No.	Latitude	Longitude
1	36.64500	−121.92333
2	36.61500	−121.87500
3	36.63833	−121.85500
4	36.66667	−121.90667

(5) The approximately one-tenth [0.10] NM2 area near Pillar Point from Pillar Point Harbor entrance along a 100 yard wide access route southeast along a true bearing of approximately 174° true (159° magnetic) to the bell buoy (identified as ''Buoy 3'') at 37.48154 N, 122.48156 W and then along a 100 yard wide access route northwest along a true bearing of approximately 284° true (269° magnetic) to the gong buoy (identified as ''Buoy 1'') at 37.48625 N, 122.50603 W, the southwest boundary of Zone Five. Zone Five exists only when a High Surf Warning has been issued by the National Weather Service and is in effect for San Mateo County and only during December, January, and February. Zone Five is bounded by:

Point ID No.	Latitude	Longitude
1 (gong buoy identified as ''Buoy 1'')	37.48625	−122.50603
2	37.49305	−122.50603
3 (sail rock)	37.49305	−122.50105
4	37.48625	−122.50105

Appendix F to Subpart M of Part 922—Davidson Seamount Management Zone

[Coordinates in this appendix are unprojected (Geographic Coordinate System) and are calculated using the North American Datum of 1983]

Point ID No.	Latitude	Longitude
1	35.90000	−123.00000
2	35.90000	−122.50000
3	35.50000	−122.50000

Point ID No.	Latitude	Longitude
4	35.50000	−123.00000

[FR Doc. E8–27220 Filed 11–19–08; 8:45 am]

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Federal Register

Thursday,
November 20, 2008

Part IV

Department of Agriculture

Rural Business-Cooperative Service

7 CFR Part 5001

BioRefinery Assistance Program; Proposed Rule

Notice of Funds Availability (NOFA) Inviting Applications for Biorefineries; Notice

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

7 CFR Part 5001

RIN 0570–AA73

BioRefinery Assistance Program

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Advanced notice of proposed rulemaking.

SUMMARY: This Advanced Notice of Proposed Rulemaking (ANPRM) seeks comments for the development of a proposed rule to implement a BioRefinery Assistance guaranteed loan program. In conjunction with this ANPRM, USDA is publishing a separate notice in this **Federal Register** announcing a Notice of Funds Availability (NOFA) for a BioRefinery Assistance Program to provide guaranteed loans for the development and construction of commercial-scale biorefineries or for the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. The comments being sought under this ANPRM reference the biorefinery assistance program described in a separate notice published elsewhere in this issue of the **Federal Register**.

DATES: Please submit your comments by January 20, 2009.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.
- *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

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

FOR FURTHER INFORMATION CONTACT: U.S. Department of Agriculture, Rural Development, Energy Branch, Attention: BioRefinery Assistance Program, 1400 Independence Avenue, SW., STOP 3225, Washington, DC, 20250–3225. Telephone: (202) 720–1400.

I. Background

The purpose of section 9003 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) is to assist in the development of new and emerging technologies for the development of advanced biofuels in order to increase the energy independence of the United States; promote resource conservation, public health, and the environment; diversify markets for agricultural and forestry products and agriculture waste material; and create jobs and enhance the economic development of the rural economy. Thus, the purpose of the program presented in this NOFA is to assist in the development and construction of commercial-scale biorefineries and the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. To that end, the program will promote the development of the first commercial scale biorefineries that do not rely on corn kernel starch as the feedstock. Preference for funding will be given to projects where first-of-a-kind technology will be deployed at the commercial scale.

The Agency will make guarantees available on loans for eligible projects that will provide for the development, construction, and/or retrofitting of commercial biorefineries using eligible technology. Eligible technology is (a) any technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel and (b) any technology not described in (a) above that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

Over the life of the program, it is likely that guarantees will be awarded to projects that are first-of-a-kind or projects with commercial applications that are expanded to new regions, modified to utilize different feedstocks.

II. Agency Intent

The Agency plans to issue a proposed rule for the BioRefinery Assistance guaranteed loan program, which is expected to be very similar to the requirements laid out in the aforementioned biorefinery assistance program NOFA. Consistent with the Agency's intent to develop a single, unified guaranteed loan regulation to reduce burden and simplify the requirements of the Agency's guaranteed loan programs, the Agency intends to incorporate the BioRefinery Assistance guaranteed loan program into the proposed guaranteed loan program under 7 CFR part 5001 when that program is promulgated.

To assist the Agency in developing a proposed rule for the BioRefinery Assistance guaranteed loan program, the Agency is seeking input from interested parties on the questions detailed in Section III below.

III. Questions

1. Definitions/Terms (Section II.A. in the Biorefinery Assistance Program NOFA and Section 9003 of the 2008 Farm Bill)

The Agency is seeking comments on how the following two phrases should be defined as used in the definition of ''eligible technology'' as that term is defined in the 2008 Farm Bill:

- ''Viable commercial-scale operation''
- ''Technical and economic potential for commercial application''

One of the priorities in the 2008 Farm Bill for scoring guaranteed loan applications is ''whether the applicant has *established a market* for the advanced biofuel and the *byproducts* produced.'' In the context of this scoring priority, the Agency is seeking comment on defining the following:

- ''Established a market''
- ''Byproducts''
- ''Co-product'' and its relationship to byproduct.

A second priority in the 2008 Farm Bill for scoring guaranteed loan applications is ''the level of *local* ownership proposed in the application.'' In the context of this scoring priority, the Agency is seeking comment on defining the following:

- ''Local ownership''

A third priority in the 2008 Farm Bill for scoring guaranteed loan applications is ''whether the *area* in which the applicant proposes to place the biorefinery has other similar facilities.'' In the context of this scoring priority, the Agency is seeking comment on defining the following:

- ''Area''

2. Oversight and Monitoring (Section II.E. in the Biorefinery Assistance Program NOFA)

What information and reports should be required once the project is established and stabilized? How should performance of the project/technology be evaluated and by whom? For example, Should there be a technology-specific protocol that is evaluated by an independent third party?

3. Eligible Borrowers (Section II.G. in the Biorefinery Assistance Program NOFA)

Given that much of the funding for National Laboratories comes from

Federal sources, which reduces the likelihood of their being awarded a loan guarantee under this program, what should their role in the program be?

4. Loan Applications (Section II.J. in the Biorefinery Assistance Program NOFA)

Should a separate technical report be required, what information would it contain, who would be qualified to complete it, and who would be qualified to review it? Would the applicant be willing to pay the cost of the environmental impact analysis?

What is the potential value added to the program, in support of the Agency's responsibilities for project credit assessment, in requiring a private sector credit rating on the biorefinery project as if the total debt anticipated in support of the project were not subject to Federal guarantees?

5. Evaluation of Guaranteed Loan Applications (Section II.K. in the Biorefinery Assistance Program NOFA)

Should specific scoring criteria carry more weight than others?

Should other evaluation criteria be considered?

How should the impacts on resource conservation, public health, and the environment, and the potential for rural development be evaluated?

Should priority consideration be given to technologies that add significant value to low-value feedstock even if it adversely impacts existing low-value added facilities that use similar feedstock?

In consideration of the 100 point scoring protocol depicted in the NOFA, at what level should the Agency set a minimum score in order for an application to receive consideration by the Agency for a potential guarantee?

6. Lender's Functions and Responsibilities—Origination (Section II.N. in the Biorefinery Assistance Program NOFA)

Credit Evaluation. Are the requirements of the lender's credit analysis found in paragraph (a), Credit evaluation, of Section II.N. adequate?

Equity. What should the equity requirements be? Should there be minimum equity requirements that may vary depending on the size of the project? Will it differ between construction and development versus retrofitting?

7. Basic Guarantee and Loan Provisions (Section II.Q. in the Biorefinery Assistance Program NOFA)

Project cost. What are eligible project costs?

Issuance of the Loan Note Guarantee. Should the Loan Note Guarantee be issued prior to construction or be limited to post-construction financing? What parameters or issues should be considered prior to issuance of the Guarantee?

Dated: November 7, 2008.

Ben Anderson,

Administrator, Rural Business-Cooperative Service.

[FR Doc. E8–27203 Filed 11–19–08; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Notice of Funds Availability (NOFA) Inviting Applications for Biorefineries

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: This notice announces the funds available for the BioRefinery Assistance Program (the ''Program'') to provide guaranteed loans for the development and construction of commercial-scale biorefineries or for the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. In conjunction with this notice, USDA is publishing elsewhere in this issue an advanced notice of proposed rulemaking (ANPRM) seeking comments for the development of a proposed rule to implement the BioRefinery Assistance guaranteed loan program.

DATES: To be considered for funding in the first half of Fiscal Year 2009, applications must be completed and submitted to the USDA Rural Development National Office by December 31, 2008. To be considered for funding in the second half of Fiscal Year 2009, complete applications must be submitted to the USDA Rural Development National Office between March 1, 2009 and April 30, 2009. Comments regarding the information collection requirements under the Paperwork Reduction Act of 1995 must be submitted on or before January 20, 2009.

ADDRESSES: Applications and forms may be obtained from:

- U.S. Department of Agriculture, Rural Development, Energy Branch, Attention: BioRefinery Assistance Program, 1400 Independence Avenue, SW., STOP 3225, Washington, DC 20250–3225.
- Agency Web site: *http://www.rurdev.usda.gov.* Follow instructions for obtaining the application and forms.

Submit an original completed application with two copies to USDA's Rural Development National Office: Energy Branch, Attention: BioRefinery Assistance Program, 1400 Independence Avenue, SW., STOP 3225, Washington, DC 20250–3225.

FOR FURTHER INFORMATION CONTACT: Energy Branch, Attention: BioRefinery Assistance Program, 1400 Independence Avenue, SW., Mail Stop 3225, Washington, DC 20250–3225. Telephone: 202–720–1400.

SUPPLEMENTARY INFORMATION:

Programs Affected

This Program is listed in the Catalog of Federal Domestic Assistance under Number 10.865.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, Rural Development is requesting emergency approval from OMB of the reporting and a recordkeeping requirement contained in this Notice and hereby opens a 60-day public comment period.

Title: BioRefinery Assistance Program Guaranteed Loans.

OMB Number: 0570–XXXX.

Type of Request: Emergency Approval of a new collection.

Expiration Date of Approval: Six months from date of OMB approval.

Abstract: The collection of information is vital to Rural Development to make wise decisions regarding the eligibility of projects and borrowers in order to ensure compliance with the regulations and to ensure that the funds obtained from the Government are used appropriately (i.e., being used for the purposes for which the guaranteed loans were awarded). In sum, this collection of information is necessary in order to implement this Program.

Rural Development has established ''Instructions for Application for Loan Guarantee in the Application Guide—Section 9003 BioRefinery Assistance Loan Guarantees'' that contains Form RD 4279–1 and full details of the application process. Eligible entities are strongly encouraged to consult the instructions guide when preparing applications for submission.

All applicants requesting Federal funding must complete Form RD 4279–1, ''Application for Loan Guarantee (Business and Industry and Section 9006 Program)''. Completed applications must include a proposal narrative and written evidence to collect needed information required by the Agency for reporting requirements. This includes but not limited to: Forms RD 1980–41, ''Guaranteed Loan Status Report''; RD 1980–44, ''Guaranteed Loan Borrower Default Status''; RD 400–1, ''Equal Opportunity Agreement''; RD 400–4, ''Assurance Agreement''; RD 4279–3, ''Conditional Commitment''; RD 449–30, ''Loan Note Guarantee Report of Loss''; RD 1980–43, ''Lender's Guaranteed Loan Payment to USDA''; RD 4279–4 ''Lender's Agreement''; RD 1980–19, ''Guaranteed Loan Closing Report''; RD 4279–6, ''Assignment Guarantee Agreement''; RD 1940–20 ''Request for environmental Information''; RD 1940–Q, ''Certification for Contracts, Grants, and Loans'' (if loan exceeds $150,000); SF–LLL, ''Disclosure of Lobbying Activities'' and AD–1047, ''Certification Regarding Debarment, Suspension, and Other Responsibility Matters.''

The following estimates are based on the average over the first three years the program is in place.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 4 hours per response.

Respondents: Individuals, Indian tribes, units of State or local government, corporations, farm cooperatives, farmer cooperative organizations, associations of agricultural producers, National Laboratories, institutions of higher education, rural electric cooperatives, public power entities, and consortia of any of these entities.

Estimated Number of Respondents: 10.

Estimated Number of Responses per Respondent: 31.

Estimated Number of Responses: 306.

Estimated Total Annual Burden (hours) on Respondents: 1,281.

Copies of this information collection may be obtained from Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250–0742 or by calling (202) 692–0043.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of Rural Development, including whether the information will have practical utility; (b) the accuracy of the new Rural Development estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Cheryl Thompson, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250.

Section 9003 of the Food, Conservation, and Energy Act of 2008

(2008 Farm Bill) and its accompanying Managers Report direct the Secretary to implement this program as soon as possible in fiscal year 2009. As a result, the Agency has requested emergency approval from OMB of the information collection to implement this Notice. The Agency is soliciting comments with respect to this information collection and such comments will be considered and addressed in the final rule and in the information collection submission to OMB for the 3-year approval. All comments will also become a matter of public record.

E-Government Act Compliance

Rural Development is committed to complying with the E-Government Act, to provide increased opportunities for citizens to access Government information and services electronically.

I. Background

Section 9003 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) is intended to assist in the development and construction of commercial-scale biorefineries and the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. Consistent with Congressional intent, preference will be given to projects where first-of-a-kind technology will be deployed at the commercial scale. To that end, the program will promote the development of the first commercial scale biorefineries that do not rely on corn kernel starch as the feedstock or standard biodiesel technology.

The Agency will make guarantees available on loans for eligible projects that will provide for the development, construction, and/or retrofitting of commercial biorefineries using eligible technology. Eligible technology is:

(a) Any technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel, and

(b) Any technology not described in paragraph (a) above that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

Over the life of the program, it is likely that guarantees will be awarded to projects that are first-of-a-kind and that may include projects with commercial applications that are expanded to new regions, modified to utilize different feedstocks, or substantially improved such that they represent a significant technological risk.

- The section 9003 program being implemented is similar, but not identical to, the guaranteed loan program for innovative technologies implemented by the U.S. Department of Energy under title XVII of the Energy Policy Act of 2005 (Pub. L. 109–58). The Agency is implementing the section 9003 as a separate program because the types of projects that would be ''good candidates'' for guaranteed loans under title XVII of the Energy Policy Act of 2005 would not likely be good candidates for guaranteed loans under section 9003, and vice-versa.

A. Guaranteed Loan Funding

The 2008 Farm Bill provides mandatory budget authority for this Program of $75 million in Fiscal Year 2009 to support loan guarantees based on credit subsidy scoring that is yet to be determined.

The maximum principal amount of a loan guaranteed under this Program is $250 million; there is no minimum amount. The amount of a loan guaranteed under this Program will be reduced by the amount of other direct Federal funding that the eligible borrower receives for the same project.

The maximum guarantee under this Program is 80 percent of the principal and interest due on a loan guaranteed under this Program if the loan amount is equal to or less than $80 million. If the loan amount is more than $80 million and less than $125 million, the maximum guarantee is 70 percent for the amount in excess of $80 million. If the loan amount is equal to or more than $125 million, the maximum guarantee is 60 percent for the entire loan amount.

The amount of a loan guaranteed for a project under this Program will not exceed 80 percent of total eligible project costs. Thus, the amount of guaranteed loan funds that may be made available to an applicant for an eligible project will not exceed 64 percent of the total eligible project costs.

The interest rate for the guaranteed loan will be negotiated between the lender and the applicant and shall be in line with interest rates on other similar government guaranteed loan programs. The interest rate may be either fixed or variable, as long as it is a legal rate, and shall be fully amortizing. The interest rate for both the guaranteed and unguaranteed portions of the loan must be of the same type (i.e., both fixed or both variable). The interest rate charged will be subject to Agency review and approval.

The length of a loan guaranteed under this Program would be for a period of no more than 20 years or 85 percent of the useful life of the project, as determined by the lender and confirmed by the Agency, whichever is less. The length of the loan term would be required to be the same for both the guaranteed and unguaranteed portion of the loan.

B. Eligibility Requirements for Guarantee Assistance

This Notice contains eligibility requirements for borrowers, projects, and lenders, as discussed below.

Borrower Eligibility

To be eligible to receive a guaranteed loan under this Program, a borrower must be one of the following:

- Individual,
- Indian tribe,
- Unit of State or local government,
- Corporation,
- Farm cooperative,
- Farmer cooperative organization,
- Association of agricultural producers,
- National Laboratory,
- Institution of higher education,
- Rural electric cooperative,
- Public power entity, or
- Consortium of any of those entities.

Project Eligibility

Projects eligible for loan guarantees under this Program must be located in a rural area and be for either:

- The development and construction of commercial-scale biorefineries using eligible technology, or
- The retrofitting of existing facilities, including, but not limited to, wood products facilities and sugar mills, with eligible technology.

Eligible technology is defined as either:

- A technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel; or
- A technology not described in the previous paragraph that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

Lender Eligibility

Regulated or supervised lenders that meet the requirements specified in this Notice (see section I) may be eligible to participate in this Program.

C. Applications

The lender must submit a separate application for each project for which a loan guarantee is sought under this Program. The contents of the application, including forms, certifications, and agreements, are very similar to what is required for the Business and Industry Guaranteed Loan Program and the Renewable Energy Systems and Energy Efficiency

Improvements Guaranteed Loan Program. It is recommended that applicants refer to the application guide for this program (''Instructions for Application for Loan Guarantee—Section 9003 BioRefinery Assistance Loan Guarantees''), which can be found on the Agency's Web site.

Because of factors of cost and complexity for eligible projects under this Program, the lender must include with the application a project-specific feasibility study, as defined in this Notice. The feasibility study must be prepared by a qualified consultant. The feasibility study must address, in part, both the technical and economic feasibility of the project.

The Agency intends to accept applications twice during Fiscal Year 2009 for consideration for funding under this Program. The first window for submitting applications begins on the publication date of this Notice and closes December 31, 2008. Therefore, it is imperative that applicants submit complete applications to the USDA Rural Development National Office by December 31, 2008, in order to be considered for funding in the first half of FY 2009. Applicants not selected in the first round may reapply during the second application window.

The second window for submitting applications under this Program begins on March 1, 2009. Complete applications must be submitted to the USDA Rural Development National Office between March 1, 2009, and April 30, 2009, to be considered for funding in the second half of FY 2009. Applications received after April 30, 2009, will not be considered for funding in FY 2009.

In administering this program's budgetary authority for FY 2009, the Agency will allocate up to, but no more, than 50 percent of its FY 2009 $75 million budgetary authority to fund applications received by the end of the first application window. Any funds not obligated to support applications submitted during the first application window will be available to support applications received during the second window. The Agency, therefore, will have a minimum of 50 percent of its FY 2009 budgetary authority for this program available to support applications received during the second application window.

Ineligible or incomplete applications will be returned to the applicant. If an application is determined to be ineligible for any reason, the Agency will inform the lender, in writing, of the reasons and provide any applicable appeal rights. The denial or rejection of an application under the Program may be appealed as provided in this Notice.

D. Evaluation of Guaranteed Loan Applications

Submission of an application neither reserves funding nor ensures funding. The Agency will evaluate each application and make a determination as to whether the borrower is eligible, whether the lender is eligible, whether the proposed project is eligible, the credit-worthiness and technical merit of the project, and whether the proposed funding request complies with all applicable statutes and regulations. The evaluation will be based on the information provided by the lender and on other sources of information, such as recognized industry experts in the applicable technology field, as necessary.

The Agency will score each application in order to prioritize each proposed project. The evaluation criteria that the Agency will use to score these projects are:

- Whether the borrower has established a market for the advanced biofuel and the byproducts produced.
- Whether the area in which the borrower proposes to place the biorefinery has other similar advanced biofuel facilities.
- Whether the borrower is proposing to use a feedstock not previously used in the production of advanced biofuels.
- Whether the borrower is proposing to work with producer associations or cooperatives.
- The level of financial participation by the borrower, including support from non-Federal and private sources. Such financial participation may take the form of direct financial support, technical support, and contributions of in-kind resources including such kinds of support from state government. Any direct Federal funding from other sources will reduce the amount of the loan that may be guaranteed under this program.
- Whether the borrower has established that the adoption of the process proposed in the application will have a positive impact on resource conservation, public health, and the environment.
- Whether the borrower can establish that, if adopted, the biofuels production technology proposed in the application will not have any significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks.
- The potential for rural economic development, including the number of local jobs created and inclusion of local banks or other capital sources in any proposed debt syndication.
- The level of local ownership proposed in the application.
- Whether the project can be replicated.
- The extent to which the project converts cellulosic biomass feedstocks into advanced biofuel.
- Whether the project is a first-of-a-kind technology, system, or process.

Using these evaluation criteria, the Agency expects that existing biodiesel technology is unlikely to score high enough to be selected for a guaranteed loan under this NOFA.

II. Provisions for BioRefinery Assistance Loan Guarantees

All guaranteed loan requests for this Program are subject to the provisions of this Notice as laid out in this section of the Notice.

A. Definitions

The following definitions are applicable to this Notice.

Advanced biofuel. Fuel derived from renewable biomass, other than corn kernel starch to include:

(1) Biofuel derived from cellulose, hemicellulose, or lignin;

(2) Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);

(3) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;

(4) Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat;

(5) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass;

(6) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass; or

(7) Other fuel derived from cellulosic biomass.

Agency. The Rural Business-Cooperative Service or successor Agency assigned by the Secretary of Agriculture to administer the BioRefinery Assistance Program. References to the National Office, Finance Office, State Office or other Agency offices or officials should be read as prefaced by ''Agency'' or ''Rural Development'' as applicable.

Association of agricultural producers. An organization that represents independent producers directly engaged in the production of agricultural products, including crops (including farming); livestock (including ranching); forestry products; hydroponics; nursery

stock; or aquaculture, whereby 50 percent or greater of their gross income is derived from the operations; and whose mission includes working on behalf of such producers and the majority of whose membership and board of directors are comprised of agricultural producers.

Arm's-length transaction. A transaction between ready, willing, and able disinterested parties who are not affiliated with or related to each other and have no security, monetary, or stockholder interest in each other.

Assignment Guarantee Agreement. A signed, Agency-approved agreement between the Agency, the lender, and the holder setting forth the terms and conditions of an assignment of a guaranteed portion of a loan or any part thereof.

Assurance agreement. A signed, Agency-approved agreement between the Agency and the lender that assures the Agency that the lender is in compliance with and will continue to be in compliance with Title VI of the Civil Rights Act of 1964, 7 CFR part 15, and Agency regulations promulgated thereunder.

Biofuel. A fuel derived from renewable biomass.

Biogas. Biomass converted to gaseous fuels.

Biorefinery. A facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products and may produce electricity.

Borrower. The person that borrows, or seeks to borrow, money from the lender, including any party or parties liable for the guaranteed loan.

