12–12–08 Friday
Vol. 73 No. 240 Dec. 12, 2008

Pages 75535–75926

Federal Register

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge as one of the databases on GPO Access, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register** *www.gpoaccess.gov/nara,* available through GPO Access, is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, Number 1 (January 2, 1994) forward.

For more information about GPO Access, contact the GPO Access User Support Team, call toll free 1-888-293-6498; DC area 202-512-1530; fax at 202-512-1262; or via e-mail at *gpoaccess@gpo.gov.* The Support Team is available between 7:00 a.m. and 9:00 p.m. Eastern Time, Monday–Friday, except official holidays.

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Printing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 73 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC	
Subscriptions:	
Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**
Single copies/back copies:	
Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**
FEDERAL AGENCIES	
Subscriptions:	
Paper or fiche	**202–741–6005**
Assistance with Federal agency subscriptions	**202–741–6005**

Printed on recycled paper.

Contents

Federal Register

Vol. 73, No. 240

Friday, December 12, 2008

Agricultural Marketing Service
RULES
Kiwifruit Grown in California; Decreased Assessment Rate, 75537–75540

Agriculture Department
See Agricultural Marketing Service
See Animal and Plant Health Inspection Service
See Food Safety and Inspection Service
See Forest Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 75665
Environmental Impact Statements; Availability, etc.:
Proposed National Bio and Agro-Defense Facility, 75665–75667

Air Force Department
NOTICES
Meetings:
US Air Force Scientific Advisory Board, 75686
Privacy Act; Systems of Records, 75686–75691

American Battle Monuments Commission
NOTICES
No Fear Act, 75670–75671

Animal and Plant Health Inspection Service
RULES
Citrus Canker; Movement of Fruit from a Quarantined Area; Bag Markings, 75537

Antitrust Division
NOTICES
National Cooperative Research and Production Act (1993):
Interchangeable Virtual Instruments Foundation, Inc., 75771–75772
International Electronics Manufacturing Initiative, 75772
OpenSAF Foundation, 75772
PXI Systems Alliance, Inc., 75772
Semiconductor Test Consortium, Inc., 75772–75773

Arctic Research Commission
NOTICES
Meetings:
Business and Executive Sessions, 75671

Army Department
NOTICES
Environmental Impact Statements; Availability, etc.:
Maneuver Center of Excellence Actions, Fort Benning, GA, 75691–75692

Arts and Humanities, National Foundation
See National Foundation on the Arts and the Humanities

Broadcasting Board of Governors
NOTICES
Meetings; Sunshine Act, 75671

Centers for Disease Control and Prevention
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 75721–75723

Commerce Department
See International Trade Administration
See National Oceanic and Atmospheric Administration

Commodity Futures Trading Commission
PROPOSED RULES
Significant Price Discovery Contracts on Exempt Commercial Markets, 75888–75921

Corporation for National and Community Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 75678–75679

Defense Department
See Air Force Department
See Army Department
See Navy Department
NOTICES
Modification of Federal Advisory Committee Charter, 75679
Privacy Act; Systems of Records, 75679–75686

Drug Enforcement Administration
NOTICES
Revocation of Registration:
Hicham K. Riba, D.D.S., 75773–75774
Your Druggist Pharmacy, 75774–75776

Education Department
NOTICES
Credit Enhancement for Charter School Facilities Program; Notice inviting Applications for New Awards (FY 2009), 75693–75698

Election Assistance Commission
NOTICES
Proposed Advisory 09-001 Maintenance of Effort Funding; Request for Public Comment, 75698–75700

Energy Department
See Federal Energy Regulatory Commission

Environmental Protection Agency
RULES
Approval and Promulgation of Implementation Plans:
Alaska; Interstate Transport of Pollution; Correction, 75600
Pesticide Regulations; Technical Amendments, 75592–75600
Pesticide Tolerance:
Etofenprox, 75601–75605
Pesticide Tolerances:
Isoxaflutole, 75605–75609
PROPOSED RULES
Data Requirements for Antimicrobial Pesticides; Extension of Comment Period, 75629

Revisions to the California State Implementation Plan:
Approval of the Ventura County Air Pollution Control District - Reasonably Available Control Technology Analysis, 75626–75628
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 75705–75709
Certain New Chemicals; Receipt and Status Information, 75709–75714
Environmental Impact Statements; Availability, etc.:
Comments Availability, 75714–75715
Weekly Receipt, 75715–75716
Integrated Science Assessment for Oxides of Nitrogen and Sulfur - Environmental Criteria; Document Availability, 75716–75717
Maine Marine Sanitation Device Standard - Receipt of Petition, 75717–75718
Meetings:
Board of Scientific Counselors, National Center for Environmental Research Standing Subcommittee, 75718–75719