Business plan. A comprehensive document that:

(1) Describes clearly the borrower's ownership structure and management, including experience and succession planning;

(2) Discusses, if applicable, the borrower's parent, affiliates, and subsidiaries, including their names and a description of the relationship;

(3) Discusses how the borrower will operate the proposed project, including, at a minimum, a description of:

(i) The business and its strategy;

(ii) Possible vendors and models of major system components;

(iii) The products and services to be provided;

(iv) The availability of the resources (e.g., labor, raw materials, supplies) necessary to provide those products and services;

(v) Site location and its relation to product distribution (e.g., rail lines or highways) and any land use or other permits necessary to operate the facility; and

(vi) The market for the product and its competition, including any and all competitive threats and advantages;

(4) Presents pro forma financial statements, including:

(i) Balance sheet and income and expense for a period of not less than 3 years of stabilized operation, and

(ii) Cash flows for the life of the project; and

(5) Describes the proposed use of funds.

Collateral. The asset(s) pledged by the borrower in support of the loan.

Conditional Commitment. An Agency-approved form provided to the lender indicating the loan guarantee it has requested has been approved subject to the completion of all conditions and requirements contained therein.

Deficiency balance. The balance remaining on a loan after all collateral has been liquidated.

Deficiency judgment. A monetary judgment rendered by a court of competent jurisdiction after foreclosure and liquidation of all collateral securing the loan.

Eligible borrower. An individual, Indian tribe, or unit of State or local government, including a corporation, farm cooperative, farmer cooperative organization, association of agricultural producers, National Laboratory, institution of higher education, rural electric cooperative, public power entity, or consortium of any of those entities.

Eligible project costs. Those expenses approved by the Agency for the project as identified in paragraphs (g)(3)(i) through (ix) of Section Q of this NOFA.

Eligible technology.

(1) A technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel; or

(2) A technology not described in paragraph (1) of this definition that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

Fair market value. The price that could reasonably be expected for an asset in an arm's-length transaction under ordinary economic and business conditions.

Farm cooperative. A farmer or rancher owned and controlled business from which benefits are derived and distributed equitably on the basis of use by each of the farmer or rancher owners.

Farmer Cooperative Organization. A cooperative organization is a cooperative or an entity, not chartered as a cooperative, that operates as a cooperative in that it is owned and operated for the benefit of its members, including the manner in which it distributes its dividends and assets.

Feasibility study. An analysis by a qualified consultant of the economic, market, technical, financial, and management capabilities of a proposed project or business in terms of its expectation for success.

Finance Office. The office which maintains the Agency financial accounting records located in St. Louis, Missouri.

Future recovery. Any funds collected by lender associated with a defaulted project, after final loss claim has been paid by USDA.

Guaranteed loan. A loan made and serviced by a lender for which the Agency has issued a Loan Note Guarantee.

Holder. A person or entity, other than the lender, who owns all or part of the guaranteed portion of the loan with no servicing responsibilities. When the single note option is used and the lender assigns a part of the guaranteed note to an assignee, the assignee becomes a holder only when the Agency receives notice and the transaction is completed through use of Form RD 4279–6, ''Assignment Guarantee Agreement,'' or predecessor form.

Immediate family. Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, parent, child, brother, sister, aunt, uncle, grandparent, grandchild, niece, or nephew.

Indian tribe. This term has the meaning given it in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

Institution of higher education. This term has the meaning given it in section 102(a) of the Higher Education Act of 1965 (20 U.S.C. 1002(a)).

Intellectual property. Any and all intangible assets that consists of human knowledge and ideas including, without limitation, patents, copyrights, trademarks, service marks, and trade secrets.

Lender. A regulated or supervised lender that meets the criteria specified in Section I of this NOFA.

Lender's Agreement. The Agency approved signed form between the Agency and the lender setting forth the lender's loan responsibilities under an issued Loan Note Guarantee.

Lender's analysis. The analysis and evaluation of the credit factors associated with each guarantee application to ensure loan repayment through the use of credit document procedures and an underwriting process that is consistent with industry

standards and the lender's written policy and procedures.

Liquidation value. A monetary value given to property that is sold or exchanges hands under forced or limiting conditions, such as bankruptcy.

Loan agreement. The Agency approved agreement between the borrower and lender containing the terms and conditions of the loan and the responsibilities of the borrower and lender.

Loan Note Guarantee. The Agency approved form containing the terms and conditions of the guarantee of an identified loan.

Loan-to-cost. The ratio of the dollar amount of a loan to the dollar value of the actual eligible project cost adjusted for other debt, project obligations, or other factors as determined by USDA.

Loan-to-value. The ratio of the dollar amount of a loan to the dollar value of the collateral pledged as security for the loan.

Market value. The amount for which property would sell for its highest and best use in an arm's length transaction.

Negligent loan servicing.

(1) The failure of a lender to perform those services that a reasonably prudent lender would perform in originating, servicing, and liquidating its own portfolio of unguaranteed loans; or

(2) The failure of the lender to perform its origination and servicing responsibilities in accordance with its origination and servicing policies and procedures in use by the lender at the time the loan is made.

(3) The term includes the concepts of failure to act, not acting in a timely manner, or acting in a manner contrary to the manner in which a reasonably prudent lender would act.

Offtake agreement. The terms and conditions governing the sale and transportation of biofuels, biobased products, and electricity produced by the borrower to another party.

Parity. A lien position whereby two or more lenders share a security interest of equal priority in collateral. In the event of default, each lender will be affected on a *pro rata* basis.

Participation. Sale of an interest in a loan by the lender wherein the lender retains the note, collateral securing the note, and all responsibility for loan servicing and liquidation.

Person. Any individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, public body, or State or local government.

Promissory Note. A legal instrument that a borrower signs promising to pay a specific amount of money at a stated time. ''Note'' or ''Promissory Note'' shall also be construed to include ''Bond'' or other evidence of debt where appropriate.

Protective advances. Advances made by the lender for the purpose of preserving and protecting the collateral where the debtor has failed to, and will not or can not, meet obligations to protect or preserve collateral.

Qualified consultant. An independent, third-party possessing the knowledge, expertise, and experience to perform in an efficient, effective, and authoritative manner the specific task required.

Qualified Intellectual Property. Any intellectual property included on current (within one year) audited balance sheets for which an audit opinion has been received that states the financial reports fairly represent the values therein and the reported value has been arrived at in accordance with Generally Accepted Accounting Principles (GAAP) standards for valuing intellectual property. The supporting work papers must be satisfactory to the Administrator.

Regulated or supervised lender. A lender that is subject to examination or supervision by an appropriate agency of the United States or a State that supervises or regulates credit institutions.

Renewable biomass.

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) that:

(i) Are byproducts of preventive treatments that are removed to reduce hazardous fuels; to reduce or contain disease or insect infestation; or to restore ecosystem health;

(ii) Would not otherwise be used for higher-value products; and

(iii) Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of paragraphs (2), (3), and (4) of subsection (e) of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512) and large-tree retention of subsection (f) of that section; or

(2) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

(i) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

(ii) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and byproducts (including fats, oils, greases, and manure); and food waste and yard waste.

Renewable biomass agreement. The terms and conditions governing the sale and transportation of the renewable biomass to the borrower by another party.

Retrofitting. The modification of a building or equipment to incorporate functions not included in the original design that allow for the production of advanced biofuels.

Rural or rural area. Any area of a State not in a city or town that has a population of more than 50,000 inhabitants, according to the latest decennial census of the United States, and the contiguous and adjacent urbanized area. In determining which census blocks in an urbanized area are not in a rural area, the Agency shall exclude any cluster of census blocks that would otherwise be considered not in a rural area only because the cluster is adjacent to not more than 2 census blocks that are otherwise considered not in a rural area under this definition. For the purposes of this definition, cities and towns are incorporated population centers with definite boundaries, local self government, and legal powers set forth in a charter granted by the State. For Puerto Rico, Census Designated Place, as defined by the U.S. Census Bureau, will be used as the equivalent to city or town. For the purpose of defining a rural area in the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, the Agency shall determine what constitutes rural and rural area based on available population data.

State. Any of the 50 States of the United States, the Commonwealth of Puerto Rico, the District of Columbia, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

Subordination. An agreement between the lender and borrower whereby lien priorities on certain assets pledged to secure payment of the guaranteed loan will be reduced to a position junior to, or on parity with, the lien position of another loan (see paragraph (h)(1) in section O).

Technical and economic potential. A technology not described in paragraph

(1) of the definition of ''eligible technology'' is considered to have demonstrated ''technical and economic potential'' for commercial application in a biorefinery that produces an advanced biofuel if each of the following conditions is met:

(1) The advanced biofuel biorefinery's likely financial and production success is evidenced in a thorough evaluation including, but not limited to:

(i) Feedstocks;

(ii) Process engineering;

(iii) Siting;

(iv) Technology;

(v) Energy production; and

(vi) Financial and sensitivity review using a banking industry software analysis program with appropriate industry standards.

(2) The evaluation in paragraph (1) of this definition is completed by an independent third-party expert in a feasibility study, technical report, or other analysis, each of which must be satisfactory to the Agency, that demonstrates the success of the project.

(3) The advanced biofuel technology has at least a 12 month (four season) operating cycle at semi-work scale.

Total project cost. The sum of all costs (including eligible and ineligible project costs) associated with a completed project.

Transfer and assumption. The conveyance by a debtor to an assuming party of the assets, collateral, and liabilities of the loan in return for the assuming party's binding promise to pay the outstanding debt.

Viable commercial-scale. An operation is considered to a viable commercial scale operation if it meets each of the following conditions:

(1) Evidence that a proposed project's revenue will be sufficient to recover the full cost of the project over the term of the guaranteed loan, service debt, and result in an anticipated annual rate of return sufficient to encourage investors or lenders to provide funding for the project.

(2) Such proposed project will be able to operate profitably without public and private sector subsidies upon completion of construction (volumetric excise tax is not included as a subsidy).

(3) Contracts for feedstocks are adequate to address proposed off-take from the biorefinery.

(4) The proposed project demonstrates the ability to achieve market entry, suitable infrastructure to transport the advanced biofuel to its market is available, and general market competitiveness of the advanced biofuel technology and related products.

(5) The project must demonstrate that it can be easily replicated and that replications can be sited at multiple facilities across a wide geographic area based on the proposed deployment plan.

(6) The advanced biofuel technology has at least a 12 months (four seasons) operating history at semi-work scale, which demonstrates the ability to operate at a commercial scale.

B. Exception Authority

Except as specified in paragraphs (a) through (d) of this section, the Administrator may, on a case-by-case basis, make exceptions to any requirement or provision of this Notice only when such an exception is in the best financial interests of the Federal Government and is otherwise not in conflict with applicable law.

(a) *Lender and borrower eligibility.* No exception to lender or borrower eligibility can be made.

(b) *Project eligibility.* No exception to project eligibility can be made.

(c) *Term length.* No exception to the maximum length of the loan term can be made with respect to loan originations.

(d) *Rural area definition.* No exception to the definition of rural area, as defined in this Notice, can be made.

C. Review or Appeals

A person has review or appeal rights in accordance with 7 CFR part 11.

D. Conflicts of Interest

No conflict of interest or appearance of conflict of interest will be allowed. For purposes of this Notice, conflict of interest includes, but is not limited to, distribution or payment of guaranteed loan funds or award of project contracts to an individual owner, partner, stockholder, or beneficiary of the lender or borrower or an immediate family member of such an individual.

E. Oversight and Monitoring

(a) *General.* The lender will cooperate fully with Agency oversight and monitoring of all lenders involved in any manner with any guarantee under this Program to ensure compliance with the provisions in this Notice. Such oversight and monitoring will include, but is not limited to, reviewing lender records and meeting with lenders.

(b) *Reports and notifications.* The Agency will require lenders to submit to the Agency reports and notifications to facilitate the Agency's oversight and monitoring. These reports and notifications include, but are not necessarily limited to:

(1) During construction, the lender will submit quarterly construction progress reports to the Agency. These reports will contain, at a minimum, construction milestone attainment, loan advances, and personnel hiring, training, and retention.

(2) Periodic reports, to be submitted quarterly unless otherwise specified in the Conditional Commitment, regarding the condition of its Agency guaranteed loan portfolio (including borrower status and loan classification) and any material change in the general financial condition of the borrower since the last periodic report was submitted.

(3) Monthly default reports, including borrower payment history, for each loan in monetary default using a form approved by the Agency.

(4) Notification within 15 days of:

(i) Any loan agreement violation by any borrower, including when a borrower is 30 days past due or is otherwise in default;

(ii) Any permanent or temporary reduction in interest rate; and

(iii) Any change in the loan classification of any loan made under this Notice.

(5) If a lender receives a final loss payment, an annual report on its collection activities for each unsatisfied account for 3 years following payment of the final loss claim.

F. Forms, Regulations, and Instructions

Copies of all forms, regulations, and instructions referenced in this Notice may be obtained through the Agency.

Basic Eligibility Requirements

G. Borrower Eligibility

To be eligible for a guaranteed loan under this Program, a borrower: must meet each of the conditions specified in the following paragraphs, as applicable.

(a) The borrower must be one of the following:

(1) An individual;

(2) An Indian tribe;

(3) A unit of State or local government;

(4) A corporation;

(5) A farm cooperative;

(6) A farmer cooperative organization;

(7) An association of agricultural producers;

(8) A National Laboratory;

(9) An institution of higher education;

(10) A rural electric cooperative;

(11) A public power entity; or

(12) A consortium of any of the above entities.

(b) Individual borrowers must either:

(1) Be citizens of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or

(2) Reside in the U.S. after legal admittance for permanent residence.

(c) Entities other than individuals must be at least 51 percent owned by persons who are either citizens as identified above or legally admitted permanent residents residing in the U.S.

(d) Each borrower must have, or obtain, the legal authority necessary to construct, operate, and maintain the proposed facility and services and to obtain, give security for, and repay the proposed loan.

(e) A borrower will be considered ineligible for a guarantee under this Program if either the borrower or any owner with more than 20 percent ownership interest in the borrower:

(i) Has an outstanding judgment obtained by the U.S. in a Federal Court (other than U.S. Tax Court),

(ii) Is delinquent on the payment of Federal income taxes,

(iii) Is delinquent on Federal debt, or

(iv) Is debarred or suspended from receiving Federal assistance.

H. Project Eligibility

Projects eligible for loan guarantees under this Program must meet the criteria specified in this section.

(a) The project must be located in a rural area.

(b) The project must be for either:

(1) The development and construction of commercial-scale biorefineries using eligible technology or

(2) The retrofitting of existing facilities, including, but not limited to, wood products facilities and sugar mills, with eligible technology.

(c) The project must meet the financial metric criteria specified in paragraphs (c)(1) through (c)(3) of this section. These financial metric criteria shall be calculated from the realistic information in the pro forma statements or borrower financial statements of a typical operating year after the project is completed and stabilized.

(1) A debt coverage ratio of 1.0 or higher;

(2) A debt-to-tangible net worth ratio of 4:1 or lower for start-up businesses and of 9:1 or lower for existing businesses.

(3) A loan-to-value ratio of no more than 1.0.

I. Lender Eligibility

To be eligible to participate in this Program under this Notice, a lender must be a regulated or supervised lender and must maintain at all times the following minimum acceptable levels of capital:

- Total Risk-Based Capital ratio of 10 percent or higher;
- Tier 1 Risk-Based Capital ratio of 6 percent or higher; and
- Tier 1 Leverage Capital ratio of 5 percent or higher.

If the regulated or supervised lender is a commercial bank or thrift, these levels would be based on those reflected in Call Reports and Thrift Financial Reports.

Further, the Agency will approve loan guarantees only for lenders with adequate experience with similar projects and the expertise to make, secure, service, and collect loans approved under this Notice. Lenders debarred from other Federal credit programs will not be eligible under this program.

Basic Application Provisions

J. Loan Applications

Applications for loan guarantees, which are to be filed with the USDA Rural Development National Office's Energy Branch as shown under **ADDRESSES**, must contain the items identified in the paragraphs (b)(1) through (18), organized pursuant to a Table of Contents in a chapter format.

(a) *Table of Contents.*

(b) *Project Summary.* Provide a concise summary of the proposed project and application information, project purpose and need, and project goals, including the following:

(1) *Title.* Provide a descriptive title of the project.

(2) *Borrower eligibility.* Describe how the borrower meets the eligibility criteria identified in Section II.G of this Notice.

(3) *Project eligibility.* Describe how the project meets the eligibility criteria identified in Section II.H of this Notice. This description is to provide the reader with a frame of reference for reviewing the rest of the application. Clearly state whether the application is for the construction and development of a biorefinery or for the retrofitting of an existing facility and provide a brief description of the project. Provide results from demonstration or pilot facilities that prove the technology proposed to be used meets the definition of eligible technology. Additional project description information will be needed later in the application.

(4) *Matching funds.* Submit a spreadsheet identifying sources, amounts, and status of matching funds. The spreadsheet must also include a directory of matching funds source contact information. Attach any applications, correspondence, or other written communication between applicant and matching fund source.

(5) *Application for Loan Guarantee.* Completed Form RD 4279–1, ''Application for Loan Guarantee'' (or successor form).

(6) *Environmental information.* Form RD 1940–20, ''Request for Environmental Information''; omit the attachments specified in the instructions to the form; and attach an environmental information document completed pursuant to 7 CFR part 1940, subpart G, Exhibit H.

(i) *Civil Rights Impact Analysis.* The Agency is responsible for ensuring that all requirements of RD Instruction 2006–P, ''Civil Rights Impact Analysis,'' with the addition of Executive Order 12898, Environmental Justice, are met and will complete the appropriate level of review in accordance with that instruction. When guaranteed loans are proposed, Agency employees will conduct a Civil Rights Impact Analysis (CRIA) with regard to environmental justice. The CRIA must be conducted and the analysis documented utilizing Form RD 2006–38, ''Civil Rights Impact Analysis Certification.'' This must be done prior to loan approval, obligation of funds, or other commitments of agency resources, including issuance of a Conditional Commitment, whichever occurs first.

(ii) *Intergovernmental consultation.* Intergovernmental consultation comments in accordance with RD Instruction 1940–J and 7 CFR, part 3015, subpart V.

(7) *Credit reports.*

(i) A personal credit report from an acceptable credit reporting company for a proprietor (owner), each partner, officer, director, key employee, and stockholder owning 20 percent or more interest in the applicant, except for those corporations listed on a major stock exchange. Credit reports are not required for elected and appointed officials when the applicant is a public body.

(ii) Commercial credit reports obtained by the lender on the borrower and any parent, affiliate, and subsidiary firms.

(8) *Appraisals.* Appraisals, accompanied by a copy of a Phase I Environmental Site Assessment (ESA) in accordance with ASTM standards. If the appraisal has not been completed when the application is filed, an estimated appraisal must be submitted with the application. In all cases, a completed appraisal consistent with paragraph (c) in section N must be submitted prior to the loan being closed.

(9) *Financial information.* For all businesses, a current (not more than 90 days old) balance sheet; a *pro forma* balance sheet at startup; projected balance sheets and income and expense statements for a period of not less than 3 years of stabilized operation; and cash flow statements for the life of the

project. Projections should be supported by a list of assumptions showing the basis for the projections.

(10) *Credit rating.* For loans of $125 million or more, an evaluation and credit rating of the total project's indebtedness, without consideration for a government guarantee, from a nationally recognized rating agency.

(11) *Lender's analysis.* Lender's complete written analysis of the project, including:

(i) A summary of the technology to be used in the project;

(ii) The viability of such technology for the particular project application;

(iii) Whether the project is retrofit or Greenfield;

(iv) Borrower's management;

(v) Repayment ability (including a cash-flow analysis);

(vi) Sponsor's history of debt repayment;

(vii) Necessity of any debt refinancing;

(viii) The credit reports of the borrower, its principals, and any parent, affiliate, or subsidiary; and

(ix) The credit analysis specified in Section II.N of this Notice.

(12) *Loan Agreement.* A proposed loan agreement or a sample loan agreement with an attached list of the proposed loan agreement provisions. The loan agreement must be executed by the lender and borrower before the Agency issues a Loan Note Guarantee. The following requirements must be addressed in the loan agreement:

(i) Prohibition against assuming liabilities or obligations of others;

(ii) Restriction on dividend payments;

(iii) Limitation on the purchase or sale of equipment and fixed assets;

(iv) Limitation on compensation of officers and owners;

(v) Financial covenants regarding working capital or current ratio requirement, and maximum debt-to-net worth ratio;

(vi) Borrower change of control;

(vii) Repayment and amortization of the loan;

(viii) List of collateral and lien priority for the loan;

(ix) Type and frequency of financial statements to be required for the duration of the loan;

(x) A section for the later insertion of any additional requirements imposed by the Agency in its Conditional Commitment; and

(xi) A section for the later insertion of any necessary mitigation measures by the borrower to avoid or reduce adverse environmental impacts from this proposal's construction or operation.

(13) *Business plan.* Submit a business plan. Any or all of the requirements in the business plan may be omitted if the information is included in the feasibility study.

(14) *Feasibility study.* Submit a feasibility study on the proposed project. Elements in an acceptable feasibility study include, but are not limited to, the elements outlined in Table 1. In addition, as part of the feasibility study, both a technical assessment and economic analysis of the project are required. These two assessments are discussed in detail in paragraphs (d) and (e) of this section.

TABLE 1—FEASIBILITY STUDY COMPONENTS

(A) Executive Summary
Introduction/Project Overview (Brief general overview of project location, size, etc.)
Economic feasibility determination.
Technical feasibility determination.
Market feasibility determination.
Financial feasibility determination.
Management feasibility determination.
Recommendations for implementation.
(B) Economic Feasibility
Information regarding project site;
Availability of trained or trainable labor;
Availability of infrastructure, including utilities, and rail, air and road service to the site.
Feedstock:
Feedstock source management.
Estimates of feedstock volumes and costs.
Collection, Pre-Treatment, Transportation, and Storage.
Impacts on existing manufacturing plants or other facilities that use similar feedstock if the applicant's proposed biofuel production technology is adopted.
Project impact on resource conservation, public health, and the environment.
Overall economic impact of the project including any additional markets created for agricultural and forestry products and agricultural waste material and potential for rural economic development.
Feasibility/plans of project to work with producer associations or cooperatives including estimated amount of annual feedstock and biofuel and byproduct dollars from producer associations and cooperatives.
(C) Market Feasibility
Information on the sales organization and management;
Nature and extent of market and market area;
Marketing plans for sale of projected output—principal products and by-products;
Extent of competition including other similar facilities in the market area;
Commitments from customers or brokers—principal products and by-products.
Risks Related to the Advanced Biofuel Industry, including industry status.
(D) Technical Feasibility
Suitability of the selected site for the intended use including the information documents Form RD 1940–20 and required narrative in the 7 CFR part 1940, subpart G Exhibit H format.

TABLE 1—FEASIBILITY STUDY COMPONENTS—Continued

Report shall be based upon verifiable data and contain sufficient information and analysis so that a determination may be made on the technical feasibility of achieving the levels of income or production that are projected in the financial statements. Describe the scale of development for which the process technology has been proven, i.e., lab (or bench), pilot, or demonstration scale; and the specific volume of the process (expressed either as volume of feedstock processed—tons per unit of time, or as product—gallons per unit of time).
Report shall also identify any constraints or limitations in these financial projections and any other facility or design-related factors which might affect the success of the enterprise.
Report shall also identify and estimate project operation and development costs and specify the level of accuracy of these estimates and the assumptions on which these estimates have been based.
The Project engineer or architect is considered an independent party provided neither the principals of the firm nor any individual of the firm who participates in the technical feasibility report has a financial interest in the project if no other individual or firm with the expertise necessary to make such a determination is reasonably available to perform the function, an individual or firm that is not independent may be used.
Ability of the proposed system to be Commercially Replicated.
Supports the Renewable Fuel Standard established in the Energy Independence and Security Act of 2007.
Risks Related to:
Construction of the Advanced Biofuel Plant.
Advanced Biofuel Production.
Regulation and Governmental Action.
(E) Financial Feasibility
Reliability of the financial projections and assumptions on which the financial statements are based including all sources of project capital, both private and public, such as Federal funds. Three years (minimum) projected Balance Sheets and Income Statements. Cash Flow projections for the life of the project.
Ability of the business to achieve the projected income and cash flow.
Assessment of the cost accounting system.
Availability of short-term credit or other means to meet seasonable business costs;
Adequacy of raw materials and supplies.
Sensitivity Analysis—including feedstock and energy costs, product/co-product prices.
Risks Related to:
The Project.
Applicant Financing Plan.
The operational units.
Tax Issues.
(F) Management Feasibility
Continuity and adequacy of management.
Projected total supply from members and non-members.
Projected competitive demand for raw materials.
Procurement plan and projected procurement costs.
Form of commitment of raw materials (marketing agreements, etc.).
Identify applicant and/or management's previous experience concerning the receipt of federal financial assistance, including amount of funding, date received, purpose, and outcome.
Risks Related to:
Applicant as a Company (i.e. Development-Stage) Conflicts of Interest.
(G) Qualifications
A réumé or statement of qualifications of the author of the feasibility study, including prior experience, should be submitted.

(15) *Lender certifications*.

(i) A certification by the lender stating that it has completed a comprehensive analysis of the proposal, the borrower is eligible, the loan is for an eligible project, and there is reasonable assurance of repayment ability based on the borrower's history, projections and equity, and the collateral to be obtained.

(ii) A certification by the lender that the proposed project will be in compliance with all applicable State and Federal environmental laws and regulations.

(16) *DUNS Number*. A Dun and Bradstreet Universal Numbering System (DUNS) number.

(17) *Bioenergy experience*. Identify applicant, including principals, prior experience in bioenergy projects and the receipt of Federal financial assistance, including amount of funding, date received, purpose, and outcome, for such projects.

(18) *Other*. Any additional information required by the Agency.

(c) *Form modifications*. The BioRefinery Assistance Program will be using the same forms as the Business and Industry and Section 9006 programs with the understanding that:

(1) All references in those forms to the Business and Industry program or the Section 9006 program in whatever manner, and whether referenced singularly or jointly, shall be deemed to be references to the BioRefinery Assistance Program described in this Notice, and

(2) All references to the Business and Industry or Section 9006 regulations in those forms in whatever manner, whether general or specific, whether singularly or jointly, and whether or not specific Code of Federal Regulation citations are used, shall be deemed to be a reference to the requirements of the BioRefinery Assistance Program described in this Notice. In addition, the following modifications are to be used for this Program.

(i) Application for Loan Guarantee (Form RD 4279–1) is modified as described below.

(A) Part A, Block 10, Type of Borrower, do not fill out if your entity is not listed.

(B) Part A, Block 11. Instead of the SIC Code, fill in your NAICS.

(C) Part A, Block 22 is not applicable.

(D) Part A, Block 29, Financial Statements. Comply with the financial statement requirements in this Notice rather than in Block 29.

(E) Part A, Block 30, which deals with guarantors, is not applicable.

(F) Part A, Block 33, Technical Report. Replace Technical Report with Feasibility Study, which will include a technical assessment of the project.

(G) Part B, Block 17, which addresses equity. Do not fill in this block, but instead provide similar information according to the equity requirements contained in this Notice.

(H) Part B, Block 22, which addresses the lender's analysis. Attach the lender's analysis as described in this Notice.

(3) Lender's Agreement (Form RD 4279–4), Section I, Item B, is applicable with the addition that negligent servicing includes any instance where a lender fails to ensure that all environmental laws are being complied with by any person receiving guaranteed loan funds under this Program.

(4) Loan Note Guarantee (Form RD 4279–5), Section 3, Full Faith and Credit, under Conditions of Guarantee is applicable with the addition that negligent servicing includes any instance where a lender fails to ensure that all environmental laws are being complied with by a person receiving guaranteed loan funds under this Program.

(d) *Technical Assessment.* As part of the feasibility study, a detailed technical assessment is required for each project. The technical assessment must demonstrate that the project design, procurement, installation, startup, operation and maintenance of the project will operate or perform as specified over its useful life in a reliable and a cost effective manner, and must identify what the useful life of the project is. The technical assessment must also identify all necessary project agreements, demonstrate that those agreements will be in place on or before the time of loan closing, and demonstrate that necessary project equipment and services will be available over the useful life. All technical information provided must follow the format specified in paragraphs (d)(1) through (9) below. Supporting information may be submitted in other formats. Design drawings and process flow charts are encouraged as exhibits. A discussion of each topic identified in paragraphs (d)(1) through (9) is not necessary if the topic is not applicable to the specific project. Questions identified in the Agency's technical review of the project must be answered to the Agency's satisfaction before the application will be approved. All projects require the services of a professional engineer (PE).

(1) *Qualifications of project team.* The project team will vary according to the complexity and scale of the project. The project team must have demonstrated expertise in similar advanced biofuel technology development, engineering, installation, and maintenance. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services for the development, construction, and retrofitting, as applicable, of technology for producing advanced biofuels must be provided. In addition, authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the biorefinery to operate over its useful life must be provided. The application must:

(i) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the borrower's risk, and a design build method, often referred to as turnkey, where the borrower establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(ii) Discuss the advanced biofuels technology equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(iii) Discuss the project team members' qualifications for engineering, designing, and installing advanced biofuels refineries including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available; and

(iv) Describe the advanced biofuels refinery operator's qualifications and experience for servicing, operating, and maintaining such equipment or projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available.

(2) *Agreements and permits.* All necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (2)(i) through (vi), must be identified in the application.

(i) Advanced biofuels refineries must be installed in accordance with applicable local, State, and national codes and regulations. Identify zoning and code issues, and required permits and the schedule for meeting those requirements and securing those permits.

(ii) Identify licenses where required and the schedule for obtaining those licenses.

(iii) Identify land use agreements required for the project and the schedule for securing the agreements and the term of those agreements.

(iv) Identify any permits or agreements required for solid, liquid, and gaseous emissions or effluents and the schedule for securing those permits and agreements.

(v) Identify available component warranties for the specific project location and size.

(vi) Identify all environmental issues, including environmental compliance issues, associated with the project.

(3) *Resource assessment.* Adequate and appropriate evidence of the availability of the feedstocks required for the advanced biofuels refinery to operate as designed must be provided in the application. Indicate the type and quantity of the feedstock including storage, where applicable. Indicate shipping or receiving method and required infrastructure for shipping, and other appropriate transportation mechanisms. For proposed projects with an established resource, provide a summary of the resource.

(4) *Design and engineering.* Authoritative evidence that the advanced biofuels refinery will be designed and engineered so as to meet its intended purposes, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards must be provided in the application. Projects shall be engineered by a qualified entity. Biorefineries must be engineered as a complete, integrated facility. The engineering must be comprehensive including site selection, systems and component selection, and systems monitoring equipment. Biorefineries must be constructed by a qualified entity.

(i) The application must include a concise but complete description of the project including location of the project; resource characteristics, including the kind and amount of feedstocks; biorefinery specifications; kind, amount,

and quality of the output; and monitoring equipment. Address performance on a monthly and annual basis. Describe the uses of or the market for the advanced biofuels produced by the biorefinery. Discuss the impact of reduced or interrupted feedstock availability on the biorefinery's operations.

(ii) The application must include a description of the project site and address issues such as site access, foundations, backup equipment when applicable, and the environmental information documents Form RD 1940–20 and required narrative in the 7 CFR part 1940, subpart G, Exhibit H format. Identify any unique construction and installation issues.

(iii) Sites must be controlled by the eligible borrower for at least the proposed project life or for the financing term of any associated federal loans or loan guarantees.

(5) *Project development schedule*. Each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown must be provided in the application. Provide a detailed description of the project timeline including resource assessment, project and site design, permits and agreements, equipment procurement, and project construction from excavation through startup and shakedown.

(6) *Equipment procurement.* A demonstration that equipment required by the biorefinery is available and can be procured and delivered within the proposed project development schedule must be provided in the application. Biorefineries may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory.

(7) *Equipment installation.* A full description of the management of and plan for site development and systems installation, details regarding the scheduling of major installation equipment needed for project construction, and a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the biorefinery as a whole must be provided in the application.

(8) *Operations and maintenance.* The operations and maintenance requirements of the biorefinery necessary for the biorefinery to operate as designed over the useful life must be provided in the application. The application must also include:

(i) Information regarding available biorefinery and component warranties and availability of spare parts;

(ii) A description of the routine operations and maintenance requirements of the proposed biorefinery, including maintenance schedule for the mechanical, piping, and electrical systems and system monitoring and control requirements, as well as provision of information that supports expected useful life of the biorefinery and timing of major component replacement or rebuilds;

(iii) A discussion of the costs and labor associated with operations and maintenance of the biorefinery and plans for in-sourcing or outsourcing. A description of the opportunities for technology transfer for long term project operations and maintenance by a local entity or owner/operator; and

(iv) Provision and discussion of the risk management plan for handling large, unanticipated failures of major components.

(9) *Decommissioning.* When uninstalling or removing the project, a description of the decommissioning process. A description of any issues, requirements, and costs for removal and disposal of the biorefinery.

(e) *Economic Analysis.* The feasibility study must also contain a detailed economic analysis of the project. The economic analysis must describe the costs and revenues of the proposed project to demonstrate the financial performance of the project by:

(1) Providing a detailed analysis and description of project costs including project management, resource assessment, project design, project permitting, land agreements, equipment, site preparation, systems installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs;

(2) Providing a detailed analysis and description of annual project revenues and expenses over the useful life of the project;

(3) Providing a detailed description of applicable investment incentives, productivity incentives, loans, and grants; and

(4) Identifying any other project authorities and subsidies that affect the project.

K. Evaluation of Guaranteed Loan Applications

(a) *General review.* The Agency will utilize a panel of reviewers, including Rural Development field staff and U.S. Department of Energy staff, to review each application. Each application will be evaluated to confirm that both the borrower and project are eligible, the project has technical merit, there is reasonable assurance of repayment, there is sufficient collateral and equity, and the proposed project complies with all applicable statutes and regulations. If the Agency determines it is unable to guarantee the loan, the lender will be informed in writing. Such notification will include the reasons for denial of the guarantee.

(b) *Ineligible applications.* If the borrower, lender, or the project is determined to be ineligible for any reason, the Agency will inform the lender, in writing, of the reasons and provide any applicable appeal rights. No further evaluation of the application will occur.

(c) *Incomplete applications.* If the application is incomplete, the Agency will identify those parts of the application that are incomplete and return it, with a written explanation, to the lender for possible future resubmission. Upon receipt of a complete application, if submitted within the proper deadlines noted in this NOFA, the Agency will complete its evaluation.

(d) *Technical merit determination.* The Agency's determination of a project's technical merit will be based on the information in the application. The Agency may engage the services of other government agencies or recognized industry experts in the applicable technology field, at its discretion, to evaluate and rate the application. The Agency may use this evaluation and rating to determine the level of technical merit of the proposed project. Projects determined by the Agency to be without technical merit will not be selected for funding.

(e) *Evaluation criteria.* The Agency will score each eligible application that meets the minimum requirements for financial and technical feasibility, based on the evaluation criteria identified below. A minimum score of 40 points is required in order to be considered for a guarantee. The Agency will give priority to those applications with the highest scores above the minimum threshold. A maximum of 100 points is possible.

(1) Whether the borrower has established a market for the advanced biofuel and the byproducts produced. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the business has less than or equal to a 50 percent commitment for feedstocks, marketing agreements for the

advanced biofuel, and the byproducts produced, 0 points will be awarded.

(ii) If the business has a greater than 50 percent commitment for feedstocks, marketing agreements for the advanced biofuel and the byproducts produced, 5 points will be awarded.

(2) Whether the area in which the borrower proposes to place the biorefinery has other similar advanced biofuel facilities. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the biorefinery will be located in a trade area that has other advanced biofuel facilities, with area defined as ''within the area supplying the feedstock,'' 0 points will be awarded.

(ii) If the biorefinery will be located in a trade area that does not have other advanced biofuel facilities, with area defined as ''within the area supplying the feedstock,'' 5 points will be awarded.

(3) Whether the borrower is proposing to use a feedstock not previously used in the production of advanced biofuels. A maximum of 14 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower proposes to use a feedstock previously used in the production of advanced biofuels in a commercial facility, 0 points will be awarded.

(ii) If the borrower proposes to use a feedstock not previously used in production of advanced biofuels in a commercial facility, 14 points will be awarded.

(4) Whether the borrower is proposing to work with producer associations or cooperatives. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower procurement or marketing agreements amount to less than or equal to 50 percent of annual feedstock and biofuel and byproduct dollars with producer associations or cooperatives, 0 points will be awarded.

(ii) If the borrower procurement or marketing agreements amount to more than 50 percent of annual feedstock and biofuel and byproduct dollars with producer associations or cooperatives, 5 points will be awarded.

(5) The level of financial participation by the borrower, including support from non-Federal and private sources. Such financial participation may take the form of direct financial support, technical support, and contributions of in-kind resources including financial or other support from state or local government. A maximum of 20 points can be awarded. Other Direct Federal funding will not be considered as part of the borrower's cash equity participation. Points to be awarded will be determined as follows:

(i) If the borrower's cash equity injection plus other sources is equal to or greater than 30 percent, but less than 40 percent, tangible balance sheet equity, 10 points will be awarded.

(ii) If the borrower's cash equity injection plus other sources is equal to or greater than 40 percent tangible balance sheet equity, 20 points will be awarded.

(iii) If a project uses other Federal direct funding, 10 points will be deducted.

(6) Whether the borrower has established that the adoption of the process proposed in the application will have a positive impact on resource conservation, public health, and the environment. A maximum of 9 points can be awarded. Points to be awarded will be determined as follows:

(i) If process adoption will have a positive impact on resource conservation, 3 points will be awarded.

(ii) If process adoption will have a positive impact on public health, 3 points will be awarded.

(iii) If process adoption will have a positive impact on environment, 3 points will be awarded.

(7) Whether the borrower can establish that, if adopted, the biofuels production technology proposed in the application will not have any significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower has not established, through an independent third party, that the biofuels production technology proposed in the application, if adopted, will not have any significant negative impacts on existing manufacturing plants or other facilities that use similar feed stocks, 0 points will be awarded.

(ii) Applicant has established, through an independent third party, that the biofuels production technology proposed in the application, if adopted, will not have any significant negative impacts on existing manufacturing plants or other facilities that use similar feed stocks, 5 points will be awarded.

(8) The potential for rural economic development. If the business creates jobs with an average wage that exceeds both the State and County median household wages, 3 points will be awarded.

(9) The level of local ownership proposed in the application. A maximum of 13 points can be awarded. Points to be awarded will be determined as follows:

(i) If local ownership is greater than 20 percent, with area defined as ''within the area supplying the feedstock,'' up to 6 points will be awarded.

(ii) If local ownership is greater than 50 percent, with area defined as ''within the area supplying the feedstock,'' 13 points will be awarded.

(10) Whether the project can be replicated. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the project can be commercially replicated regionally (*e.g.*, Northeast, Southwest, etc.), 2 points will be awarded.

(ii) If the project can be commercially replicated nationally, up to 5 points will be awarded.

(11) The extent to which the project converts cellulosic biomass feedstocks into advanced biofuels. A maximum of 6 points can be awarded.

(i) If 50% or less of the amount of advanced biofuels produced by the project is derived from cellulosic renewable biomass feedstocks, then 0 points will be awarded.

(ii) If more than 50% of the amount of advanced biofuels produced by the project is from cellulosic renewable biomass feedstocks, then 6 points will be awarded.

(12) If the project is a first-of-a-kind technology, system, or process, 10 points will be awarded.

L. Loan Approval and Obligating Funds

(a) *Environmental review.* The Agency has reviewed the types of applicant proposals that may qualify for assistance under this section and has determined, in accordance with 7 CFR Part 1940–G, that all proposals shall be reviewed as a Class II Environmental Assessment (EA) as the development of new and emerging technologies would not meet the classification of a Categorical Exclusion (CE) in accordance with 7 CFR Part 1940.310 or a Class I EA in accordance with 7 CFR Part 1940.311. Furthermore, if after Agency review of proposals the Agency has determined that the proposal could result in significant environmental impacts on the quality of the human environment, an Environmental Impact Statement may be required pursuant to 7 CFR Part 1940.313.

(b) *Conditional Commitment.* Upon approval of a loan guarantee, the Agency will issue a Conditional Commitment to the lender containing conditions, including all applicable regulatory, statutory, and other requirements, under which a Loan Note Guarantee will be issued. One of the conditions shall be that the project receiving guaranteed loan funds under

this Program will be in compliance with all applicable State and Federal environmental laws and regulations. The Conditional Commitment is a binding obligation by the Agency. However, if the terms of the Conditional Commitment are not satisfied, the Commitment is no longer binding on the Agency.

(c) *Alternate conditions.* If certain conditions of the Conditional Commitment cannot be met, the lender and applicant may propose alternate conditions. Within the requirements of the applicable regulations and instructions and prudent lending practices, the Agency may negotiate with the lender and the applicant regarding any proposed changes to the Conditional Commitment.

(d) *Wage rates.* As a condition of receiving a loan guaranteed under this Program, each borrower shall ensure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with Guaranteed Loan Funds under this Notice shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 through 3144, 3146, and 3147 of title 40, U.S.C. Awards under this Notice are further subject to the relevant regulations contained in title 29 of the Code of Federal Regulations.

M. Lender's Functions and Responsibilities—General

All lenders requesting or obtaining a loan guarantee under this Notice are responsible for:

(a) Processing applications for guaranteed loans;

(b) Developing and maintaining adequately documented loan files;

(c) Recommending only loan proposals that are eligible and financially feasible;

(d) Obtaining valid evidence of debt and collateral in accordance with sound lending practices;

(e) Supervising construction;

(f) Distribution of loan funds;

(g) Servicing guaranteed loans in a prudent manner, including liquidation if necessary;

(h) Following Agency regulations; and

(i) Obtaining Agency approvals or concurrence as required.

N. Lender's Functions and Responsibilities—Origination

(a) *Credit evaluation.* The lender must determine credit quality of the borrower, including the following:

(1) The lender must address all of the elements of credit quality in a written credit analysis, including cash flow, collateral, and adequacy of equity.

(i) *Cash flow.* All efforts will be made to structure debt so that the business has adequate debt coverage and the ability to accommodate expansion.

(ii) *Collateral.* Collateral must have documented value sufficient to protect the interest of the lender and the Agency, as determined by the Agency.

(iii) *Equity.* Borrowers shall demonstrate evidence of cash equity injection in the project of not less than 20 percent of eligible project costs. The fair market value of equity in real property that is to be pledged as collateral for the loan may be substituted in whole or in part to meet the cash equity requirement. However, the appraisal completed to establish the fair market value of the real property must not be more than 1 year old and must meet Agency appraisal standards. Otherwise, cash equity injection must be in the form of cash.

(2) The credit analysis must also include spreadsheets of the balance sheets and income statements of the borrower for the 3 previous years (for existing businesses), pro forma balance sheets at startup, and projected yearend balance sheets and income statements for a period of not less than 3 years of stabilized operation, with appropriate ratios and comparisons with industrial standards (such as Dun & Bradstreet or Robert Morris Associates) to the extent available.

(3) All data must be shown in total dollars and also in common size form, obtained by expressing all balance sheet items as a percentage of assets and all income and expense items as a percentage of sales.

(b) *Lien priorities.* The entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan. The unguaranteed portion of the loan will neither be paid first nor given any preference or priority over the guaranteed portion. The guarantee will be secured by a first lien on all collateral necessary to run the project in the event of the borrower's default including, without limitation, all real property, contracts and permits, and all furnishings, fixtures, and equipment of the project. In addition, the lender and the Agency should be shown as an additional insured on insurance policies (or other risk sharing instruments) that benefit the project and must be able to assume any contracts that are material to running the project including any feedstock or offtake agreements.

(c) *Appraisals.* Lenders are required to provide real property and chattel collateral appraisals conducted by an independent qualified appraiser in accordance with the Uniform Standards of Professional Appraisal Practices or successor standards.

(1) All appraisals used to establish the fair market value of the real property must not be more than 1 year old.

(2) All appraisals will include consideration of the potential effects from a release of hazardous substances or petroleum products or other environmental hazards on the market value of the collateral.

(3) A complete self-contained appraisal must be conducted.

(4) Lenders must complete, for all applications, a Phase I Environmental Site Assessment (ESA) in accordance with ASTM standards, which should be provided to the appraiser for completion of the self-contained appraisal. Lenders shall use specialized appraisers.

(d) *Construction planning and performing development.*

(1) *Design Policy.* The lender must ensure that all project facilities will be designed utilizing accepted architectural and engineering practices and must conform to applicable Federal, state, and local codes and requirements. The lender will also ensure that the project will be completed using the available funds and, once completed, will be used for its intended purpose and produce products in the quality and quantity proposed in the completed application approved by the Agency.

(2) *Project Control.* The lender will monitor the progress of construction and undertake the reviews and inspections necessary to ensure that construction conforms to applicable Federal, state, and local code requirements; proceeds are used in accordance with the approved plans, specifications, and contract documents; and that funds are used for eligible project costs. The lender will provide a resident inspector.

(3) *Changes or cost overruns.* The borrower shall be responsible for any changes or cost overruns. If any such change or cost overrun occurs, then any change order must be expressly approved by the Agency which approval shall not be unreasonably withheld, and neither the lender nor borrower will divert funds from purposes identified in the guaranteed loan application to pay for any such change or cost overrun without the express written approval of the Agency. In no event will the current loan be modified or a subsequent guaranteed loan be approved to cover any such changes or costs. Failure to comply with the terms of this paragraph will be considered a material adverse change in the borrower's financial condition, and the lender must address

this matter, in writing, to the Agency's satisfaction. In the event any of the aforementioned increases in costs and/or expenses are incurred by the borrower, the borrower must provide for such increases in a manner that there is no diminution of the borrower's operating capital.