Executive Office of the President
See Presidential Documents

Federal Communications Commission
PROPOSED RULES
Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, 75629–75630
Radio Broadcasting Services:
Mount Enterprise, TX, 75630–75631
Port Angeles, WA, 75631

Federal Deposit Insurance Corporation
NOTICES
Meetings; Sunshine Act, 75719–75720

Federal Emergency Management Agency
RULES
Suspension of Community Eligibility, 75609–75611
NOTICES
Disaster Housing Assistance Program (DHAP)-Ike, 75729–75730

Federal Energy Regulatory Commission
NOTICES
Applications:
Consumers Energy Co., 75700–75701
Riverbank Ogdensburg, LLC, 75701
Scott's Mill Hydropower, LLC, 75701–75702
Southern Natural Gas Co., 75702
Environmental Impact Statements; Availability, etc.:
Port Barre Investments, L.L.C. (d/b/a Bobcat Gas Storage); Bobcat Gas Storage Project Expansion, 75702–75705
Meetings:
Tuscarora Gas Transmission Co.; Technical Conference, 75705

Federal Motor Carrier Safety Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 75793–75794
Qualification of Drivers; Exemption Applications; Vision, 75794–75808

Federal Railroad Administration
NOTICES
Waiver of Compliance Request:
Capital Metropolitan Transportation Authority; Public Hearing, 75808–75809

Federal Reserve System
NOTICES
Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies, 75720
Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities, 75720

Financial Management Service
See Fiscal Service

Fiscal Service
RULES
Collateral Acceptability and Valuation, 75589–75591

Food and Drug Administration
PROPOSED RULES
Withdrawal of Certain Proposed Rules and Other Proposed Actions, 75625–75626
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 75723–75724
Draft Guidance for Industry and Food and Drug Administration Staff:
Submission and Review of Sterility Information in Premarket Notification Submissions for Devices Labeled as Sterile; Availability, 75724–75725

Food Safety and Inspection Service
RULES
Uniform Compliance Date for Food Labeling Regulations, 75564–75566

Forest Service
NOTICES
Environmental Impact Statements; Availability, etc.:
Wallowa-Whitman National Forest, Baker County, OR; Snow Basin Vegetation Management Project, 75667–75670
Proposed New Fee Sites, 75670

Health and Human Services Department
See Centers for Disease Control and Prevention
See Food and Drug Administration
See National Institutes of Health
NOTICES
Designation of a Class of Employees for Addition to the Special Exposure Cohort, 75720

Homeland Security Department
See Federal Emergency Management Agency
See U.S. Customs and Border Protection
RULES
Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 75540–75564
NOTICES
Environmental Impact Statements; Availability, etc.:
Proposed National Bio and Agro-Defense Facility, 75665–75667

Housing and Urban Development Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 75731–75732

Federal Property Suitable as Facilities to Assist the Homeless, 75732
Funding Availability (NOFA) for the Section 202 Demonstration Pre-Development Grant Program: Extension of Application Due Date, 75732–75733
Reconsideration of Waivers Granted to and Alternative Requirements for the State of Mississippi's CDBG Disaster Recovery Grant, 75733–75738
Regulatory Waiver Requests Granted for the Third Quarter (Calendar Year 2008), 75738–75763

Indian Affairs Bureau
NOTICES
Indian Gaming, 75764
Indian Gaming; Tribal-State Class III Gaming Compact Amendment Taking Effect, 75764

Interior Department
See Indian Affairs Bureau
See Land Management Bureau
See National Park Service
See Reclamation Bureau
See Surface Mining Reclamation and Enforcement Office

Internal Revenue Service
RULES
Creditor Continuity of Interest, 75566–75568

International Trade Administration
PROPOSED RULES
Steel Import Monitoring and Analysis System, 75624–75625
NOTICES
Extension of Final Results of Antidumping Duty Changed Circumstances Review:
Certain Pasta from Italy, 75671–75672
Final Results of Countervailing Duty Administrative Review:
Polyethylene Terephthalate Film, Sheet, and Strip from India, 75672–75673
Stainless Steel Plate in Coils from Belgium, 75673–75675
Final Results of Sunset Review and Revocation of Order:
High and Ultra-High Voltage Ceramic Station Post Insulators from Japan, 75675–75676
Quarterly Update to Annual Listing of Foreign Government Subsidies on Articles of Cheese Subject to an In-Quota Rate of Duty, 75676–75677

International Trade Commission
NOTICES
Investigations:
Certain Ground Fault Circuit Interrupters and Products Containing Same, 75768–75770
Circular Welded Carbon Quality Steel Line Pipe from China, 75770
Ethyl Alcohol for Fuel Use; Determination of the Base Quantity of Imports, 75770–75771

Judicial Conference of the United States
NOTICES
Meetings:
Advisory Committee on Rules of Bankruptcy Procedure, 75771
Committee on Rules of Practice and Procedure, 75771

Justice Department
See Antitrust Division
See Drug Enforcement Administration

Labor Department
See Occupational Safety and Health Administration

Land Management Bureau
NOTICES
Environmental Impact Statements; Availability, etc.:
Mimbres Resource Management Plan (RMPA), Las Cruces District Office, NM, 75764–75765
Meetings:
Central Montana Resource Advisory Council, 75765

National Foundation on the Arts and the Humanities
NOTICES
Meetings:
Arts Advisory Panel, 75776

National Institutes of Health
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 75725–75726
Meetings:
Center for Scientific Review, 75726–75727
National Eye Institute, 75727
National Institute on Deafness and Other Communication Disorders, 75727–75728
National Institute on Drug Abuse, 75728–75729

National Oceanic and Atmospheric Administration
RULES
Fisheries in the Western Pacific:
Bottomfish and Seamount Groundfish Fisheries; Management Measures for the Northern Mariana Islands, 75615–75622
Crustacean Fisheries; Deepwater Shrimp; Correction, 75622–75623
Taking of Marine Mammals Incidental to Commercial Fishing Operations:
Atlantic Large Whale Take Reduction Plan, 75611–75615
PROPOSED RULES
Fisheries of the Exclusive Economic Zone Off Alaska:
Bering Sea and Aleutian Islands Crab Rationalization Program, 75661–75664
Bering Sea and Aleutian Islands Management Area and Gulf of Alaska License Limitation Program, 75659–75661
Taking and Importing Marine Mammals:
U.S. Navy Training in the Virginia Capes Range Complex, 75631–75659
NOTICES
Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Adjustment to Exempted Fishing Permit, 75677–75678
U.S. Climate Change Science Program Draft Unified Synthesis Product:
Global Climate Change Impacts in the United States, 75678

National Park Service
NOTICES
Continuation of Visitor Services, 75765–75767
Extension of Concession Contracts, 75767

Navy Department
RULES
Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea (1972), 75591–75592
NOTICES
Privacy Act; Systems of Records, 75692–75693

Nuclear Regulatory Commission
NOTICES
Licensing Support System Advisory Review Panel; Renewal of Charter, 75776–75777

Occupational Safety and Health Administration
RULES
Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee, 75568–75589

Presidential Documents
PROCLAMATIONS
Special observances:
Human Rights Day, Bill of Rights Day, and Human Rights Week (Proc. 8328), 75923–75926
ADMINISTRATIVE ORDERS
Government Agencies and Employees:
Agency for International Development, U.S.; designation of officers to act as Administrator (Memorandum of December 9, 2008), 75535–75536

Presidio Trust
NOTICES
Environmental Impact Statements; Availability, etc.:
Presidio Trust Management Plan Main Post Update, 75777

Public Debt Bureau
See Fiscal Service

Reclamation Bureau
NOTICES
California Bay-Delta Public Advisory Committee; Charter Renewal, 75767–75768

Securities and Exchange Commission
NOTICES
Self-Regulatory Organizations; Proposed Rule Changes:
Municipal Securities Rulemaking Board, 75778–75787

State Department
NOTICES
Youth Programs Academic Year Disability Components; Request for Grant Proposals, 75787–75793

Surface Mining Reclamation and Enforcement Office
RULES
Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams, 75814–75885

Surface Transportation Board
NOTICES
Abandonment Exemption:
Union Pacific Railroad Co.; Comanche County, OK, 75809
Continuance in Control Exemption:
Watco Companies, Inc.; Alabama Warrior Railway, L.L.C., 75809–75810
Corporate Family Transaction:
Canadian Pacific Railway Co., Soo Line Holding Co., and Dakota, Minnesota & Eastern Railroad Corp., et al.; Iowa, Chicago & Eastern Railroad Corp., 75810
Operation Exemption:
Alabama Warrior Railway, L.L.C.; Sloss Industries Corp. and Jefferson Warrior Railroad Co., Inc., 75811
Petition for Exemption:
Alaska Railroad Corp.; Construct and Operate a Rail Line Between North Pole and Delta Junction, AK, 75811–75812