(4) *New draws.* The following two certifications are required for each new draw:

(i) Certification by the project engineer to the lender that the work referred to in the draw has been successfully completed; and

(ii) Certification from the lender that all debts have been paid and all mechanics' liens have been waived.

(e) *Laws that contain other compliance requirements.* Each lender and borrower must comply with:

(1) *Equal Credit Opportunity Act.* In accordance with title V of Public Law 93–495, the Equal Credit Opportunity Act, with respect to any aspect of a credit transaction, neither the lender nor the Agency will discriminate against any applicant on the basis of race, color, religion, national origin, sex, marital status or age (providing the applicant has the capacity to contract), or because all or part of the applicant's income derives from a public assistance program, or because the applicant has, in good faith, exercised any right under the Consumer Protection Act. The lender will comply with the requirements of the Equal Credit Opportunity Act as contained in the Federal Reserve Board's Regulation implementing that Act (see 12 CFR part 202). Such compliance will be accomplished prior to loan closing.

(2) *Equal opportunity.* For all construction contracts in excess of $10,000, the contractor must comply with Executive Order 11246, ''Equal Employment Opportunity,'' as amended by Executive Order 11375, and as supplemented by applicable Department of Labor regulations (41 CFR part 60). The borrower and lender are responsible for ensuring that the contractor complies with these requirements.

(3) *Americans with Disabilities Act (ADA).* Guaranteed loans that involve the construction of or addition to facilities that accommodate the public and commercial facilities, as defined by the ADA, must comply with the ADA. The lender and borrower are responsible for compliance.

(4) *Environmental analysis.* Each lender and borrower must comply with the environmental analysis identified in 7 CFR part 1940, subpart G, which outlines environmental procedures and requirements for this Notice. Each proposal will be evaluated to determine the proper level of National Environmental Policy Act (NEPA) review on a case-by-case basis by the Agency's environmental staff. The lender's borrower will cooperate with the Agency in the preparation of the environmental review. Prospective borrowers are advised to contact the Agency to determine environmental requirements as soon as practicable after they decide to pursue any form of financial assistance directly or indirectly available through the Agency.

(i) Any required environmental review must be completed by the Agency prior to the Agency obligating any funds.

(ii) The borrower will be notified of all specific compliance requirements, including, but not limited to, the publication of public notices, and consultation with State Historic Preservation Offices and the U.S. Fish and Wildlife Service.

(iii) A site visit by the Agency may be scheduled, if necessary, to determine the scope of the review.

(iv) A borrower taking any actions or incurring any obligations prior to or during application review and processing that would either limit the range of alternatives to be considered or that would have an adverse effect on the environment, such as the initiation of construction, may result in project ineligibility.

(f) *Environmental responsibilities.* Lenders have a responsibility to become familiar with Federal environmental requirements; to consider, in consultation with the prospective borrower, the potential environmental impacts of their proposals at the earliest planning stages; and to develop proposals that minimize the potential to adversely impact the environment. Lenders must alert the Agency to any controversial environmental issues related to a proposed project or items that may require extensive environmental review at the time of the application as well as after the loan closes if unforeseen events take place. Lenders must ensure that their borrowers complete Form RD 1940–20; omit the attachments specified in the instructions to the form; and attach an environmental information document completed pursuant to 7 CFR part 1940, subpart G, Exhibit H; assist in the collection of additional data when the Agency needs such data to complete its environmental review of the proposal; and assist in the resolution of environmental problems.

(g) *Loan closing.* The lender or its designated representative is responsible for loan closings. At the closing, the lender will ensure that all the conditions in the Agency's Conditional Commitment have been met.

O. Lender's Functions and Responsibilities—Servicing General

(a) *Routine servicing.* The lender is responsible for servicing the entire loan and for taking all servicing actions that a prudent lender would perform in servicing its own portfolio of loans that are not guaranteed.

(1) The lender must service the entire loan and must remain mortgagee and secured party of record notwithstanding the fact that another party may hold a portion of the loan.

(2) The Loan Note Guarantee is unenforceable by the lender to the extent any loss is occasioned by violation of usury laws, use of loan funds for unauthorized purposes, negligent servicing, or failure to obtain the required security interest regardless of the time at which the Agency acquires knowledge of the foregoing. This responsibility includes, but is not limited to, the collection of payments, obtaining compliance with the covenants and provisions in the loan agreement, obtaining and analyzing financial statements, checking on payment of taxes and insurance premiums, and maintaining liens on collateral.

(b) *Loan classification.* Within 90 days of receipt of the Loan Note Guarantee, the lender must notify the Agency of the loan's classification or rating under its regulatory standards. Should the classification be changed at a future time, the Agency must be notified within 15 days.

(c) *Insurance requirements.* The lender must ensure that the borrower has obtained, and will maintain for the life of the guaranteed loan, all necessary insurance coverage appropriate to the proposed project, in accordance with the lender's loan origination policies and procedures or what a reasonably prudent lender requires, whichever is more stringent.

(d) *Financial reports.* The lender must obtain and forward to the Agency the financial statements required by the loan agreement or the Conditional Commitment.

(1) The lender must submit to the Agency:

(i) Quarterly financial statements within 45 days of the end of each quarter and

(ii) Annual audited financial statements within 120 days of the end of the borrower's fiscal year.

(2) The lender must analyze the financial statements and provide the Agency with a written summary of the lender's analysis and conclusions,

including trends, strengths, weaknesses, extraordinary transactions, and other indications of the financial condition of the borrower. Spreadsheets of the new financial statements must be included.

(e) *Requirements after construction.*

(1) *Reports.* In addition to complying with the requirements for loan servicing, once the project has been constructed, the lender must provide the Agency periodic reports from the borrower commencing the first full calendar year following the year in which project construction was completed and continuing for the life of the guaranteed loan. The borrower's reports will include, but not be limited to, the information specified in the following paragraphs, as applicable.

(i) The actual amount of advanced biofuels produced to assess whether project goals are being met.

(ii) If applicable, documentation that identified health and/or sanitation problem has been solved.

(iii) A summary of the cost of operating and maintaining the facility.

(iv) Description of any maintenance or operational problems associated with the facility.

(v) Demonstration that the project is and has been in compliance with all applicable State and Federal environmental laws and regulations.

(vi) The number of jobs created.

(vii) A description on the status of the project's feedstock including, but not limited to, the feedstock being used, outstanding feedstock contracts, feedstock changes and interruptions, and quality of the feedstock.

(2) *Inspections.* The lender shall conduct annual inspections of the project for the life of the guaranteed loan.

(f) *Release of collateral.*

(1) All releases of collateral with a value exceeding $100,000 must be supported by a current appraisal on the collateral released. The appraisal will be at the expense of the borrower and must meet the appraisal requirements contained in this Notice. The remaining collateral must be sufficient to provide for repayment of the Agency's guaranteed loan. The Agency may, at its discretion, require an appraisal of the remaining collateral in cases where it is determined that the Agency may be adversely affected by the release of collateral. Sale or release of collateral must be based on an arm's-length transaction.

(2) Within the parameters of the paragraph (f)(1):

(i) Lenders may, over the life of the guaranteed loan, release collateral with a cumulative value of up to 20 percent of the original loan amount without Agency concurrence if the proceeds generated are used to reduce the guaranteed loan or to buy replacement collateral.

(ii) Release of collateral with a cumulative value in excess of 20 percent of the original loan or when the proceeds will not be used to reduce the guaranteed loan or to buy replacement collateral, must be requested, in writing, by the lender and concurred by the Agency, in writing, in advance of the release. A written evaluation will be completed by the lender to justify the release.

(g) *Loan transfer and assumption.*

(1) Subject to approval by the lender and the Agency and the payment to the Agency of a one percent fee, loans are assumable. Assumption shall be deemed to occur in the event of a change in the control of the borrower. For purposes of the loan, change of control means the merger, sale of all or substantially all of the assets of the borrower, or the sale of more than 25 percent of the stock or other equity interest of either the borrower or its corporate parent.

(2) All loan transfers and assumptions must comply with the following:

(i) *Documentation of request.* All transfers and assumptions must be approved, in writing, by the Agency and must be to eligible borrowers.

(ii) *Terms.* Loan terms must not be changed unless the change is approved, in writing, by the Agency with the concurrence of any holder and the transferor, if they have not been or will not be released from liability. Any new loan terms must be within the terms authorized by this Notice. The Agency cannot approve deals unless all statutory, regulatory, and budgetary requirements are met. The lender's request for approval of new loan terms will be supported by an explanation of the reasons for the proposed change in loan terms. The Agency will not approve any change in terms that results in an increase in the cost of the loan guarantee, unless the Agency can secure any additional budget authority that would be required.

(iii) *Release of liability.* The transferor may be released from liability only with prior Agency written concurrence and only when the value of the collateral being transferred is at least equal to the amount of the loan being assumed and is supported by a current appraisal and a current financial statement. The Agency will not pay for the appraisal. If the transfer is for less than the debt, the lender must demonstrate to the Agency that the transferor has no reasonable debt-paying ability considering their assets and income in the foreseeable future.

(iv) *Proceeds.* Any proceeds received from the sale of collateral before a transfer and assumption will be credited to the transferor's guaranteed loan debt in inverse order of maturity before the transfer and assumption are closed.

(v) *Additional loans.* Loans to provide additional funds in connection with a transfer and assumption must be considered as a new loan application under the provisions of this Notice.

(vi) *Credit quality.* The lender must make a complete credit analysis of the proposed borrower and the project which is subject to Agency review and approval.

(vii) *Documents.* Prior to Agency approval, the lender must advise the Agency, in writing, that the transaction can be properly and legally transferred, and the conveyance instruments will be filed, registered, or recorded as appropriate.

(A) The assumption will be done on the lender's form of assumption agreement and will contain the Agency case number of the transferor and transferee. The lender will provide the Agency with a copy of the transfer and assumption agreement. The lender must ensure that all transfers and assumptions are noted on all original Loan Note Guarantees.

(B) The lender will provide to the Agency a written certification that the transfer and assumption is valid, enforceable, and complies with all Agency regulations.

(viii) *Loss resulting from transfer.* If a loss should occur upon consummation of a complete transfer and assumption for less than the full amount of the debt and the transferor is released from liability, the lender, if it holds the guaranteed portion, may file Form RD 449–30, ''Loan Note Guaranteed Report of Loss,'' to recover its pro rata share of the actual loss. If a holder owns any of the guaranteed portion, such portion must be repurchased by the lender or the Agency in accordance with the provisions of this Notice. In completing the report of loss the amount of the debt assumed will be entered as net collateral (recovery). Approved protective advances and accrued interest thereon made during the arrangement of a transfer and assumption will be included in the calculations.

(ix) *Related party.* If the transferor and transferee are affiliated or related parties, any transfer and assumption must be for the full amount of the debt.

(x) *Cash downpayment.* When the transferee will be making a cash downpayment as part of the transfer and assumption:

(A) The lender must have an appropriate appraiser, acceptable to

both the transferee and transferor and currently authorized to perform appraisals, determine the value of the collateral securing the loan. The appraisal fee and any other costs will not be paid by the Agency.

(B) The market value of the collateral, plus any additional property the transferee proposes to offer as collateral, must be adequate to secure the balance of the guaranteed loans, as determined by the Agency.

(C) Cash downpayments may be paid directly to the transferor provided:

(*1*) The lender recommends that the cash be released, and the Agency concurs prior to the transaction being completed. The lender may wish to require that an amount be retained for a defined period of time as a reserve against future defaults. Interest on such account may be paid periodically to the transferor or transferee as agreed;

(*2*) The lender determines that the transferee has the repayment ability to meet the obligations of the assumed guaranteed loan as well as any other indebtedness;

(*3*) Any payments by the transferee to the transferor will not suspend the transferee's obligations to continue to meet the guaranteed loan payments as they come due under the terms of the assumption; and

(*4*) The transferor agrees not to take any action against the transferee in connection with the assumption without prior written approval of the lender and the Agency.

(h) *Subordination of lien position.* A subordination of the lender's lien position must be requested, in writing, by the lender and concurred, in writing, by the Agency in advance of the subordination. Agency concurrence requires that:

(1) The subordination be in the best financial interests of the Federal government;

(2) The lien to which the guaranteed loan is subordinated is for a fixed dollar limit;

(3) Lien priorities remain for the portion of the loan that was not subordinated; and

(4) The subordination does not extend the term of the guaranteed loan, and in no event exceeds more than 3 years.

(i) *Repurchase from holder.*

(1) *Repurchase by lender.* A lender has the option to repurchase the unpaid guaranteed portion of the loan from a holder within 30 days of written demand by the holder when the borrower is in default not less than 60 days on principal or interest due on the loan; or the lender has failed to remit to the holder its pro rata share of any payment made by the borrower within 30 days of the lender's receipt thereof. The repurchase by the lender will be for an amount equal to the unpaid guaranteed portion of principal and accrued interest less the lender's servicing fee. The holder must concurrently send a copy of the demand letter to the Agency. The guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the demand letter to the lender requesting the repurchase. The lender will accept an assignment without recourse from the holder upon repurchase. The lender is encouraged to repurchase the loan to facilitate the accounting of funds, resolve the problem, and prevent default, where and when reasonable. The lender will notify the holder and the Agency of its decision.

(2) *Agency purchase.*

(i) If the lender does not repurchase the unpaid guaranteed portion of the loan as provided in paragraph (1) of this section, the Agency will purchase from the holder the unpaid principal balance of the guaranteed portion together with accrued interest to the date of repurchase, less the lender's servicing fee, within 30 days after written demand to the Agency from the holder. (This is in addition to the copy of the written demand on the lender.) The guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the original demand letter of the holder to the lender requesting the repurchase.

(ii) The holder's demand to the Agency must include a copy of the written demand made upon the lender. The holder must also include evidence of its right to require payment from the Agency. Such evidence will consist of either the original of the Loan Note Guarantee properly endorsed to the Agency or the original of the Assignment Guarantee Agreement properly assigned to the Agency without recourse including all rights, title, and interest in the loan. The holder must include in its demand the amount due including unpaid principal, unpaid interest to date of demand, and interest subsequently accruing from date of demand to proposed payment date. The Agency will be subrogated to all rights of the holder.

(iii) The Agency will notify the lender of its receipt of the holder's demand for payment. The lender must promptly provide the Agency with the information necessary for the Agency to determine the appropriate amount due the holder. Upon request by the Agency, the lender will furnish a current statement certified by an appropriate authorized officer of the lender of the unpaid principal and interest then owed by the borrower on the loan and the amount then owed to any holder. Any discrepancy between the amount claimed by the holder and the information submitted by the lender must be resolved between the lender and the holder before payment will be approved. Such conflict will suspend the running of the 30 day payment requirement.

(iv) Purchase by the Agency neither changes, alters, nor modifies any of the lender's obligations to the Agency arising from the loan or guarantee nor does it waive any of Agency's rights against the lender. The Agency will have the right to set-off against the lender all rights inuring to the Agency as the holder of the instrument against the Agency's obligation to the lender under the guarantee.

(3) *Repurchase for servicing.* If, in the opinion of the lender, repurchase of the guaranteed portion of the loan is necessary to adequately service the loan, the holder must sell the guaranteed portion of the loan to the lender for an amount equal to the unpaid principal and interest on such portion less the lender's servicing fee. The guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the demand letter of the lender or the Agency to the holder requesting the holder to tender its guaranteed portion. The lender must not repurchase from the holder for arbitrage or other purposes to further its own financial gain. Any repurchase must only be made after the lender obtains the Agency's written approval. If the lender does not repurchase the portion from the holder, the Agency may, at its option, purchase such guaranteed portion for servicing purposes.

(j) *Additional loans.* The lender may make additional expenditures or new loans to a borrower with an outstanding loan guaranteed under this Notice only with prior written Agency approval. The Agency will only approve additional expenditures or new loans to the extent such actions where the expenditure or loan will not violate one or more of the loan covenants of the borrower's loan agreement. In all instances, the lender must notify the Agency when they make any additional expenditures or new loans. In all cases, any additional expenditure or loan made by the lender must be junior in priority to the loan guaranteed hereunder.

(k) *Default by borrower.*

(1) The lender must notify the Agency when a borrower is 30 days past due on a payment or is otherwise in default of the loan agreement. Form RD 1980–44,

''Guaranteed Loan Borrower Default Status,'' will be used and the lender will continue to submit this form bimonthly until such time as the loan is no longer in default. If a monetary default exceeds 60 days, the lender will arrange a meeting with the Agency and the borrower to resolve the problem.

(2) In considering options, the prospect for providing a permanent cure without adversely affecting the risk to the Agency and the lender is the paramount objective.

(i) Curative actions include but are not limited to:

(A) Deferment of principal (subject to rights of any holder);

(B) An additional unguaranteed loan by the lender to bring the account current;

(C) Reamortization of or rescheduling the payments on the loan (subject to rights of any holder);

(D) Transfer and assumption of the loan in accordance with the provisions in this Notice;

(E) Reorganization;

(F) Liquidation;

(G) Subsequent loan guarantees; and

(H) Changes in interest rates with the Agency's, the lender's, and holder's approval, provided that the interest rate is adjusted proportionately between the guaranteed and unguaranteed portion of the loan.

(ii) In the event a deferment, rescheduling, reamortization, or moratorium is accomplished, it will be limited to the remaining life of the collateral or remaining limits as contained in the loan term provisions in this Notice, whichever is less.

(l) *Protective advances*. Protective advances are advances made by the lender for the purpose of preserving and protecting the collateral where the debtor has failed to, will not, or cannot meet its obligations. Sound judgment must be exercised in determining that the protective advance preserves collateral and recovery is actually enhanced by making the advance. Protective advances will not be made in lieu of additional loans.

(1) The maximum loss to be paid by the Agency will never exceed the original principal plus accrued interest regardless of any protective advances made.

(2) Protective advances and interest thereon at the note rate will be guaranteed at the same percentage of loss as provided in the Loan Note Guarantee.

(3) Protective advances must constitute an indebtedness of the borrower to the lender and be secured by the security instruments. Agency written authorization is required when cumulative protective advances exceed $200,000.

(m) *Liquidation*. In the event of one or more incidents of default or third-party actions that the borrower cannot or will not cure or eliminate within a reasonable period of time, liquidation may be considered. If the lender concludes that liquidation is necessary, it must request the Agency's concurrence. The lender will liquidate the loan unless the Agency, at its option, carries out liquidation. When the decision to liquidate is made, if the loan has not already been repurchased, provisions will be made for repurchase in accordance with the repurchase from holder provisions in this Notice.

(1) *Decision to liquidate*. A decision to liquidate shall be made when it is determined that the default cannot be cured through actions identified in this Notice or it has been determined that it is in the best financial interest of the Federal government and the lender to liquidate. The decision to liquidate or continue with the borrower must be made as soon as possible when any of the following exist:

(i) A loan has been delinquent 90 days and the lender and borrower have not been able to cure the delinquency through one of the actions identified in this Notice.

(ii) It has been determined that delaying liquidation will jeopardize full recovery on the loan.

(iii) The borrower or lender has been uncooperative in resolving the problem and the Agency or the lender has reason to believe the borrower is not acting in good faith, and it would enhance the position of the guarantee to liquidate immediately.

(2) *Liquidation by the Agency*. The Agency may require the lender to assign the security instruments to the Agency if the Agency, at its option, decides to liquidate the loan. When the Agency liquidates, reasonable liquidation expenses will be assessed against the proceeds derived from the sale of the collateral. Form RD 1980–45, ''Notice of Liquidation Responsibility,'' will be forwarded to the Finance Office when the Agency liquidates the loan.

(3) *Submission of liquidation plan*. The lender will, within 30 days after a decision to liquidate, submit to the Agency, in writing, its proposed detailed method of liquidation. Upon approval by the Agency of the liquidation plan, the lender will commence liquidation.

(4) *Lender's liquidation plan*. The liquidation plan must include, but is not limited to, the following:

(i) Such proof as the Agency requires to establish the lender's ownership of the guaranteed loan promissory note and related security instruments and a copy of the payment ledger if available which reflects the current loan balance and accrued interest to date and the method of computing the interest.

(ii) A full and complete list of all collateral.

(iii) The recommended liquidation methods for making the maximum collection possible on the indebtedness and the justification for such methods, including recommended action for acquiring and disposing of all collateral.

(iv) Necessary steps for preservation of the collateral.

(v) Copies of the borrower's latest available financial statements.

(vi) An itemized list of estimated liquidation expenses expected to be incurred along with justification for each expense.

(vii) A schedule to periodically report to the Agency on the progress of liquidation.

(viii) Estimated protective advance amounts with justification.

(ix) Proposed protective bid amounts on collateral to be sold at auction and a breakdown to show how the amounts were determined.

(x) If a voluntary conveyance is considered, the proposed amount to be credited to the guaranteed debt.

(xi) Legal opinions, if needed.

(xii) The lender will obtain an independent appraisal report meeting the requirements of appraisal requirements in this Notice on all collateral securing the loan which will reflect the fair market value and potential liquidation value. In order to formulate a liquidation plan which maximizes recovery, collateral must be evaluated for the release of hazardous substances, petroleum products, or other environmental hazards which may adversely impact the market value of the collateral. Both the estimate and the appraisal shall consider this aspect. The independent appraiser's fee, including the cost of a Phase I Environmental Site Assessment (ESA) in accordance with ASTM standards, will be shared equally by the Agency and the lender.

(5) *Approval of liquidation plan*. The Agency will inform the lender, in writing, whether it concurs in the lender's liquidation plan. Should the Agency and the lender not agree on the liquidation plan, negotiations will take place between the Agency and the lender to resolve the disagreement. When the liquidation plan is approved by the Agency, the lender will proceed expeditiously with liquidation.

(i) A transfer and assumption of the borrower's operation can be accomplished before or after the loan

goes into liquidation. However, if the collateral has been purchased through foreclosure or the borrower has conveyed title to the lender, no transfer and assumption is permitted.

(ii) A protective bid may be made by the lender, with prior Agency written approval, at a foreclosure sale to protect the lender's and the Agency's interest. The protective bid will not exceed the amount of the loan, including expenses of foreclosure, and should be based on the liquidation value considering estimated expenses for holding and reselling the property. These expenses include, but are not limited to, expenses for resale, interest accrual, length of time necessary for resale, maintenance, guard service, weatherization, and prior liens.

(iii) Under no circumstances will the Agency pay more than 90 days of additional accrued interest once the liquidation plan is approved.

(6) *Acceleration.* The lender, or the Agency if it liquidates, will proceed to accelerate the indebtedness as expeditiously as possible when acceleration is necessary including giving any notices and taking any other legal actions required. A copy of the acceleration notice or other acceleration document will be sent to the Agency (or lender if the Agency liquidates). The guaranteed loan will be considered in liquidation once the loan has been accelerated and a demand for payment has been made upon the borrower.

(7) *Filing an estimated loss claim.* When the lender is conducting the liquidation and owns any or all of the guaranteed portion of the loan, the lender will file an estimated loss claim once a decision has been made to liquidate if the liquidation will exceed 90 days. The estimated loss payment will be based on the liquidation value of the collateral. For the purpose of reporting and loss claim computation, the lender will discontinue interest accrual on the defaulted loan in accordance with Agency procedures, and the loss claim will be promptly processed in accordance with applicable Agency regulations.

(8) *Accounting and reports.* When the lender conducts liquidation, it will account for funds during the period of liquidation and will provide the Agency with reports at least quarterly on the progress of liquidation including disposition of collateral, resulting costs, and additional procedures necessary for successful completion of the liquidation.

(9) *Transmitting payments and proceeds to the Agency.* When the Agency is the holder of a portion of the guaranteed loan, the lender will transmit to the Agency its pro rata share of any payments received from the borrower; liquidation; or other proceeds using Form RD 1980–43, ''Lender's Guaranteed Loan Payment to USDA.''

(10) *Abandonment of collateral.* There may be instances when the cost of liquidation would exceed the potential recovery value of the collection. The lender, with proper documentation and concurrence of the Agency, may abandon the collateral in lieu of liquidation. A proposed abandonment will be considered a servicing action requiring the appropriate environmental review by the Agency in accordance with subpart G of part 1940 of this title. Examples where abandonment may be considered include, but are not limited to:

(i) The cost of liquidation is increased or the value of the collateral is decreased by environmental issues;

(ii) The collateral is functionally or economically obsolete;

(iii) The collateral has deteriorated; or

(iv) The collateral is specialized and there is little or no demand for it.

(11) *Recovery and deficiency judgments.* The lender should take action to maximize recovery from all collateral. The lender will seek a deficiency judgment when there is a reasonable chance of future collection of the judgment. The lender must make a decision whether or not to seek a deficiency judgment when:

(i) A borrower voluntarily liquidates the collateral, but the sale fails to pay the guaranteed indebtedness;

(ii) The collateral is voluntarily conveyed to the lender; or

(iii) A liquidation plan is being developed for forced liquidation.

(12) *Compromise settlement.* A compromise settlement may be considered at any time.

(i) The lender and the Agency must receive complete financial information on all parties obligated for the loan and must be satisfied that the statements reflect the true and correct financial position of the debtor including all assets. Adequate consideration must be received before a release from liability is issued. Adequate consideration includes money, additional security, or other benefit to the goals and objectives of the Agency.

(ii) Once the Agency and the lender agree on a reasonable amount that is fair and adequate, the lender can proceed to effect the compromise settlement.

(iii) A compromise will only be accepted if it is in the best financial interest of the Federal government.

(n) *Determination of loss and payment.* In all liquidation cases, final settlement will be made with the lender after the collateral is liquidated, unless otherwise designated as a future recovery or after settlement and compromise of all parties has been completed. The Agency will have the right to recover losses paid under the guarantee from any party which may be liable.

(1) *Report of loss form.* Form RD 449–30 will be used for calculations of all estimated and final loss determinations. Estimated loss payments may only be approved by the Agency after the Agency has approved a liquidation plan.

(2) *Estimated loss.* In accordance with the requirements of 7 CFR part 4287, an estimated loss claim based on liquidation appraisal value will be prepared and submitted by the lender.

(i) The estimated loss payment shall be applied as of the date of such payment. The total amount of the loss payment remitted by the Agency will be applied by the lender on the guaranteed portion of the loan debt. Such application does not release the borrower from liability.

(ii) An estimated loss will be applied first to reduce the principal balance on the guaranteed loan and the balance, if any, to accrued interest. Interest accrual on the defaulted loan will be discontinued.

(iii) A protective advance claim will be paid only at the time of the final report of loss payment, except in certain transfer and assumption situations as specified in 7 CFR part 4287.

(3) *Final loss.* Within 30 days after liquidation of all collateral is completed, a final report of loss must be prepared and submitted by the lender to the Agency. The Agency will not guarantee interest beyond this 30-day period other than for the period of time it takes the Agency to process the loss claim. Before approval by the Agency of any final loss report, the lender must account for all funds during the period of liquidation, disposition of the collateral, all costs incurred, and any other information necessary for the successful completion of liquidation. Upon receipt of the final accounting and report of loss, the Agency may audit all applicable documentation to determine the final loss. The lender will make its records available and otherwise assist the Agency in making any investigation. The documentation accompanying the report of loss must support the amounts shown on Form RD 449–30.

(i) The lender must document that all of the collateral has been accounted for and properly liquidated and that liquidation proceeds have been properly accounted for and applied correctly to the loan.

(ii) The lender will show a breakdown of any protective advance amount as to the payee, purpose of the expenditure, date paid, and evidence that the amount expended was proper and that payment was actually made.

(iii) The lender will show a breakdown of liquidation expenses as to the payee, purpose of the expenditure, date paid, and evidence that the amount expended was proper and that payment was actually made. Liquidation expenses are recoverable only from collateral proceeds. Attorney fees may be approved as liquidation expenses provided the fees are reasonable and cover legal issues pertaining to the liquidation that could not be properly handled by the lender and its in-house counsel.

(iv) Accrued interest will be supported by documentation as to how the amount was accrued. If the interest rate was a variable rate, the lender will include documentation of changes in both the selected base rate and the loan rate.

(v) Loss payments will be paid by the Agency within 60 days after the review of the final loss report and accounting of the collateral.

(4) *Loss limit.* The amount payable by the Agency to the lender cannot exceed the limits set forth in the Loan Note Guarantee.

(5) *Rent.* Any net rental or other income that has been received by the lender from the collateral will be applied on the guaranteed loan debt.

(6) *Liquidation costs.* Liquidation costs will be deducted from the proceeds of the disposition of collateral. If changed circumstances after submission of the liquidation plan require a substantial revision of liquidation costs, the lender will procure the Agency's written concurrence prior to proceeding with the proposed changes. No in-house expenses of the lender will be allowed. In-house expenses include, but are not limited to, employee's salaries, staff lawyers, travel, and overhead.

(7) *Payment.* When the Agency finds the final report of loss to be proper in all respects, it will approve Form RD 449–30 and proceed as follows:

(i) If the loss is greater than any estimated loss payment, the Agency will pay the additional amount owed by the Agency to the lender.

(ii) If the loss is less than the estimated loss payment, the lender will reimburse the Agency for the overpayment plus interest at the note rate from the date of payment.

(iii) If the Agency has conducted the liquidation, it will pay the lender in accordance with the Loan Note Guarantee.

(o) *Future recovery.* After a loan has been liquidated and a final loss has been paid by the Agency, any future funds which may be recovered by the lender will be pro rated between the Agency and the lender based on the original percentage of guarantee.

(p) *Bankruptcy.* The lender is responsible for protecting the guaranteed loan and all collateral securing the loan in bankruptcy proceedings.

(1) *Lender's responsibilities.* It is the lender's responsibility to protect the guaranteed loan debt and all of the collateral securing it in bankruptcy proceedings. These responsibilities include, but are not limited to, the following:

(i) The lender will file a proof of claim where necessary and all the necessary papers and pleadings concerning the case.

(ii) The lender will attend and, where necessary, participate in meetings of the creditors and all court proceedings.

(iii) When permitted by the Bankruptcy Code, the lender will request modification of any plan of reorganization whenever it appears that additional recoveries are likely.

(iv) The Agency will be kept adequately and regularly informed, in writing, of all aspects of the proceedings.

(v) In a Chapter 11 reorganization, if an independent appraisal of collateral is necessary in the Agency's opinion, the Agency and the lender will share such appraisal fee equally.

(2) *Reports of loss during bankruptcy.* When the loan is involved in reorganization proceedings, payment of loss claims may be made as provided in this section. For a liquidation proceeding, only paragraphs (p)(2)(iii) and (v) of this section are applicable.

(i) *Estimated loss payments.*

(A) If a borrower has filed for protection under Chapter 11 of the United States Code for a reorganization (but not Chapter 13) and all or a portion of the debt has been discharged, the lender will request an estimated loss payment of the guaranteed portion of the accrued interest and principal discharged by the court. Only one estimated loss payment is allowed during the reorganization. All subsequent claims of the lender during reorganization will be considered revisions to the initial estimated loss. A revised estimated loss payment may be processed by the Agency, at its option, in accordance with any court-approved changes in the reorganization plan. Once the reorganization plan has been completed, the lender is responsible for submitting the documentation necessary for the Agency to review and adjust the estimated loss claim to reflect any actual discharge of principal and interest and to reimburse the lender for any court-ordered interest-rate reduction under the terms of the reorganization plan.

(B) The lender will use Form RD 449–30 to request an estimated loss payment and to revise any estimated loss payments during the course of the reorganization plan. The estimated loss claim, as well as any revisions to this claim, will be accompanied by documentation to support the claim.

(C) Upon completion of a reorganization plan, the lender will complete a Form RD 1980–44 and forward this form to the Finance Office.

(ii) *Interest loss payments.*

(A) Interest losses sustained during the period of the reorganization plan will be processed in accordance with paragraph (p)(2)(i) of this section.

(B) Interest losses sustained after the reorganization plan is completed will be processed annually when the lender sustains a loss as a result of a permanent interest rate reduction which extends beyond the period of the reorganization plan.

(C) If an estimated loss claim is paid during the operation of the Chapter 11 reorganization plan and the borrower repays in full the remaining balance without an additional loss sustained by the lender, a final report of loss is not necessary.

(iii) *Final loss payments.* Final loss payments will be processed when the loan is liquidated.

(iv) *Payment application.* The lender must apply estimated loss payments first to the unsecured principal of the guaranteed portion of the debt and then to the unsecured interest of the guaranteed portion of the debt. In the event a bankruptcy court attempts to direct the payments to be applied in a different manner, the lender will immediately notify the Agency servicing office.

(v) *Overpayments.* Upon completion of the reorganization plan, the lender will provide the Agency with the documentation necessary to determine whether the estimated loss paid equals the actual loss sustained. If the actual loss sustained as a result of the reorganization is less than the estimated loss, the lender will reimburse the Agency for the overpayment plus interest at the note rate from the date of payment of the estimated loss. If the actual loss is greater than the estimated loss payment, the lender will submit a revised estimated loss in order to obtain

payment of the additional amount owed by the Agency to the lender.

(vi) *Protective advances.* If approved protective advances were made prior to the borrower having filed bankruptcy, these protective advances and accrued interest will be considered in the loss calculations.

(3) *Legal expenses during bankruptcy proceedings.*

(i) When a bankruptcy proceeding results in a liquidation of the borrower by a trustee, legal expenses will be handled as directed by the court.

(ii) Chapter 11 pertains to a reorganization of a business contemplating an ongoing business rather than a termination and dissolution of the business where legal protection is afforded to the business as defined under Chapter 11 of the Bankruptcy Code. Consequently, expenses incurred by the lender in a Chapter 11 reorganization can never be liquidation expenses unless the proceeding becomes a Chapter 11 liquidation. If the proceeding should become a Liquidating 11, reasonable and customary liquidation expenses may be deducted from proceeds of collateral as provided in the Lender's Agreement. Chapter 7 pertains to a liquidation of the borrower's assets. If, and when, liquidation of the borrower's assets under Chapter 7 is conducted by the bankruptcy trustee, then the lender cannot claim expenses.

P. Basic Borrower Provisions

(a) The borrower must allow the Agency access to the project and its performance information until the loan is repaid in full and permit periodic inspection of the project by a representative of the Agency.

(b) The borrower must permit representatives of the Agency (or other agencies of the U.S.) to inspect and make copies of any records pertaining to any Agency guaranteed loan during regular office hours of the borrower or at any other time upon agreement between the borrower and the Agency, as appropriate.

Q. Basic Guarantee and Loan Provisions

(a) *Conditions of guarantee.* A loan guarantee under this Notice will be evidenced by a Loan Note Guarantee issued by the Agency. Each lender will execute a Lender's Agreement. If a valid Lender's Agreement already exists, it is not necessary to execute a new Lender's Agreement with each loan guarantee. The provisions of this Notice will apply to all outstanding guarantees. In the event of a conflict between the guarantee documents and this Notice as they exist at the time the documents are executed, the Notice will control. To the extent that the Agency publishes a regulation whose provisions are inconsistent with the terms of this Notice, the terms of this Notice shall control for loan guarantees entered into pursuant to this Notice.

(b) *Full faith and credit.* A guarantee under this Notice constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which a lender or holder has actual knowledge at the time it becomes such lender or holder or which a lender or holder participates in or condones. The guarantee will be unenforceable to the extent that any loss is occasioned by a provision for interest on interest. In addition, the guarantee will be unenforceable by the lender to the extent any loss is occasioned by the violation of usury laws, negligent servicing, or failure to obtain the required security regardless of the time at which the Agency acquires knowledge thereof. Any losses occasioned will be unenforceable to the extent that loan funds are used for purposes other than those specifically approved by the Agency in its Conditional Commitment. The Agency will guarantee payment as follows:

(1) To any holder, 100 percent of any loss sustained by the holder on the guaranteed portion of the loan and on interest due on such portion.

(2) To the lender, the lesser of:

(i) Any loss sustained by the lender on the guaranteed portion, including principal and interest evidenced by the notes or assumption agreements and secured advances for protection and preservation of collateral made with the Agency's authorization; or

(ii) The guaranteed principal advanced to or assumed by the borrower and any interest due thereon.

(c) *Soundness of guarantee.* All loans guaranteed under this Notice must be financially sound and feasible, with reasonable assurance of repayment.

(d) *Rights and liabilities.* When a portion of the guaranteed loan is sold to a holder, the holder shall succeed to all rights of the lender under the Loan Note Guarantee to the extent of the portion purchased. The lender will remain bound to all obligations under the Loan Note Guarantee, Lender's Agreement, and the Agency program regulations. A guarantee and right to require purchase will be directly enforceable by a holder notwithstanding any fraud or misrepresentation by the lender or any unenforceability of the guarantee by the lender, except for fraud or misrepresentation of which the holder has actual knowledge at the time it becomes the holder or in which the holder participates or condones.

(1) In the event of material fraud, negligence or misrepresentation by the lender or the lender's participation in or condoning of such material fraud, negligence or misrepresentation, the lender will be liable for payments made by the Agency to any holder.

(2) A lender will receive all payments of principal and interest on account of the entire loan and will promptly remit to the holder its pro rata share thereof, determined according to its respective interest in the loan, less only the lender's servicing fee.

(e) *Interest rates.*

(1) *General.* The interest rate for the guaranteed loan will be negotiated between the lender and the applicant. The interest rate charged must be in line with interest rates on other similar government guaranteed loan programs, and is subject to Agency review and approval.

(i) The interest rate may be either fixed or variable, as long as it is a legal rate, and shall be fully amortizing.

(ii) The interest rate for both the guaranteed and unguaranteed portions of the loan must be of the same type (i.e., both fixed or both variable).

(iii) The guaranteed and unguaranteed portions of the loan can bear interest at different rates, provided that the blended rate on the entire guaranteed loan shall not exceed the rate on the guaranteed portion of the loan by more than one (1) percent.

(iv) Both portions of the loan must amortize at the same rate.

(2) *Variable rates.* A variable interest rate agreed to by the lender and borrower must be based on published indices, such as the Prime Rate, applicable Treasury rate, or the London Inter Bank Offering Rate (LIBOR), and agreed to by the lender and the Agency. Variable rates should have either an internal or external interest rate cap.

(i) The variable interest rate may be adjusted at different intervals during the term of the loan, but the adjustments may not be more often than quarterly and no less than yearly to prevent negative amortization, and must be specified in the loan agreement.

(ii) Variable rate loans will not provide for negative amortization nor will they give the borrower the ability to choose its payment among various options.

(iii) The lender must incorporate, within the variable rate Promissory Note at loan closing, the provision for adjustment of payment installments coincident with an interest-rate adjustment.

(iv) The lender will ensure that the outstanding principal balance is properly amortized within the prescribed loan maturity to eliminate the possibility of a balloon payment at the end of the loan.

(3) *Interest changes.* Any change in the interest rate between the date of issuance of the Conditional Commitment and before the issuance of the Loan Note Guarantee must be approved, in writing, by the Agency approval official. Approval of such a change will be shown as an amendment to the Conditional Commitment. Such changes are subject to the restrictions set forth in the following paragraphs.

(i) *Reductions.* The borrower, lender, and holder (if any) may collectively initiate a permanent or temporary reduction in the interest rate of the guaranteed loan at any time during the life of the loan upon written agreement among these parties. The Agency must be notified by the lender, in writing, within 15 days of the change. If any of the guaranteed portion has been purchased by the Agency, then the Agency will affirm or reject interest rate change proposals in writing. The Agency will concur in such interest-rate changes only when it is demonstrated to the Agency that the change is a more viable alternative than initiating or proceeding with liquidation of the loan or continuing with the loan in its present state.

(A) Fixed rates can be changed to variable rates to reduce the borrower's interest rate only when the variable rate has a ceiling for the life of the guaranteed loan that is less than or equal to the original fixed rate.

(B) The interest rates, after adjustments, must comply with the requirements for interest rates on new loans as established under this Notice.

(C) The lender is responsible for the legal documentation of interest-rate changes by an endorsement or any other legally effective amendment to the promissory note; however, no new notes may be issued. Copies of all legal documents must be provided to the Agency.

(ii) *Increases.* Increases in interest rates are not permitted beyond what is provided in the loan documents. Increases from a variable interest rate to a higher interest rate that is a fixed rate are allowed, subject to concurrence by the Agency.

(f) *Term length, schedule, and repayment.*

(1) The repayment term for a loan under this Notice will be for a maximum period of 20 years or 85 percent of the useful life of the project, as determined by the lender and confirmed by the Agency, whichever is less. The length of the loan term shall be the same for both the guaranteed and unguaranteed portion of the loan.

(2) The first installment of principal may be scheduled for payment after the project is operational and has begun to generate income. However, the first full installment of principal must be due and payable within 3 years from the date of the Promissory Note and be paid at least annually thereafter. Interest payments will be paid at least annually from the date of the note.

(3) Only loans that require a periodic payment schedule that will retire the debt over the term of the loan without a balloon payment will be guaranteed (i.e., the loan will fully amortize over its life without any balloon payment due at maturity).

(4) The maturity of a loan will be based on the use of proceeds, the useful life of the assets being financed, and the borrower's ability to repay. The lender may apply the maximum guidelines specified above only when the loan cannot be repaid over a shorter term.

(5) Guarantees must be provided only after consideration is given to the borrower's overall credit quality and to the terms and conditions of any applicable subsidies, tax credits, and other such incentives.

(6) A principal plus interest repayment schedule is permissible.

(7) The lender will determine the particular prepayment provisions to offer, subject to concurrence by the Agency.

(g) *Guaranteed Loan Funding*

(1) *Maximum amount.* The maximum principal amount of a loan guaranteed under this Program is $250 million. There is no minimum amount. The amount of a loan guaranteed under this Program will be reduced by the amount of other direct Federal funding that the eligible borrower receives for the same project.

(2) *Maximum guarantee.* The maximum guarantee on the principal and interest due on a loan guaranteed under this Program is as follows:

(i) If the loan amount is equal to or less than $80 million, 80%;

(ii) If the loan amount is more than $80 million and less than $125 million, 80% on the first $80 million and 70% on the loan amount that is greater than $80 million; and

(iii) If the loan amount is equal to or more than $125 million, 60%.

(3) *Percentage of total project cost.* The amount of a loan guaranteed for a project under this Program will not exceed 80 percent of total eligible project costs. Eligible project costs are only those costs associated with the items listed in paragraphs (g)(3)(i) through (ix) below, as long as the items are an integral and necessary part of the total project.

(i) Purchase and installation of equipment (new, refurbished, or remanufactured), except agricultural tillage equipment, used equipment, and vehicles.

(ii) Construction or retrofitting, except residential.

(iii) Permit and license fees;

(iv) Professional service fees, except for application preparation;

(v) Feasibility studies;

(vi) Business plans;

(vii) Working capital;

(viii) Land acquisition; and

(ix) Cost of financing, excluding guarantee and renewal fees.

(h) *Guarantee and other fees*

(1) *Guarantee fee.* For any loan, the guarantee fee will be paid to the Agency by the lender at the time the Loan Note Guarantee is requested, and is nonrefundable.

(i) The guarantee fee will be calculated by multiplying the outstanding principal balance by the percentage of the loan that is guaranteed under this program by the guarantee fee rate shown below. The guarantee fee rate shall be determined as follows:

(A) Two percent for guarantees on loans greater than 75 percent of total project cost.

(B) One and one-half percent for guarantees on loans of greater than 65 percent but less than or equal to 75 percent of total project cost.

(C) One percent for guarantees on loans of 65 percent or less of total project cost.

(ii) The guarantee fee may be passed on to the borrower.

(2) *Annual renewal fee.* The annual renewal fee will be calculated on the unpaid principal balance as of close of business on December 31 of each year. Annual renewable fees are due on January 31. For loans where the Loan Note Guarantee is issued between October 1 and December 31, the first annual renewal fee payment will not be due until the January 31st immediately following the first anniversary of the date the Loan Note Guarantee was issued.

(i) Payments not received by April 1 are considered delinquent and, at the Agency's discretion, may result in cancellation of the guarantee to the lender. Holders' rights will continue in effect as specified in the Loan Note Guarantee and Assignment Guarantee Agreement. Any delinquent annual renewal fees will bear interest at the note rate and will be deducted from any loss payment due the lender.

(ii) The annual renewal fee will be calculated by multiplying the outstanding principal balance by the percentage of the loan that is guaranteed under this program by the annual renewal fee rate shown below. The renewal fee rate shall be as follows:

(A) One hundred basis points (1 percent) for guarantees on loans that were originally greater than 75 percent of total project costs.

(B) Seventy five basis points (0.75 percent) for guarantees on loans that were originally greater than 65 percent but less than or equal to 75 percent of total project costs.

(C) Fifty basis points (0.50 percent) for guarantees on loans that were originally for 65 percent or less of total project costs.

(iii) The annual renewal fee will be paid to the Agency for as long as the guaranteed loan is outstanding and is payable during the construction period.

(3) *Lender fees.* The lender may charge the borrower reasonable fees as approved by the Agency.

(i) *Conditions precedent to issuance of Loan Note Guarantee.* All applicable regulatory, statutory, and other requirements must be met to issue the Loan Note Guarantee. The Secretary has the discretion to cancel a Conditional Commitment at any time. Further, the Loan Note Guarantee will not be issued until the lender certifies to the following conditions:

(1) No major changes have been made in the lender's loan conditions and requirements since the issuance of the Conditional Commitment, unless such changes have been approved by the Agency.

(2) All planned property acquisition has been or will be completed, all development has been or will be substantially completed in accordance with plans and specifications, and conforms with applicable Federal, state, and local codes.