Tennessee Valley Authority
NOTICES
Renewal of the Regional Resource Stewardship Council, 75793

Transportation Department
See Federal Motor Carrier Safety Administration
See Federal Railroad Administration
See Surface Transportation Board

Treasury Department
See Fiscal Service
See Internal Revenue Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 75812

U.S. Customs and Border Protection
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 75730–75731

Separate Parts In This Issue

Part II
Interior Department, Surface Mining Reclamation and Enforcement Office, 75814–75885

Part III
Commodity Futures Trading Commission, 75888–75921

Part IV
Executive Office of the President, Presidential Documents, 75923–75926

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

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR

Proclamations:
Proclamation.....75925

Administrative Orders:
Memorandums:
Memorandum of July 10, 2002 (superseded by Memorandum of December 12, 2008)
Memorandum of December 9, 2008 75535

7 CFR
301.....75537
920.....75537

8 CFR
103.....75540
212.....75540
214.....75540
245.....75540
299.....75540

9 CFR
317.....75564
381.....75564

17 CFR

Proposed Rules:
15.....75888
16.....75888
17.....75888
18.....75888
19.....75888
21.....75888
36.....75888
40.....75888

19 CFR

Proposed Rules:
360.....75624

21 CFR

Proposed Rules:
Ch. 1 75625

26 CFR
1.....75566

29 CFR
1910.....75568
1915.....75568
1917.....75568
1918.....75568
1926.....75568

30 CFR
780.....75814
784.....75814
816.....75814
817.....75814

31 CFR
380.....75589

32 CFR
706.....75591

40 CFR
Ch. 1 75592
52.....75600
180 (2 documents) 75601, 75605

Proposed Rules:
52.....75626
158.....75629
161.....75629

44 CFR
64.....75609

47 CFR

Proposed Rules:
Ch. 1 75629
73 (2 documents) 75630, 75631

50 CFR
229 (2 documents) 75611, 75613
665 (2 documents) 75615, 75622

Proposed Rules:
216.....75631
679.....75659
680.....75661

Federal Register
Vol. 73, No. 240
Friday, December 12, 2008

Presidential Documents

Title 3—

The President

Memorandum of December 9, 2008

Designation of Officers of the United States Agency for International Development To Act As Administrator

Memorandum for the Administrator of the United States Agency for International Development

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.*, it is hereby ordered that:

Section 1. *Order of Succession.* Subject to the provisions of section 2 of this memorandum, the Assistant Administrators for the Bureaus, in the order in which they were appointed as an Assistant Administrator, shall act as and perform the functions and duties of the office of the Administrator (Administrator), during any period in which the Administrator and the Deputy Administrator have died, resigned, or otherwise become unable to perform the functions and duties of the office of Administrator, until such time as the Administrator or Deputy Administrator are able to perform the functions and duties of that office:

(a) Bureau for Africa;

(b) Bureau for Asia;

(c) Bureau for Democracy, Conflict, and Humanitarian Assistance;

(d) Bureau for Economic Growth, Agriculture, and Trade;

(e) Bureau for Europe and Eurasia;

(f) Bureau for Global Health;

(g) Bureau for Latin America and the Caribbean;

(h) Bureau for Legislative and Public Affairs;

(i) Bureau for Management; and

(j) Bureau for the Middle East.

Sec. 2. *Exceptions.* (a) No individual who is serving in an office listed in section 1 in an acting capacity, by virtue of so serving, shall act as the Administrator pursuant to this memorandum.

(b) No individual listed in section 1 shall act as Administrator unless that individual is otherwise eligible to so serve under the Federal Vacancies Reform Act of 1998.

(c) Notwithstanding the provisions of this memorandum, the President retains discretion, to the extent permitted by law, to depart from this memorandum in designating an acting Administrator.

Sec. 3. This memorandum supersedes the President's memorandum of July 10, 2002, (Designation of Officers of the United States Agency for International Development to Act as Administrator).

Sec. 4. This memorandum is intended to improve the internal management of the executive branch and 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, it agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person.

Sec. 5. You are authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, December 9, 2008.