(3) Required hazard, flood, liability, worker compensation, and personal life insurance, when required, are in effect.

(4) Truth-in-lending requirements have been met.

(5) All equal credit opportunity requirements have been met.

(6) The loan has been properly closed, and the required security instruments have been obtained or will be obtained on any acquired property that cannot be covered initially under State law.

(7) The borrower has marketable title to the collateral then owned by the borrower, subject to the instrument securing the loan to be guaranteed and to any other exceptions approved, in writing, by the Agency.

(8) When required, the entire amount of funds for working capital has been disbursed except in cases where the Agency has approved disbursement over an extended period of time.

(9) All other requirements of the Conditional Commitment have been met.

(10) Lien priorities are consistent with the requirements of the Conditional Commitment. No claims or liens of laborers, subcontractors, suppliers of machinery and equipment, or other parties have been or will be filed against the collateral and no suits are pending or threatened that would adversely affect the collateral when the security instruments are filed.

(11) The loan proceeds will be disbursed for purposes and in amounts consistent with the Conditional Commitment and Form RD 4279–1. A copy of the detailed loan settlement of the lender must be attached to support this certification.

(12) There has been neither any material adverse change in the borrower's financial condition nor any other material adverse change in the borrower, for any reason, during the period of time from the Agency's issuance of the Conditional Commitment to issuance of the Loan Note Guarantee regardless of the cause or causes of the change and whether or not the change or causes of the change were within the lender's or borrower's control. The lender must address any assumptions or reservations in the requirement and must address all adverse changes of the borrower, and any parent, affiliate, or subsidiary of the borrower.

(13) None of the lender's officers, directors, stockholders, or other owners (except stockholders in an institution that has normal stockshare requirements for participation) has a substantial financial interest in the borrower and neither the borrower nor its officers, directors, stockholders, or other owners has a substantial financial interest in the lender. If the borrower is a member of the board of directors or an officer of a Farm Credit System (FCS) institution that is the lender, the lender will certify that an FCS institution on the next highest level will independently process the loan request and act as the lender's agent in servicing the account.

(14) The loan agreement includes all mitigation measures identified in the Agency's environmental impact analysis for this proposal (measures with which the borrower must comply) for the purpose of avoiding or reducing adverse environmental impacts of the proposal's construction or operation.

(j) *Issuance of the guarantee.*

(1) When loan closing plans are established, the lender must notify the Agency in writing. At the same time, or immediately after loan closing, the lender must provide the following to the Agency

(i) Lender's certifications as required by Conditions Precedent to Issuance of Loan Note Guarantee in this Notice;

(ii) An executed Form RD 4279–4; and

(iii) An executed Form RD 1980–19, ''Guaranteed Loan Closing Report,'' and appropriate guarantee fee.

(2) When the Agency is satisfied that all conditions for the guarantee have been met, the Loan Note Guarantee and the following documents, as appropriate, will be issued:

(i) *Assignment Guarantee Agreement.* If the lender assigns the guaranteed portion of the loan to a holder, the lender, holder, and the Agency must execute the Assignment Guarantee Agreement;

(ii) *Certificate of Incumbency.* If requested by the lender, the Agency will provide the lender with a copy of Form RD 4279–7, ''Certificate of Incumbency and Signature,'' with the signature and title of the Agency official responsible for signing the Loan Note Guarantee, Lender's Agreement, and Assignment Guarantee Agreement; and

(iii) *Legal documents.* Copies of legal loan documents.

(k) *Refusal to execute Loan Note Guarantee.* If the Agency determines that it cannot execute the Loan Note Guarantee, the Agency will promptly inform the lender of the reasons and give the lender a reasonable period within which to satisfy the objections. If the lender requests, in writing, additional time and within the period allowed, the Agency may grant the request. If the lender satisfies the objections within the time allowed, the guarantee will be issued.

(l) *Replacement of document.* If the Loan Note Guarantee or Assignment Guarantee Agreement has been lost, stolen, destroyed, mutilated, or defaced, the Agency may issue a replacement to the lender or holder upon receipt from the lender of a notarized certificate of loss and an indemnity bond acceptable to the Agency. If the holder is the United States, a Federal Reserve Bank, a Federal Government corporation, a State or Territory, or the District of Columbia, an indemnity bond is not required.

(m) *Alterations of loan instruments.* Under no circumstances shall the lender alter or approve any alterations of any loan instrument without the prior written approval of the Agency.

(n) *Reorganizations.*

(1) *Changes in borrower.* Any changes in borrower ownership or organization prior to the issuance of the Loan Note Guarantee must meet the eligibility requirements of the Program and be approved by the Agency prior to the issuance of the Conditional Commitment. Once the Conditional Commitment is issued, no substitution of borrower(s) or change in the form of legal entity will be approved, unless Agency approval, in writing, is obtained.

(2) *Transfer of lenders.* The Agency may approve the substitution of a new lender in place of a former lender who holds an outstanding Conditional Commitment when the Loan Note Guarantee has not yet been issued provided, that there are no changes in the borrower's ownership or control, loan purposes, or scope of project and loan conditions in the Conditional Commitment and the loan agreement remain the same.

The new lender's servicing capability, eligibility, and experience will be analyzed by the Agency prior to approval of the substitution. The original lender will provide the Agency with a letter stating the reasons it no longer desires to be a lender for the project. The substituted lender must execute a new part B of Form RD 4279–1.

(3) *Substitution of lender.* After the issuance of a Loan Note Guarantee, the lender shall not sell or transfer the entire loan without the prior written approval of the Agency. The Agency will not pay any loss or share in any costs (i.e., appraisal fees, environmental studies, or other costs associated with servicing or liquidating the loan) with a new lender unless a relationship is established through a substitution of lender in accordance with paragraph (b) of this section. This includes cases where the lender has failed and been taken over by a regulatory agency such as the Federal Deposit Insurance Corporation (FDIC) and the loan is subsequently sold to another lender.

(i) The Agency may approve the substitution of a new lender if:

(A) The proposed substitute lender:

(*1*) Is an eligible lender in accordance with this Notice;

(*2*) Is able to service the loan in accordance with the original loan documents; and

(*3*) Acquires/Agrees, in writing, to acquire title to the unguaranteed portion of the loan held by the original lender and assumes all original loan requirements, including liabilities and servicing responsibilities.

(B) The substitution of the lender is requested, in writing, by the borrower, the proposed substitute lender, and the original lender if still in existence.

(ii) Where the lender has failed and been taken over by FDIC and the guaranteed loan is liquidated by FDIC rather than being sold to another lender, the Agency will pay losses and share in costs as if FDIC were an approved substitute lender.

(o) *Sale or Assignment of Guaranteed Loan.* The lender may sell all or part of the guaranteed portion of the loan on the secondary market or retain the entire loan. The guaranteed portion of the loan shall be fully transferable to any accredited investor. However, the lender shall not sell or participate any amount of the guaranteed or unguaranteed portion of the loan to the borrower or members of the borrower's immediate families, officers, directors, stockholders, other owners, or a parent, subsidiary or affiliate. If the lender desires to market all or part of the guaranteed portion of the loan at or subsequent to loan closing, such loan must not be in default. Loans made with the proceeds of any obligation the interest on which is excludable from income under 26 U.S.C. 103 (interest on State and local banks) or any successor section will not be guaranteed. The Secretary may not guarantee a loan funded with the net proceeds of a bond described in section 142(a) of the Internal Revenue Code of 1986.

(1) *Single note system.* The entire loan is evidenced by one note, and one Loan Note Guarantee is issued. The lender may assign all or part of the guaranteed portion of the loan to one or more holders by using the Agency's Assignment Guarantee Agreement. The holder, upon written notice to the lender and the Agency, may reassign the unpaid guaranteed portion of the loan sold under the Assignment Guarantee Agreement. Upon notification and completion of the assignment through the use of Form RD 4279–6, the assignee shall succeed to all rights and obligations of the holder thereunder. If this option is selected, the lender may not at a later date cause any additional notes to be issued.

(2) *Multi-note system.* Under this option the lender may provide one note for the unguaranteed portion of the loan and no more than 10 notes for the guaranteed portion. When this option is selected by the lender, the holder will receive one of the borrower's executed notes and a Loan Note Guarantee. The Agency will issue a Loan Note Guarantee for each guaranteed note to be attached to the note. An Assignment Guarantee Agreement will not be used when the multi-note option is utilized.

(3) *After loan closing.* If a loan is closed using the multinote option and at a later date additional notes are desired, the lender may cause a series of new notes, so that the total number of notes issued does not exceed the total number provided for in paragraph (b) of this section, to be issued as replacement for previously issued guaranteed notes, provided:

(i) Written approval of the Agency is obtained;

(ii) The borrower agrees and executes the new notes;

(iii) The interest rate terms remain the same as those in effect when the loan was closed;

(iv) The maturity date of the loan is not changed;

(v) The Agency will not bear or guarantee any expenses that may be incurred in reference to such reissuance of notes;

(vi) There is adequate collateral securing the notes;

(vii) No intervening liens have arisen or have been perfected and the secured lien priority is better or remains the same; and

(viii) All holders agree.

(p) *Termination of lender servicing fee.* The lender's servicing fee will stop when the Agency purchases the guaranteed portion of the loan from the secondary market. No such servicing fee may be charged to the Agency and all loan payments and collateral proceeds received will be applied first to the guaranteed loan and, when applied to the guaranteed loan, will be applied on a pro rata basis.

(q) *Participation.* The lender may sell participations in the loan under its normal operating procedures; however, the lender must retain title to the notes if any of them are unguaranteed and retain the lender's interest in the collateral.

(r) *Minimum retention.* Lenders may syndicate a portion of its risk position to other eligible lenders provided that at no time during the life of the guarantee may the original lender hold less than 50 percent of their original unguaranteed position in the loan.

(s) *Termination of guarantee.* A guarantee issued under this Notice will terminate automatically upon:

(1) Full payment of the guaranteed loan;

(2) Full payment of any loss obligation or negotiated loss settlement except for future recovery provisions and payments made as a result of the Debt Collection Improvement Act of 1996. After final payment of claims to lenders and/or holders, the Agency will retain all funds received as the result of

the Debt Collection Improvement Act of 1996; or

(3) Written request from the lender to the Agency that the guarantee will terminate 30 days after the date of the request, provided that the lender holds all of the guaranteed portion, and the original Loan Note Guarantee is returned to the Agency to be canceled.

Nondiscrimination Statement

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Dated: November 7, 2008.

Ben Anderson,

Administrator, Rural Business–Cooperative Service.

[FR Doc. E8–27201 Filed 11–19–08; 8:45 am]

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Federal Register

Thursday,
November 20, 2008

Part V

Department of Education

34 CFR Part 222
Impact Aid Programs; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 222

RIN 1810–AB00

[Docket ID: ED–2008–OESE–0008]

Impact Aid Programs

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends regulations governing the Impact Aid program under Title VIII of the Elementary and Secondary Education Act of 1965 (Act), as amended by the No Child Left Behind Act of 2001. The program, in general, provides assistance for maintenance and operations costs to local educational agencies (LEAs) that are affected by Federal activities. These amended regulations are necessary to clarify and improve the administration of payments under section 8002 of the Act relating to the Federal acquisition of real property.

DATES: These regulations are effective December 22, 2008. However, affected parties do not have to comply with the information collection requirements in § 222.23 until the Department of Education publishes in the **Federal Register** the control number assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control number notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Catherine Schagh, Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E105, Washington, DC 20202–6244. Telephone: (202) 260–3858 or via the Internet, at: *Impact.Aid@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION: On June 2, 2008, the Secretary published a notice of proposed rulemaking (NPRM) in the **Federal Register** (73 FR 31592) to amend the regulations implementing the Payments for Federal Property portion of the Impact Aid program. The Payments for Federal Property portion of the Impact Aid program is authorized under section 8002 of the Elementary and Secondary Education Act of 1965 (Act), as amended by the No Child Left Behind Act of 2001. Current regulations implementing the program authorized under section 8002 are found in 34 CFR 222.20 through 222.23. In the preamble to the NPRM, the Secretary discussed on pages 31593–31595 the major changes proposed for § 222.21, concerning how an LEA establishes eligibility for section 8002 payments, and the major changes proposed for § 222.23, concerning how a local official determines an aggregate estimated assessed value (EAV) for the eligible Federal property upon which section 8002 payments are based.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, thirty-six parties submitted comments on the proposed regulations. In general, except as described below, the comments supported the proposed regulations or did not oppose them. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows. We group major issues according to subject. We discuss other substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical and other minor changes or suggested changes the Secretary is not authorized to make under applicable law.

Requirements That a Local Educational Agency Must Meet Concerning Federal Acquisition of Real Property Within the Local Educational Agency (§ 222.21)

Comment: Nearly every commenter expressed support for the proposal to expand the scope of records upon which the Secretary bases determinations and redeterminations of eligibility under section 8002(a)(1) of the Act. We received no comments that opposed it.

Discussion: The Secretary appreciates the commenters' support. The regulations will provide greater flexibility to applicants in documenting their eligibility for assistance under section 8002 of the Act.

Changes: None.

Non-Availability of Adjacent Taxable Land (§ 222.23)

Comment: One commenter expressed concerns about proposed § 222.23 insofar as this section provides that the EAV of eligible Federal property is based on adjacent taxable property. The commenter asserted that there are not suitable adjacent taxable properties in the commenter's LEA, due to the prevalence of tax-exempt property. As a result, the commenter further asserted that, with regard to the LEA in question, the proposed general method for determining EAV provided for in § 222.23 is not feasible.

Discussion: The proposed regulations anticipated cases in which taxable property close to eligible Federal property or within a particular LEA might not be available. Accordingly, proposed § 222.23(e)(1)(iii), which defines *adjacent* properties, allowed the use of taxable properties outside the boundaries of the LEA or beyond the distance from the eligible Federal property specified in the definition in extremely rare circumstances determined by the Secretary. The circumstances described by the commenter, when there are no suitable adjacent taxable properties within the LEA that could be used to determine the EAV of eligible Federal property, if verified, would warrant a determination by the Secretary that ''extremely rare circumstances'' exist so that the exception in § 222.23(e)(1)(iii) would apply and more distant properties could be used.

The Secretary is aware of other similar circumstances in which all of the waterfront or oceanfront property within an LEA is located on the eligible Federal property and there is no comparable taxable waterfront or oceanfront property in the LEA. If the Secretary determines that such a situation exists, the Secretary would invoke § 222.23(e)(1)(iii), upon request by the LEA, to permit the use of appropriate waterfront or oceanfront properties located in another LEA. The Secretary is amending the definition of *adjacent* to provide examples of situations that would be considered extremely rare circumstances and might warrant the use of more distant adjacent taxable properties.

Changes: We have revised § 222.23(e)(1)(iii) to provide examples of some extremely rare circumstances that might warrant the use of adjacent taxable properties more than two miles from the eligible Federal property or outside of the LEA.

Imputing a Non-Assessed or Tax-Exempt Portion of Eligible Federal Property (§ 222.23(C)(1)(I))

Comment: Many comments expressed strong support for the general requirement in the proposed regulations that local officials allocate a proportion of the eligible Federal property acres in each usage category for expected non-assessed or tax-exempt uses. None opposed it.

In the NPRM, the Secretary stated that she was particularly interested in comments related to whether it would be appropriate to establish a standard

proportion for each use category of eligible Federal property that would be allocated to anticipated non-assessed or tax-exempt uses and, if so, what a reasonable standard proportion would be. In response to the Secretary's query, most commenters opposed the idea of establishing a standard proportion, urging instead that the local official should rely on his or her expert knowledge of the area and of the eligible Federal property in making the allocation. One commenter requested that the Department provide guidelines about how to determine the proportion of eligible Federal property that likely would be exempt from local real property taxes.

Another commenter noted that the list of non-assessed or tax-exempt uses in proposed § 222.23(c)(1)(i) is not exhaustive. The same commenter noted that the failure to allocate a proportion of the eligible Federal property acres in each usage category for expected non-assessed or tax-exempt uses would result in the gross overstatement of the estimated assessed value. That commenter also believed that in arriving at a percentage to be used in allocating non-assessed and tax-exempt uses to the eligible Federal property, the local official would be looking at the prevalence of those uses within the boundaries of a one-mile perimeter of the eligible Federal property.

Discussion: Based upon the strong opposition expressed in the comments to the idea of establishing a standard proportion for non-assessed or tax-exempt uses, and in light of the widely divergent circumstances from locality to locality, the Secretary has decided to retain the approach in the proposed regulations of relying on the local official's expert knowledge of the area and of the eligible Federal property in making the allocation. Additionally, we have decided not to issue specific methodological guidelines on how local officials must make this determination. We will monitor the implementation of this new regulatory requirement to determine whether there is a need for further elaboration in order to assure consistent practice.

The Secretary acknowledges that the regulations do not contain an exhaustive list of non-assessed or tax-exempt uses. The words ''such as'' in the proposed regulation were meant to convey that the allocation should include any non-assessed or tax-exempt uses common in the area, not just those enumerated in the regulations. All of the non-assessed or tax-exempt uses common to the tax jurisdiction(s) should be considered by the local official in making the allocation.

The Secretary agrees that the failure to allocate a proportion of the eligible Federal property acres in each usage category for expected non-assessed or tax-exempt uses would result in the overstatement of the estimated assessed value. The regulations are intended to prevent such overstatement by ensuring that non-exempt or non-assessed uses are ascribed to a portion of eligible Federal property.

The Secretary disagrees with the commenter who stated that the percentage used to allocate a proportion of eligible Federal property to non-assessed or tax-exempt uses should be based on the property within a one-mile perimeter of the eligible Federal property. The Secretary believes that use of the tax jurisdiction(s) as a whole is a more suitable basis for projecting the non-assessed and tax-exempt uses likely to occur on the eligible Federal property should it revert to private ownership. We have revised § 222.23(c)(1)(i) to clarify this point.

Changes: Section 222.23(c)(1)(i) has been amended to specify that the local official bases non-assessed or tax-exempt proportions for the Federal property on the actual non-assessed or tax-exempt uses for each category in the entire tax jurisdiction(s) where the selected taxable adjacent properties are located.

Minimum Number of Adjacent Taxable Properties (§ 222.23(c)(2)(i))

Comment: Many comments supported the requirement in the proposed regulations for local officials to use a minimum sample of ten adjacent taxable properties for each use category. However, many commenters objected to the proposal requiring a local official to replicate the property with the lowest per-acre value of the selected adjacent taxable properties as many times as necessary to reach ten values when at least three but fewer than ten taxable properties are selected.

The commenters argued that the average value of the selected adjacent taxable properties should be used in lieu of the lowest value, because using the lowest value would artificially deflate the estimated value of the eligible Federal property while the average value would more accurately reflect the value of the eligible Federal property. Some commenters stated that the proposed use of the lowest value would be a hardship on rural districts.

One commenter supported the use of the lowest-value taxable property as the basis for replication because, according to the commenter, this value represents a truer indication of an estimated value for the Federal property given limitations of physical adaptability, legal permissibility, and financial feasibility. Moreover, according to this commenter, the inability to obtain ten adjacent taxable properties would be indicative of other economic factors at play in the area, such that the use of the lowest value for replication is appropriate. The commenter further asserted that by basing replication on the lowest value, the proposed regulations were taking the calculations away from a true highest and best use methodology.

Discussion: In setting the lowest per-acre value as the basis for replication to reach ten properties, the Secretary's intent was to create a strong incentive for local officials to perform an exhaustive search for taxable adjacent properties before relying on the alternative replication approach. Accordingly, we do not agree with the suggestion that the average value of the selected adjacent taxable properties should be used as the basis for replication. However, as noted elsewhere in this preamble, we are revising the regulations to increase, from one mile to two miles, the area within which adjacent taxable properties may be selected. This change should significantly reduce the number of cases in which replication will be necessary.

As described elsewhere in this preamble in the discussion of the limitation on the use of recent sales (§ 222.23(d)(2)(i)), contrary to the comment that using the lowest value as the basis for replication would artificially deflate the value of the eligible Federal property,these final regulations comport with the statutory requirement that the aggregate assessed value of eligible Federal property be determined on the basis of the highest and best use of adjacent property. This requirement is implemented when the local official categorizes and allocates the expected uses of eligible Federal property through a consideration of the highest and best uses of the adjacent taxable properties.

Finally, we have revised § 222.23(c)(2)(i) to specify that in those extremely rare circumstances in which the Secretary authorizes a local official to use fewer than three adjacent taxable properties to establish the base value for eligible Federal property, the average per-acre value of the selected adjacent property or properties is to be used in lieu of replication. An example of such ''extremely rare circumstances'' has also been added to the regulations.

Changes: Section 222.23(c)(2)(i) has been revised to specify that the Secretary may permit the local official

to select fewer than three parcels in a tax classification if doing so is determined by the Secretary to be necessary and reasonable and there is an insufficient number of adjacent taxable parcels to replicate. The revised regulations further provide that in these extremely rare circumstances, the local official establishes the base value of the eligible Federal property on the average per-acre value of the selected adjacent property or properties. We have also added to the regulations an example of the use of fewer than three adjacent taxable properties in extremely rare circumstances.

Three-Year Cycle (§ 222.23(d)(1))

Comment: Nearly all of the commenters supported the establishment of a three-year cycle for the local official to determine the EAV for the Federal property. Under the proposed regulations, the local official establishes the base value for eligible Federal property by selecting adjacent taxable properties in a base year and then updating the values of those adjacent taxable properties in the two succeeding years.

One commenter suggested that the three-year cycle moves the EAV away from the common definition of highest and best use, presumably on the assumption that it slows increases in the EAV in the two non-base years in which the selected adjacent taxable properties must be used again. The same commenter questioned whether the foreclosure of a selected taxable property would be among the circumstances under which the regulations would permit the substitution of a new selected taxable property in one of the two years succeeding the base year.

Discussion: The three-year cycle does not conflict with the concept of highest and best use because this concept is implemented through the local official's identification of, and proportions for, the expected-use categories for the Federal property. The assumption that it slows growth in the EAV in the non-base years is also not accurate since, under the regulations, the values and acreages of the selected adjacent taxable properties are updated in the non-base years.

Under § 222.23(d)(1)(iii), the substitution of an adjacent taxable property in a non-base year is appropriate only in the event of a change in assessment classification, a change to tax-exempt status, or a change in the character of the property. A foreclosure does not change the essential character of a property, although it may affect its value. Absent an accompanying change in assessment classification or change to tax-exempt status, foreclosure alone would not justify a substitution of an adjacent taxable property unless it could be shown that the character of the property has changed.

Changes: None.

Limitation on the Use of Recent Sales (§ 222.23(d)(2)(i))

Comment: Nearly all of the commenters supported the provision in the proposed regulations that would limit the use of recent sales in the selection of adjacent taxable properties. One commenter, however, asserted that the proposed limitation would be contrary to the ordinary understanding of highest and best use assessed value and a step in the direction of current actual assessed values.