[FR Doc. E8–29623
Filed 12–11–08; 8:45 am]
Billing code 6116–01–M

Rules and Regulations

Federal Register
Vol. 73, No. 240
Friday, December 12, 2008

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

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. APHIS–2008–0080]

RIN 0579–AC81

Citrus Canker; Movement of Fruit From a Quarantined Area; Bag Markings

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the regulations governing the interstate movement of fruit from an area quarantined for citrus canker to extend the temporary exception that allows fruit to be packed for interstate movement in bags that are clearly marked with only a limited distribution statement, if those bags are then packed in a box that is marked with both the limited distribution statement and the statement ''Limited Permit: USDA–APHIS–PPQ.'' The interim rule extended the ending date for this temporary exemption from August 1, 2008, to August 1, 2010. The interim rule was necessary to provide for the continued use of existing inventories of bags in which regulated fruit are packed while maintaining safeguards against the movement of regulated fruit to commercial citrus-producing States.

DATES: Effective on December 12, 2008, we are adopting as a final rule the interim rule published at 73 FR 44615–44617 on July 31, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Poe, Senior Staff Officer, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road Unit 137, Riverdale, MD 20737–1231; 301–734–8899.

SUPPLEMENTARY INFORMATION:

Background

Citrus canker is a plant disease caused by the bacterium *Xanthomonas citri* subsp. *citri* that affects plants and plant parts, including fresh fruit, of citrus and citrus relatives (Family Rutaceae). Citrus canker can cause defoliation and other serious damage to the leaves and twigs of susceptible plants. It can also cause lesions on the fruit of infected plants, which render the fruit unmarketable, and cause infected fruit to drop from the trees before reaching maturity. The aggressive A (Asiatic) strain of citrus canker can infect susceptible plants rapidly and lead to extensive economic losses in commercial citrus-producing areas. Citrus canker is only known to be present in the United States in the State of Florida.

The regulations to prevent the interstate spread of citrus canker are contained in §§ 301.75–1 through 301.75–14 of ''Subpart—Citrus Canker'' (7 CFR 301.75–1 through 301.75–17, referred to below as the regulations). The regulations restrict the interstate movement of regulated articles from and through areas quarantined because of citrus canker and provide, among other things, conditions under which regulated fruit may be moved into, through, and from quarantined areas for packing.

In an interim rule [1] effective and published in the **Federal Register** on July 31, 2008 (73 FR 44615–44617, Docket No. APHIS–2008–0080), we amended the regulations to extend the temporary exception that allows fruit to be packed for interstate movement in bags that are clearly marked with only a limited distribution statement, if those bags are then packed in a box that is marked with both the limited distribution statement and the statement ''Limited Permit: USDA–APHIS–PPQ.'' The interim rule extended the ending date for this temporary exemption from August 1, 2008, to August 1, 2010. The interim rule was necessary to provide for the continued use of existing inventories of bags in which regulated fruit are packed while maintaining safeguards against the movement of regulated fruit to commercial citrus-producing States.

Comments on the interim rule were required to be received on or before September 29, 2008. We received one comment by that date, from a State agricultural agency. The commenter supported the interim rule. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule without change.

This action also affirms the information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Orders 12372 and 12988, and the Paperwork Reduction Act.

Further, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

PART 301—DOMESTIC QUARANTINE NOTICES

■ Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR part 301 and that was published at 73 FR 44615–44617 on July 31, 2008.

Done in Washington, DC, this 8th day of December 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–29458 Filed 12–11–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Docket No. AMS–FV–08–0095; FV09–920–1 IFR]

Kiwifruit Grown in California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule decreases the assessment rate established for the Kiwifruit Administrative Committee

[1] To view the interim rule and the comment we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0080.*

(Committee) for the 2008–09 and subsequent fiscal periods from $0.045 to $0.035 per 9-kilo volume-fill container or equivalent of kiwifruit. The Committee locally administers the marketing order which regulates the handling of kiwifruit grown in California. Assessments upon kiwifruit handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins on August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective December 15, 2008; comments received by February 10, 2009 will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938, or Internet: *http://www.regulations.gov.* Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.* All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Debbie Wray, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, telephone: (559) 487–5901, Fax: (559) 487–5906, or E-mail: *Debbie.Wray@usda.gov,* or *Kurt.Kimmel@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 920, as amended (7 CFR part 920), regulating the handling of kiwifruit grown in California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, California kiwifruit handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable kiwifruit beginning on August 1, 2008, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule decreases the assessment rate established for the Committee for the 2008–09 and subsequent fiscal periods from $0.045 to $0.035 per 9-kilo volume-fill container or equivalent of kiwifruit.