The same commenter questioned the basis for the numerator and denominator in the proportion governing the maximum permissible number of adjacent taxable properties that are recent sales. The commenter suggested three possible alternatives: (1) All recent sales of taxable properties for the LEA divided by all taxable properties in the LEA; (2) all recent sales of taxable properties within a one-mile radius of the eligible Federal property divided by all taxable property within that radius; or (3) all recent sales of taxable properties within the local tax areas of the sample group divided by all taxable property in those areas.

The commenter asserted that the first option would be very difficult because hundreds of thousands of parcels within the LEA would have to be examined. Finally, the commenter questioned whether all parcels would be of equal weight, regardless of size, in calculating the limitation on the use of recent sales.

Discussion: The limitation on the use of recent sales was proposed because, under the existing regulations, some LEAs have selected different adjacent taxable properties each year consisting exclusively of new sales. This resulted in disparities among LEAs with respect to the relative rates of annual section 8002 maximum payment increases. Moreover, the preamble to the NPRM noted that it is unlikely that an eligible Federal property would change hands in its entirety every year if it were on the tax rolls (*73 FR 31595*). The virtually unanimous support by the commenters for the limit on the use of recent sales confirms the seriousness of the problem.

As explained in the preamble to the NPRM (73 FR 31595), the limitation on the use of adjacent taxable properties that are recent sales does not contravene the statutory requirement in section 8002(b)(3) that the aggregate assessed value of eligible Federal property be determined on the basis of the highest and best use of adjacent property. Under the final regulations, the local official takes into consideration the highest and best uses of the adjacent taxable properties in categorizing and allocating the expected uses of eligible Federal property, a crucial step in arriving at an aggregate assessed value.

Limiting the extent to which adjacent taxable properties used in calculating base values may be recent sales later on in the process does not negate the use of the highest and best use concept in the earlier stage. The aggregate assessed value obtained at the conclusion of the process is based upon highest and best use, by virtue of the application of that concept in categorizing and allocating the expected uses of eligible Federal property.

As Examples 4 and 5 accompanying the final regulations make clear, the numerator and denominator of the proportion used to determine the number of selected adjacent taxable properties that may be recent sales are based upon sales in the relevant tax jurisdiction(s). To prevent any possible further confusion, we are clarifying § 222.23(d)(2)(i) to specify that it is in fact the tax jurisdiction that is used to identify taxable parcels in a category and recent sales in that category.

The comment regarding the necessity for examining hundreds of thousands of parcels is incorrect. Under the regulations, no examination of individual parcels is needed with respect to the limitation on recent sales; all that is necessary for each relevant category is the number of properties in that category that are recent sales and the total number of properties in that category within the taxing jurisdiction.

In the preamble to the NPRM, the Secretary requested comments on the availability of the data necessary to determine the number of selected adjacent taxable properties that may be recent sales (73 FR 31592). While no commenter specifically addressed this point, as stated, nearly all of the commenters supported the proposed limitation on the use of recent sales.

The proportion used to limit the use of adjacent taxable properties that are recent sales is unweighted. Each property counts equally regardless of size.

Changes: We have revised § 222.23(d)(2)(i) to specify that the numerator and denominator are based on the numbers of properties in the relevant tax jurisdiction(s).

Definition of ''Adjacent'' (§ 222.23(e)(1))

Comment: Many commenters objected to the proposed definition of *adjacent,* which is used to describe the taxable properties used in deriving the EAV of eligible Federal property. Most commenters objected to the requirement that, among other things, *adjacent* properties be within one mile of the perimeter of the Federal property. The commenters preferred a wider range for the selection of adjacent taxable properties.

Some commenters said that the proposed restriction creates difficulties for rural LEAs. On the other hand, one LEA representative commented that the proposed one-mile limitation is reasonable, but that using a range of more than one mile would raise concerns about the validity of the EAV of the eligible Federal property.

That commenter expressed concern that the Department did not provide any examples of what circumstances might qualify as extremely rare circumstances justifying the use of adjacent taxable properties beyond the one-mile range. The commenter queried whether prior approval would be necessary before an LEA exceeds the specified range and how information about decisions of this nature will be communicated to other applicants.

Discussion: Under proposed § 222.23(e)(1), *adjacent* was defined to mean next to or close to the eligible Federal property with the specification that in most cases it means the closest taxable parcels in the LEA and that more distant ones could be used only where the Secretary finds it to be necessary and reasonable. Moreover, taxable properties further than one mile from the perimeter of the eligible Federal property could be used only in extremely rare circumstances determined by the Secretary.

Based on the volume of comments stating that a range of one mile from the perimeter of eligible Federal property would be inadequate for the selection of taxable properties, we have decided that it is appropriate to increase the maximum distance to no farther than two miles from the perimeter. Only when the Secretary determines that ''extremely rare circumstances'' exist may more distant taxable properties be used. Given that the final regulations also require the use of the closest taxable properties in most cases, we do not agree with the single commenter that increasing the permissible range would give rise to significant concern about the EAV of eligible Federal property derived on that basis.

With respect to whether prior approval for the use of more distant taxable properties is required, § 222.23(e)(1)(iii) of the regulations provides that the exception permitting the use of more distant properties applies only if the Secretary determines that extremely rare circumstances exist. Accordingly, LEAs whose local officials cannot locate taxable properties within the two-mile range should not unilaterally use more distant taxable properties, but should instead contact the Impact Aid Program for assistance. In addition, the Impact Aid Program will provide all applicants with regular updates on the implementation of these new regulatory requirements.

Changes: We have revised the definition of *adjacent* in § 222.23(e)(1)(iii) to provide that the Secretary considers the term to mean properties more than two miles from the perimeter of eligible Federal property or outside of the LEA *only in extremely rare circumstances determined by the Secretary.* We have also added examples of extremely rare circumstances, including a description of the process for obtaining approval for an exception.

Definition of ''highest and best use'' (§ 222.23(e)(2)(i))

Comment: One commenter supported the provision that, in considering the highest and best use of adjacent taxable property, the local official may consider the most developed and profitable use for which it is adaptable if that use is legally permissible and financially feasible and for which there is a need or demand in the near future. However, the commenter contrasted this language in proposed § 222.23(e)(2)(i) with the language in proposed § 222.23(e)(2)(ii)(B), which states that the local official *must* consider the extent to which the eligible Federal property is physically adaptable to the expected uses and there is a need for those uses. The commenter suggested that there be a uniform standard with respect to these two provisions and expressed a preference that both provisions should be mandatory.

The same commenter queried whether, subject to the limitation on the use of adjacent taxable properties that are recent sales, given the emphasis in the law on highest and best use, the local official should select only the highest economically developed adjacent taxable properties, provided that they are physically adaptable, legally permissible and financially feasible.

Discussion: The highest and best use of the adjacent taxable properties is the basis for categorizing and allocating the expected uses of eligible Federal property. The definition in the regulations of the term *highest and best use* seeks to ensure the reasonableness of the expected uses of eligible Federal property in two ways. First, it places certain limitations on the local official's selection of adjacent taxable parcels. Second, it requires the local official to examine the reasonableness of the expected uses the official allocates to the eligible Federal property.

The latter requirement (§ 222.23(e)(2)(ii)(C)) is expressed as a ''must''; that is, the local official must consider the extent to which the eligible Federal property is physically adaptable to the expected uses and there is a need for those uses. The former requirement (§ 222.23(e)(2)(i)(A)), which is applicable to adjacent taxable properties, is expressed as a ''may'' because it only applies in those cases where a local official elects to consider the most developed and profitable use for which an adjacent property is physically adaptable. However, the intent of the proposal was that if the local official elects to consider the most developed and profitable use for which it is adaptable, the local official may only do so if that use is legally permissible and financially feasible and there is a need or demand for that use in the near future. We have revised the regulations in § 222.23(e)(2)(i)(A) to clarify this point.

All of the limitations contained in the definition of *highest and best use* are mandatory. Any categorization and allocation of expected uses of eligible property that are based on uses of adjacent property that are unlawful, financially infeasible, or not in demand, fail to conform to the definition of *highest and best use* and do not comply with the regulations. Any categorization and allocation of expected uses of eligible property that are based on uses of adjacent property that are speculative or remote likewise fail to conform to the definition of *highest and best use* and do not comply with the regulations. Any categorization and allocation of expected uses of eligible Federal property for which the Federal property is not physically adaptable or for which there is no demand in the near future are not in accord with the regulations.

Accordingly, with respect to the second comment, the local official must do more than assure that the uses of the adjacent taxable properties are physically adaptable, legally permissible, and financially feasible. He or she must assure that the potential uses considered are not speculative or remote. He or she must also consider, under § 222.23(e)(2)(ii)(B), whether the

eligible Federal property is physically adaptable for the expected uses and whether there is a need for those uses. Moreover, as noted in Example 8, the local official should strive to use a range of properties generally representative of what surrounds the eligible Federal property (e.g., small properties, large properties, improved properties broadly representative of the housing, industrial, or agricultural building market, and unimproved properties in those categories).

In light of those principles, it likely would not be reasonable, for example, for a local official to base the valuation of a 100,000-acre military installation on ten half-acre residential properties with $500,000 houses on them. Among other things, the immediate demand in the area for another 200,000 properties of that type would be considered speculative and remote.

Changes: Section § 222.23(e)(2)(i) has been revised to provide that, in considering the highest and best use of adjacent taxable property, the local official may consider the most developed and profitable use for which it is adaptable *only* if that use is legally permissible and financially feasible and there is a need or demand for it in the near future.

Executive Order 12866

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and therefore subject to the requirements of the Executive order and review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments, or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) create novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. The Secretary has determined that this regulatory action is not significant under the Executive order.

We have reviewed these final regulations in accordance with Executive Order 12866. Under the terms of the order we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently. In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, we have determined that the benefits of the regulations justify the costs. We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Summary of Potential Costs and Benefits

In general, the final regulations will provide more specificity with respect to local officials' selection of adjacent parcels upon which they base their valuation of the Federal property. These more specific rules generally will reduce burden by eliminating the need for lengthy consultations with Department staff, multiple revisions to valuation submissions, and application amendments. Although one of the regulatory changes would require local officials to select a minimum number (generally 10) of properties on which to base the valuation of the Federal property and, therefore, may require some local officials to add more properties than they currently are using, any resulting increase in the local official's time for this task is offset by the accompanying regulatory change to reduce the selection cycle from every year to once every three years.

These final regulations will provide the following benefits for section 8002 applicants: Greater uniformity in how local officials value the eligible Federal property in each of their jurisdictions; elimination of inequitable inflation in the value of the eligible Federal property; and greater reliability and consistency in the valuation process nationwide.

Paperwork Reduction Act of 1995

Section 222.23 contains information collection requirements related to the submission of an applicant's section 8002 application. The section 8002 application form and the regulations that require it (34 CFR 222.3) are approved under OMB number 1810–0036, with an expiration date of January 31, 2009. Table 1 of that approved application (Tax Assessor's Valuation of Section 8002-eligible Federal Property) requires each applicant LEA's tax assessment official (local official) to certify the accuracy and completeness of certain information about the eligible section 8002 property, including its aggregate EAV as required by section 8002(b)(3) of the ESEA, and summary information upon which that value was derived. We anticipate OMB approval of a revised collection reflecting these requirements following the publication of the final regulations.

Section 222.23 makes several changes to the information that the local official must obtain and use in determining the aggregate EAV of the Federal property. However, for the reasons explained below, the Secretary believes that these changes do not result in an increase in the paperwork collection burden.

Sections 222.23(a)(3) and (c)(1) require local officials to identify the taxable use portions of the eligible Federal property by excluding a proportion of each expected use category that the local official would allocate to accommodate anticipated non-assessed or tax-exempt uses. We proposed this change to avoid overstating the aggregate EAV of the eligible Federal property upon which section 8002 payments are based, which otherwise might occur if a portion of the property is included that likely would remain exempt from real property taxation if no longer federally owned.

In addition, Section 222.23(c)(2)(i) requires local officials to obtain a minimum sample size of 10 adjacent properties for each type of property, rather than using a lesser number of properties. We proposed this change to standardize the minimum sample size and provide greater consistency and reliability in payments. Federal property valuations must be established as consistently as possible to achieve equity in LEAs' payments, which are based in part upon those valuations and are mutually dependent upon one another due to lack of full funding for the program.

Although the change in the minimum sample size may increase the burden for some LEAs, it will reduce or have no effect on the collection burden of others that currently obtain a higher number of sample properties. In any event, the Secretary believes that both of these changes will be offset by the following simultaneous burden reductions: (1) In § 222.23(d)(1), moving from an annual to a three-year sample selection cycle; and (2) in § 222.23(d)(2), limiting the number of recent sales that a local official may select in each base selection year, which will take far less time than searching for all new, appropriate, recent sales every year.

Assessment of Educational Impact

In the NPRM, and in accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance Number 84.041, Impact Aid-Maintenance and Operations)

List of Subjects in 34 CFR Part 222

Education, Education of children with disabilities, Educational facilities, Elementary and secondary education, Federally affected areas, Grant programs—education, Indians—education, Public housing, Reports and recordkeeping requirements, School construction, Schools.

Dated: November 13, 2008.

Kerri L. Briggs,

Assistant Secretary for Elementary and Secondary Education.

■ For the reasons discussed in the preamble, the Secretary amends part 222 of title 34 of the Code of Federal Regulations as follows:

PART 222—IMPACT AID PROGRAMS

■ 1. The authority citation for part 222 continues to read as follows:

Authority: 20 U.S.C. 7701–7714, unless otherwise noted.

■ 2. Section 222.21 is amended by revising the introductory text in paragraph (a), and revising paragraphs (d)(1) and (e) to read as follows:

§ 222.21 What requirements must a local educational agency meet concerning Federal acquisition of real property within the local educational agency?

(a) For an LEA with an otherwise approvable application to be eligible to receive financial assistance under section 8002 of the Act, the LEA must meet the requirements in subpart A of this part and § 222.22. In addition, unless otherwise provided by statute as meeting the requirements in section 8002(a)(1)(C), the LEA must document—

* * * * *

(d) * * *

(1) For a new section 8002 applicant or newly acquired eligible Federal property, only upon—

(i) Original records as of the time(s) of Federal acquisition of real property, prepared by a legally authorized official, documenting the assessed value of that real property;

(ii) Facsimiles, such as microfilm, or other reproductions of those records; or

(iii) If the documents specified in paragraphs (d)(1)(i) and (ii) are unavailable, other records that the Secretary determines to be appropriate and reliable for establishing eligibility under section 8002(a)(1) of the Act, such as Federal agency records or local historical records.

* * * * *

(e) The Secretary does not base the determination or redetermination of an LEA's eligibility under this section upon secondary documentation that is in the nature of an opinion, such as estimates, certifications, or appraisals.

* * * * *

■ 3. Section 222.23 is revised to read as follows:

§ 222.23 How does a local educational agency determine the aggregate assessed value of its eligible Federal property for its section 8002 payment?

(a) *General.* A local educational agency (LEA) determines the aggregate assessed value of its eligible Federal property for its section 8002 payment as follows:

(1) A local official who is responsible for assessing the value of real property located in the jurisdiction of the LEA in order to levy a property tax makes the determination of the section 8002 aggregate assessed value, based on estimated assessed values (EAVs) for the eligible Federal property in the jurisdiction.

(2) The local official first categorizes the types of expected uses of the eligible Federal property in each Federal installation or area (*e.g.*, Federal forest) based on the highest and best uses of taxable properties adjacent to the eligible Federal property (adjacent properties), and allocates a portion of the acres of the eligible Federal property to each of those expected uses, in accordance with paragraph (b) of this section.

(3) For each category of expected use of the eligible Federal property identified in accordance with paragraph (a)(2) of this section for each Federal installation or area, the local official then determines a base value in accordance with paragraphs (c) and (d) of this section.

(4) The local official next determines a section 8002 EAV for each category of expected use of the eligible Federal property in each Federal installation or area. The official determines that EAV by adjusting the base value for that category established in accordance with paragraph (a)(3) of this section, by any percentage, ratio, index, or other factor that the official would use to determine the assessed value (as defined in § 222.20) of the eligible Federal property to generate local real property tax revenues for current expenditures if that eligible Federal property were taxable. (This process is illustrated in Example 8 and Table 8–2 at the end of this section.)

(5) The local official then determines a total section 8002 EAV for each Federal installation or area in the LEA by adding together the assessed values determined pursuant to paragraph (a)(4) of this section for all property use categories of eligible Federal property in that Federal installation or area.

(6) The local official determines a section 8002 aggregate assessed value for the LEA as follows:

(i) If the LEA contains a single Federal installation or area with eligible Federal property, the total section 8002 EAV determined pursuant to paragraph (a)(5) of this section constitutes the section 8002 aggregate assessed value for the LEA.

(ii) If the LEA contains more than one Federal installation or area with eligible Federal property, the local official calculates the section 8002 aggregate assessed value for all of the eligible Federal property in the LEA by adding together the section 8002 total EAVs determined pursuant to paragraph (a)(5) of this section for all Federal installations and areas containing eligible Federal property within the LEA. (This process is illustrated in

Example 8 and Table 8–2 at the end of this section.)

(b) *Categorizing expected uses.* (1) The local official categorizes the expected uses of the eligible Federal property, in accordance with paragraph (a)(2) of this section, by—

(i) Identifying the tax assessment classifications that represent the highest and best uses of the taxable adjacent property (*e.g.*, residential, commercial, agricultural); and

(ii) Determining the relative proportions of taxable adjacent properties, based on acreage, that are devoted to each of those tax assessment classifications that represent the highest and best uses of the taxable adjacent property (*e.g.*, agricultural—50 percent; residential—40 percent; commercial—10 percent).

(2) The local official then determines the allocation of each of those expected uses to the eligible Federal property acres by multiplying each of the proportions determined under paragraph (b)(1)(ii) of this section by the total acres of the eligible Federal property in that Federal installation or area.

(c) *Determining the base value for expected use categories.* The local official determines a base value for each category of expected use of the eligible Federal property in accordance with paragraph (a)(3) of this section as follows:

(1) The local official first identifies the taxable-use portion of the eligible Federal property acres in each expected use category as follows:

(i) The local official allocates a proportion (percentage) of the eligible Federal property acres identified for each expected use category under paragraph (b)(2) of this section to expected non-assessed or tax-exempt uses, such as public open space, schools, churches, and roads. The local official bases these proportions on the actual non-assessed or tax-exempt uses for each category of taxable property in the entire tax jurisdiction(s) where the selected taxable adjacent properties are located.

(ii) The local official then determines the number of acres attributable to non-assessed or tax-exempt uses for each expected use category by multiplying the non-assessed or tax-exempt proportions identified in paragraph (c)(1)(i) of this section by the number of acres in each expected-use category determined pursuant to paragraph (b)(2) of this section.

Example 1 (Allocation of Proportion of Eligible Federal Property to Non-Assessed or Tax-exempt Uses): The eligible Federal property (1,000 acres) is surrounded by properties that are classified for tax purposes according to their highest and best uses as residential (40 percent) and agricultural (60 percent) property. For the residential category (400 acres), the local official determines that approximately 20 percent would be devoted to non-assessed or tax-exempt uses, such as roads, parks, churches, and schools. The local official multiplies that proportion (.20) by the number of eligible Federal acres allocated to the residential category (400 acres) to determine the number of eligible Federal acres (80 acres) that likely would not be assessed for taxation or would be tax-exempt if the Federal Government no longer owned that property, as illustrated in the chart at the end of this example (Table 1–1). The local official follows a similar process for the proportion of the eligible Federal property the official allocated to agricultural use.

TABLE 1–1—PROPORTION OF RESIDENTIAL CATEGORY OF SECTION 8002 ELIGIBLE FEDERAL PROPERTY ALLOCATED TO NON-ASSESSED OR TAX-EXEMPT USES

(1)	Allocated proportion (percent) (2)	Eligible Federal acres allocated to expected use category (Col. 2 × acres in expected use category) (3)
Residential portion of eligible Federal property (400 acres)		
Allocated by local official for non-assessed or tax-exempt uses	20	80
Allocated for taxable residential use	80	320
Total	100	400

(iii) The local official then calculates the number of acres attributable to taxable use for each expected use category by subtracting the number of acres attributable to non-assessed or tax-exempt uses determined under paragraph (c)(1)(ii) of this section from the total number of acres of eligible Federal property in that use category identified in paragraph (b)(2) of this section.

(2) For the taxable use portion determined under paragraph (c)(1)(iii) of this section for each expected use category, the local official then calculates a base value as follows:

(i) The local official selects from each expected use category identified pursuant to paragraph (b)(1)(i) of this section a minimum sample size of 10 taxable adjacent properties that represent the highest and best uses of the taxable adjacent properties. The official identifies the value that is recorded on the assessment records for each selected taxable adjacent property before any adjustment, ratio, percentage, or other factor is applied to establish a taxable (assessed) value. If at least three but fewer than 10 taxable adjacent properties are selected in an identified use category, the local official calculates a per acre value for each adjacent property and then identifies which of those properties has the lowest per-acre value. The official replicates that adjacent property's value and acreage as many times as needed until the combination of actual and replicated adjacent properties reaches ten in number. In extremely rare circumstances, the Secretary may permit the local official to select fewer than three parcels in a tax classification if doing so is determined by the Secretary to be necessary and reasonable and there is an insufficient number of adjacent taxable properties to replicate. In those extremely rare circumstances, the local official establishes the base value of the eligible Federal property using the average per acre value of the selected adjacent property or properties.

Example 2a (Minimum Sample Size of Adjacent Properties): The eligible Federal property is surrounded by properties that are classified for tax purposes as residential, commercial, and agricultural property. The local official selects at least 10 taxable adjacent parcels from each of the residential and agricultural property classifications as the basis for valuing the eligible Federal property.

In the commercial classification, however, only six taxable adjacent properties are selected. The lowest per-acre-valued parcel, Parcel A, is valued at $6,000 per acre. As illustrated in Table 2–1, the local official selects all six of the commercial taxable adjacent properties, and then replicates Parcel A's value and acreage four more times to reach the minimum number of ten properties for that classification.

Example 2b (Use of Fewer Than Three Adjacent Taxable Properties in Extremely Rare Circumstances): There are three golf courses in an LEA, one on eligible Federal property and the other two on taxable property adjacent to the eligible Federal property. Under the local tax classification scheme, there is a separate tax category for golf courses. Since there are only two adjacent taxable properties in that tax classification in the taxing jurisdiction, the LEA seeks permission to establish the base value for the golf course on the eligible Federal property using the average per-acre value of the two adjacent taxable golf courses. After verifying the facts, the Secretary determines that extremely rare circumstances exist within the meaning of § 222.23(c)(2)(i) and grants the LEA's request.

(ii) The local official then calculates an average per-acre value for the taxable portion of each expected use category by totaling the values (following application of any adjustment factors, if relevant) and acres of the actual and any replicated adjacent properties and then dividing the total value by the total number of acres in those properties, as illustrated in the following chart (Table 2–1).

TABLE 2–1—AVERAGE PER-ACRE VALUE OF MINIMUM SAMPLE SIZE OF ADJACENT PROPERTIES

	Selected adjacent properties—commercial classification	Value	Acres	Value per acre
	(1)	(2)	(3)	(4)
1	Parcel A	$150,000	25	$6,000
2	Parcel B	1,200,000	30	40,000
3	Parcel C	750,000	.25	3,000,000
4	Parcel D	1,000,000	40	25,000
5	Parcel E	500,000	5	100,000
6	Parcel F	250,000	.5	500,000
7	Replicated Parcel A	150,000	25	6,000
8	Replicated Parcel A	150,000	25	6,000
9	Replicated Parcel A	150,000	25	6,000
10	Replicated Parcel A	150,000	25	6,000
	Total	4,450,000	200.75	NA
	Average value/acre (TOTAL Col. 2/TOTAL Col. 3)			22,166.87

(iii) The local official then multiplies the average per-acre value calculated under paragraph (c)(2)(ii) of this section by the number of acres of eligible Federal property in the taxable portion of that expected-use category, determined in accordance with paragraph (b)(2) of this section to calculate the base value for that category.

(d) *Additional procedures for determining base values.* The local official applies the following additional procedures in determining a base value for each category of expected use of the eligible Federal property, in accordance with paragraph (a)(3) of this section:

(1) The local official determines base values on a three-year cycle, as follows:

(i) The local official allocates expected uses to the eligible Federal property in accordance with paragraph (b)(2) of this section and selects taxable adjacent properties in accordance with paragraph (c)(2)(i) of this section once every three years (base year).

(ii) For each of the following two application years, the local official uses the same allocation of expected uses of the eligible Federal property and the same taxable adjacent parcels selected for the base year, but updates the values and acreages of the selected taxable adjacent parcels.

(iii) If a previously selected taxable adjacent property becomes unsuitable for determining the base value for the expected-use category because that property has changed assessment classification, become tax-exempt, or undergone a change in character from the time that the property was selected for the base year, the local official substitutes a similar taxable adjacent property from the same expected-use category (assessment classification) in accordance with the requirements in paragraph (c)(2)(i) of this section.

Example 3 (Three-Year Cycle for Selected Adjacent Properties): For the fiscal year (FY) 2010 section 8002 application, the local official selects 15 residential taxable adjacent properties to use as the basis for valuing a portion of the eligible Federal property, and provides the value and acreages of each of those properties for the previous year (2009). The local official must use those same properties for the following two application years (2011 and 2012), assuming that those properties retain the same assessment classification, remain taxable, and do not undergo a change in the original character upon which their selection was based. For each of those following two years, the local official updates the values and acreages of each selected residential taxable adjacent property based on the preceding year's tax data (2010 and 2011, respectively).

However, during that two-year period, one of the residential taxable adjacent properties changes in character because the residential improvement is destroyed. That change to the original character makes the property unsuitable to include in the selected group of residential taxable adjacent properties for the remaining two years of the three-year period. Accordingly, the local official substitutes a residential taxable adjacent property that is similar to the originally selected property (*i.e.*, an improved residential adjacent property of similar value and size) to retain the same number and variety of taxable adjacent properties in that expected-use category as originally selected.

(2)(i) When selecting taxable adjacent properties for the base year in accordance with paragraph (c)(2)(i) of this section, the local official may include taxable adjacent properties that are recent sales (as defined in paragraph (e)(3) of this section), among other taxable adjacent properties, up to the following proportion:

$$\frac{\text{number of recent sales in the tax jurisdiction(s) in each expected use category for the three most recent years for which data are available}}{\text{total number of taxable properties in the tax jurisdiction(s) in the expected use category for the most recent year for which data are available}}$$

Example 4 (Proportion of Recent Sales in Assessment Classification): Beginning with the most recent year for which data are available (2007), the local official determines that 40 taxable agricultural properties sold or otherwise transferred ownership in that tax jurisdiction during the three most recent years for which data are available (2005 through 2007) and that there were 500 taxable agricultural properties during 2007 (the most recent year for which data are available). (If a particular property sold more than once during the three most recent years for which data are available, the local official counts each sale.) The local official determines the proportion of sales for taxable agricultural property as follows:

$$\frac{\text{number of agricultural sales in last three years for which data are available (40)}}{\text{total number of agricultural properties in most recent year for which data are available (500)}} = \text{proportion of recent sales (.08 or 8 percent)}$$

(ii) The local official determines the number of recent sales the official may include with other selected taxable adjacent properties for that expected use category as follows:

$$\text{proportion (percentage) of recent sales for the expected use category (calculated under paragraph (d)(2)(i) of this section)} \times \text{total number of taxable adjacent properties selected for that expected use category}$$

If the resulting number is a fraction, the local official rounds down to the next smaller whole number to determine the maximum number of recent sales that the official may include for that expected use category.

Example 5 (Number of Recent Sales Local Official May Use To Determine the Base Value for Each Expected Use Category of Eligible Federal Property): The eligible section 8002 Federal property in the LEA is a federally owned forest. Based on the highest and best uses of taxable adjacent properties, three expected use categories (assessment classifications) of properties surround that forest: Residential, commercial, and agricultural. After identifying and excluding a non-assessed or tax-exempt proportion for each expected use category of the eligible Federal property, in accordance with paragraphs (a)(3) and (c)(1) of this section, the local official selects 10 taxable adjacent properties each for the residential and commercial use categories, and 20 taxable adjacent properties for the agricultural use category to determine the base value for the taxable portion of each expected use category of the eligible Federal property.

During the three most recent years for which data are available, 10 percent of the residential properties in the tax jurisdiction were sold, six percent of the commercial properties were sold, and eight percent of the agricultural properties were sold. As illustrated in the following chart, of the 10 residential adjacent properties selected, the local official may select only one recent sale (10 percent (.10) × 10 residential adjacent properties = one) to use in determining the base value for that expected use category of the eligible Federal property.

For the commercial classification, six percent of the taxable properties in the tax jurisdiction were recent sales. As illustrated in the following chart, the local official may not select any recent sales for that expected-use category because six percent (.06) of the 10 selected commercial adjacent properties is less than one whole number, and rounding down therefore results in 0 (six percent (.06) × 10 commercial adjacent properties =.6 of a property).

Finally, as illustrated in the following chart, for the 20 selected agricultural adjacent properties, the local official may use one recent sale for that expected-use category, because eight percent (.08) of the 20 properties equals 1.6 properties (eight percent (.08) × 20 agricultural adjacent properties = 1.6) and rounding down to the nearest whole number results in one property.

TABLE 5–1—NUMBER OF RECENT SALES LOCAL OFFICIAL MAY USE TO DETERMINE THE BASE VALUE FOR EACH EXPECTED USE CATEGORY OF ELIGIBLE FEDERAL PROPERTY

	Residential	Commercial	Agricultural
1. Percent (proportion) of recent sales for expected use category	10% (.10)	6% (.06)	8% (.08)
2. Total selected adjacent properties	10	10	20
3. Row 1 × Row 2	1.0	.6	1.6
4. Number of "recent sales" local official may include among other taxable adjacent properties in determining a base value for the expected use category of the eligible Federal property	1	0	1

(e) *Definitions.* The following terms used in this section are defined as follows:

(1) *Adjacent* means next to or close to the eligible Federal property as follows:

(i) In most cases, the term *adjacent* means the closest taxable parcels within the LEA.

(ii) The term *adjacent* means properties farther away from the eligible Federal property than described in paragraph (e)(1)(i) of this section only if the Secretary determines that it is necessary and reasonable to use those more distant properties to determine the EAV of eligible Federal property.

(iii) The Secretary considers the term *adjacent* to mean properties farther than two miles from the perimeter of the eligible Federal property or outside the LEA only in extremely rare circumstances determined by the Secretary.

Example 6 (Extremely Rare Circumstances): A very small LEA consists predominantly of non-taxable and tax-exempt property including eligible Federal property. The small taxable portion of the LEA is topographically dissimilar from the Federal property and classified for tax purposes differently than the eligible Federal property most likely would be if it were on the tax rolls, in the opinion of the local

official. Based on these facts, the LEA asserts that there are no suitable adjacent taxable properties and requests permission to use taxable properties in the adjoining LEA. After verifying the facts, the Secretary determines that extremely rare circumstances exist within the meaning of § 222.23(e)(1)(iii) and grants the LEA's request.

In an LEA bordering on the Pacific Ocean, the entire coastline is taken up by the eligible Federal property. Based on the absence of taxable oceanfront property in the LEA, the LEA seeks permission to use taxable oceanfront property in the adjoining LEA. After verifying the facts, the Secretary determines that extremely rare circumstances exist within the meaning of § 222.23(e)(1)(iii) and grants the LEA's request.

(2)(i) *Highest and best use* of adjacent property is determined based on a highest and best use standard in accordance with State or local law or guidelines of general applicability, if available, that is not used exclusively for the eligible Federal property and includes any improvements on that property to the extent consistent with those laws or guidelines. To the extent that State or local law or guidelines of general applicability are not available, highest and best use generally must be based on the current use of the taxable adjacent property (including any improvements).

(ii) In determining the highest and best use, the local official—

(A) Also may consider the most developed and profitable use for which the taxable adjacent property is physically adaptable, but only if that use is legally permissible and financially feasible, and for which there is a need or demand in the near future;

(B) May not base the highest and best use of taxable adjacent property on potential uses that are speculative or remote; and

(C) Must consider the extent to which the eligible Federal property is physically adaptable for those expected uses and the extent to which those uses would be needed if the property were not in Federal ownership.

Example 7 (Determining the Highest and Best Use of Taxable Adjacent Properties as the Basis for EAV): If a Federal installation to be valued is bordered by residential and commercial/industrial properties, the local official takes into consideration those various highest and best uses (residential and commercial/industrial) in determining the EAV of the eligible Federal property as described in paragraphs (a) and (c)(2)(i) of this section.

Under that process, using acres, the local official first determines the relative proportions of adjacent properties devoted to each of those highest and best uses. For example, the local official determines that the highest and best uses of the adjacent properties are residential (60 percent) and commercial/industrial (40 percent). However, before allocating the acres of the eligible Federal property (1,000 acres) to those uses as described in paragraphs (a)(2) and (b) of this section, the local official must consider whether the Federal property is adaptable for and there is a need for those uses, in accordance with paragraph (e)(2)(ii)(B) of this section.

For example, if the Federal property is hilly and rocky or contains a large area of marshland, it may not be practical for the property to be developed primarily as residential property. Using his or her professional judgment, the local official may decide that it would be more appropriate to designate 50 percent of the acres as vacant or woodland or some other taxable classification that would indicate that improvements would likely not be located on that property. This may also affect the proportion of the property that would be designated as commercial/industrial because some of those commercial/industrial uses would support the area designated for residential use. Thus, the local official designates the remaining 50 percent of the acres as 20 percent residential and 30 percent commercial/industrial.

After the local official determines the appropriate proportions of expected uses, the official then multiplies those proportions by the total number of eligible Federal acres (1,000) to determine the number of eligible Federal acres in each expected use category, resulting in the following: residential (20 percent or 200 acres), vacant (50 percent or 500 acres), and commercial/industrial (30 percent or 300 acres). The local official then determines the base value for the taxable use portion of each expected use category under paragraph (c)(2) of this section, beginning by selecting a sample of properties that represents the highest and best uses of the taxable adjacent properties.

In selecting the sample, the local official must consider whether the Federal property would support the same degree of development as the taxable adjacent properties selected (e.g., density, size, and improvements) and whether there would be a need for that type and degree of development in the near future. The local official then makes any necessary adjustments to the sample.

(3) *Recent sales* or *recently sold* means taxable properties that have transferred ownership within the three most recent years for which data are available.

Example 8 (Calculation of Section 8002 EAV for Eligible Federal Property): Two different Federal properties are located within an LEA—a Federal forest (100 eligible acres) and a naval facility (1,000 eligible acres). Based on the highest and best uses of taxable adjacent properties, and as described more specifically below, the local official establishes an EAV for the eligible Federal property in the LEA of $92,577,000 in the base year of a three-year cycle. That EAV is based on categorizing the Federal forest as 100 percent (100 acres) woodland expected use and the naval facility as 60 percent (600 acres) residential expected use and 40 percent (400 acres) commercial/industrial expected use.

The taxing jurisdiction determines the assessed value for taxable property by multiplying the value of the property by a single assessment ratio applicable to the property's assessment category. In this case, the applicable assessment ratios are: Woodland property—30 percent of the property's value; residential property—60 percent of the property's value; and commercial/industrial property—75 percent of the property's value.

Federal forest (100 eligible Federal acres). The local official first determines the type of expected-use categories (assessment classifications) and respective proportions to use in valuing the eligible Federal property, based on the highest and best use of the taxable adjacent properties. In this case, the local official categorizes 100 percent of the Federal forest as being in the woodland use category (assessment classification) based on the highest and best use of taxable adjacent properties. The local official multiplies that proportion by the total number of eligible Federal acres (100), to determine the number of Federal acres attributable to the woodland use category (100 acres).

The local official then determines a base value for each category of expected use of the eligible Federal property as described in paragraphs (a)(3), (c), and (d) of this section. The official first determines the taxable-use portion for each expected use category, as described in paragraph (c)(1) of this section, by excluding the proportion of the total area of each use category of the eligible Federal property that the official determines should be allocated to non-assessed or tax-exempt uses.

Based on the general proportion of non-assessed or tax-exempt uses for woodland property, the local official allocates 10 percent of the woodland acres for non-assessed or tax-exempt purposes, and multiplies that proportion by the total number of acres of eligible Federal property categorized as woodland (100 acres), resulting in 10 acres attributable to a non-assessed or tax-exempt proportion of woodland. The local official then subtracts that non-assessed or tax-exempt portion (10 acres) from the total acres of eligible Federal property in that expected-use category (100 acres), resulting in 90 acres attributable to the taxable portion of the woodland expected-use category.

The local official then selects a sample of taxable adjacent properties from the expected use category (woodland), as described in paragraphs (c)(2) and (d) of this section, and uses that sample to establish a base value for that category. The sample includes the minimum required number of taxable adjacent properties (generally at least 10) from the woodland category. In addition, in selecting that sample of properties, the local official uses only the allowable proportion of recent sales, calculated as described in paragraph (d)(2) of this section. In selecting the specific taxable adjacent properties that make up that sample and that reflect the highest and best uses of the adjacent taxable properties in accordance with paragraph (c)(2)(i) of this section, the local official also considers whether the Federal property is adaptable for and whether there would be a need for those specific types of properties, such as in size and improvements, in accordance with paragraph (e)(2)(ii)(B) of this section.

The local official calculates the average value per acre ($1,000) of the selected sample of taxable adjacent woodland properties. The local official then multiplies the number of acres attributable to the taxable portion of the

woodland expected use category (90 acres) by the average value per acre ($1,000) of the selected taxable woodland adjacent properties, resulting in a base value for the woodland use category of the Federal forest of $90,000.

The local official then determines the section 8002 EAV for the Federal forest as described in paragraph (a)(4) of this section by multiplying the base value established for the woodland portion of the property ($90,000) by 30 percent (the assessment ratio for woodland property), resulting in a section 8002 EAV of $27,000 for the Federal forest.

Naval facility (1,000 total eligible Federal acres).

The local official first determines the type of expected-use categories (assessment classifications) and respective proportions to use in valuing the eligible Federal property. For the naval facility, the local official determines that the relative mix of taxable adjacent properties, based on their highest and best uses, is 60 percent residential and 40 percent commercial/industrial. The local official multiplies those proportions by the total eligible Federal acres in the naval facility (1,000), resulting in 600 acres (60 percent × 1,000 acres = 600 acres) to be valued as residential expected use and 400 acres (40 percent × 1,000 acres = 400 acres) to be valued as commercial/industrial expected use.

The local official then determines a base value for each of those expected use categories of the eligible Federal property. For the residential expected-use category, the local official allocates 20 percent for non-assessed or tax-exempt uses, and multiplies that proportion by the number of eligible Federal acres allocated to that expected-use category (600 acres), resulting in 120 acres allocated to non-assessed or tax-exempt uses. The local official excludes those 120 acres by subtracting them from the total number of residential acres (600 acres), resulting in 480 acres allocated to taxable residential uses for the residential portion of the eligible Federal property in the naval facility.

For the commercial/industrial expected-use category, the local official allocates 15 percent for non-assessed or tax-exempt uses, and multiplies that proportion by the number of eligible Federal acres allocated to that expected-use category (400 acres), resulting in 60 acres allocated to non-assessed or tax-exempt uses. The local official excludes those 60 acres by subtracting them from the total number of commercial/industrial acres (400 acres), resulting in 340 acres allocated to taxable commercial/industrial uses for the commercial/industrial portion of the eligible Federal property in the naval facility.

The local official then selects a sample of taxable adjacent properties from each identified use category, as described in paragraphs (c)(2) and (d) of this section, which the official uses to establish a base value for each of those expected-use categories. That sample includes the minimum required number of taxable adjacent properties (generally at least 10) for each expected use category. In addition, in selecting the sample of properties, the official uses only the allowable proportion of recent sales, calculated as described in paragraph (d)(2) of this section.

In considering whether the specific group of taxable adjacent properties selected reflects the highest and best uses of the adjacent taxable properties in accordance with paragraph (c)(2)(i) of this section, the local official also considers whether the Federal property is adaptable for and whether there would be a need for those specific types of properties, in accordance with paragraph (e)(2)(ii)(B) of this section.

For example, if the official selects 10 residential parcels that are all small, such as one quarter (.25) of an acre or less, and uses those parcels to determine an EAV for a large area of Federal property, the result may exaggerate what would likely happen to that property if it were available for development. If the official uses only these small parcels (e.g., .25 acres each) for the 480 acres allocated to taxable residential uses for the residential portion of the eligible Federal property, the official would be projecting that approximately 1,920 small residential lots would be developed on that Federal property (.25 × 480 = 1,920) if the property were no longer in Federal ownership. The Department believes that it would be extremely unlikely that 480 acres of the property would develop into this number of residential properties. This outcome would not reflect the local official's best judgment of the reasonable development of the property. To avoid this inappropriate result, the official would identify other taxable adjacent parcels of varying sizes to provide a more accurate picture of how the Federal property would be developed if it were on the tax rolls.

Similarly, with respect to improvements, if the local official selected taxable adjacent properties that all were improved parcels, the official would be projecting that all of the 480 acres allocated to taxable residential uses for the residential portion of the eligible Federal property would be improved. If the residential taxable adjacent parcels are a mixture of improved and unimproved properties, that projection also may be speculative based on the number of improvements that reasonably would be needed for the current and any expected new population. If the assumption is not reasonable that the entire 480 acres would be improved, then the local official would make adjustments accordingly in the sample of taxable adjacent properties by adding some unimproved residential parcels to the sample.

For the portion of the naval facility allocated to taxable residential use, the local official calculates the average per-acre value ($100,000) of the selected sample of residential adjacent properties as described in paragraph (c)(2)(ii) of this section. The local official then multiplies the number of acres allocated to the taxable residential portion (480 acres) by the average value per acre ($100,000) of the sample of residential adjacent properties to determine the base value ($48,000,000) for that portion of the eligible Federal property, as described in paragraph (c)(2)(iii) of this section. The local official determines a section 8002 EAV for that residential portion by multiplying the $48 million by 60 percent (assessment ratio for residential property), resulting in $28,800,000 as described in paragraph (a)(4) of this section.

Similarly, for the portion of the naval facility allocated to taxable commercial/industrial use, the local official calculates an aggregate per acre value ($250,000) of the selected sample of commercial/industrial taxable adjacent properties as described in paragraph (c)(2)(ii) of this section. The local official then multiplies the number of eligible Federal property acres allocated to the taxable commercial/industrial portion (340 acres) by the average value per acre of the selected commercial/industrial adjacent properties ($250,000) to determine the base value for that portion of the eligible Federal property ($85,000,000), as described in paragraph (c)(2)(iii) of this section. The local official determines a section 8002 EAV for that commercial/industrial portion by multiplying the $85,000,000 by 75 percent (the assessment ratio for commercial/industrial property), resulting in $63,750,000 as described in paragraph (a)(4) of this section.

The local official then calculates the total section 8002 EAV for the entire naval facility as described in paragraph (a)(5) of this section by adding the figures for the residential portion ($28,800,000) and the commercial/ industrial portion ($63,750,000), resulting in a total section 8002 EAV for the entire naval facility of $92,550,000.

Total section 8002 property in the LEA. Finally, the local official determines the aggregate section 8002 assessed value for the LEA as described in paragraph (a)(6) of this section by adding the section 8002 EAV for the Federal forest ($27,000), and the total section 8002 EAV for the naval facility ($92,550,000), resulting in an aggregate assessed value of $92,577,000.

This entire process is illustrated in Tables 8–1 and 8–2 below:

TABLE 8–1—ALLOCATION OF SECTION 8002 ELIGIBLE FEDERAL PROPERTY TO NON-TAXABLE AND TAXABLE USES FOR DETERMINING BASE VALUES

Tax classifications of adjacent properties based on highest and best use	Proportion of eligible Federal property allocated to property use categories (percent)	Total acres allocated to property use categories (Col. 2 × eligible acres)	Proportion allocated to non-assessed or tax-exempt uses (percent)	Acres allocated to non-assessed or tax-exempt uses (Col. 4 × Col. 3)	Acres allocated to taxable uses and used to determine base values (Col. 3 − Col. 5)
(1)	(2)	(3)	(4)	(5)	(6)
Federal Forest (100 eligible acres)					
Woodland	100	100	10	10	90
Subtotal		100		10	90
Naval Facility (1,000 eligible acres)					
Residential	60	600	20	120	480
Commercial/industrial	40	400	15	60	340
Subtotal	100	1,000		180	820
Total		1,100		190	910

TABLE 8–2—CALCULATION OF SECTION 8002 BASE VALUES, SECTION 8002 ESTIMATED ASSESSED VALUES (EAVS), AND AGGREGATE ASSESSED VALUE

Classification of adjacent parcels	Federal acres allocated for taxable use (Table 7–1, Col. 6)	Average value/acre of taxable adjacent parcels	Base value of eligible Federal property (Col. 3 × Col. 4)	Assessment ratio (percent)	Section 8002 EAVs and aggregate assessed value
(1)	(2)	(3)	(4)	(5)	(6)
Federal Forest (90 eligible acres allocated for *taxable* use (see Table 7–1, column 6))					
Woodland	90	$1,000	$90,000	30	$27,000
Subtotal	90		90,000		27,000
Naval Facility (820 eligible Federal acres allocated for *taxable* use (see Table 6–1, column 6))					
Residential	480	100,000	48,000,000	60	28,800,000
Commercial/Industrial	340	250,000	85,000,000	75	63,750,000
Subtotal	820		133,000,000		92,550,000
Total (Aggregate Assessed Value)			133,090,000		92,577,000

(Authority: 20 U.S.C. 7702)

[FR Doc. E8–27462 Filed 11–19–08; 8:45 am]

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