The California kiwifruit marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers of California kiwifruit. They are familiar with the Committee's needs and the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2005–06 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on October 14, 2008, and unanimously recommended 2008–09 expenditures of $76,492 and an assessment rate of $0.035 per 9-kilo volume-fill container or equivalent of kiwifruit. In comparison, last year's budgeted expenditures were $99,302. The assessment rate of $0.035 per 9-kilo volume-fill container or equivalent is $0.010 per 9-kilo volume-fill container or equivalent less than the rate currently in effect. The decreased assessment rate is primarily due to a decrease in management expenditures for the 2008–09 fiscal year.

The following table compares major budget expenditures recommended by the Committee for the 2007–08 and 2008–09 fiscal periods:

Budget expense categories	2007–08	2008–09
Staff Salaries/Management	$65,150	$56,700
Financial Management Services	12,000	1,000
Audit Expense	5,000	3,500
Vehicle Maintenance/Insurance	3,180	.....
Travel	3,300	3,500
Office Expenses	2,830	4,500

The assessment rate recommended by the Committee was derived by using the following formula: Anticipated 2008–09 expenses ($76,492), minus the difference between the 2008 beginning reserve ($62,647) and the desired 2009 ending reserve ($54,311), divided by the total estimated 2008–09 shipments (1,944,444 9-kilo volume-fill containers). This formula results in the assessment rate of $0.035 per 9-kilo volume-fill container or equivalent. As mentioned earlier, kiwifruit shipments for the year are estimated at 1,944,444 9-kilo volume-fill containers which should provide $68,056 in assessment income. An additional $100 in penalty and interest income is also anticipated, bringing the total projected 2008–09 revenue to $68,156. Income generated through this rate, plus interest income and reserve funds, will provide sufficient funds to meet the anticipated expenses of $76,492 and should result in a July 2009 ending reserve of $54,311 which is within the maximum reserve of approximately one fiscal year's expenses permitted by the order (§ 920.42).

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2008–09 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 31 handlers of California kiwifruit subject to regulation under the marketing order and approximately 220 growers in the production area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000. None of the 31 handlers subject to regulation have annual kiwifruit sales of $7,000,000. Dividing average crop value for 2007–08 reported by the National Agricultural Statistics Service (NASS) of $22,517,000 by the number of producers (220) yields an average annual producer revenue estimate of about $102,350, which is well below the SBA threshold of $750,000. Based on the foregoing, it may be concluded that all kiwifruit handlers and the majority of producers may be classified as small entities.

This rule decreases the assessment rate established for the Committee and collected from handlers for the 2008–09 and subsequent fiscal periods from $0.045 to $0.035 per 9-kilo volume-fill container or equivalent of kiwifruit. The Committee unanimously recommended 2008–09 expenditures of $76,492 and an assessment rate of $0.035 per 9-kilo volume-fill container or equivalent of kiwifruit. The assessment rate of $0.035 is $0.010 lower than the 2007–08 rate. The quantity of assessable kiwifruit for the 2008–09 fiscal period is estimated at 1,944,444 9-kilo volume-fill containers or equivalent of kiwifruit. Thus, the rate should provide $68,056 in assessment income. Income derived from handler assessments, along with penalty and interest income and funds from the Committee's authorized reserve, will be adequate to cover budgeted expenses.

The following table compares major budget expenditures recommended by the Committee for the 2007–08 and 2008–09 fiscal years:

Budget expense categories	2007–08	2008–09
Staff Salaries/Management	$65,150	$56,700
Financial Management Services	12,000	1,000
Audit Expense	5,000	3,500
Vehicle Maintenance/Insurance	3,180	.....
Travel	3,300	3,500
Office Expenses	2,830	4,500

The Committee reviewed and unanimously recommended 2008–09 expenditures of $76,492 which included a reduction in management expenses. Prior to arriving at this budget, the Committee considered alternative expenditure levels, but ultimately decided that the recommended levels were reasonable to properly administer the order. The assessment rate recommended by the Committee was derived by using the following formula: Anticipated 2008–09 expenses ($76,492), minus the difference between the 2008 beginning reserve ($62,647) and the desired 2009 ending reserve ($54,311), divided by the total estimated 2008–09 shipments (1,944,444 9-kilo volume-fill containers). This formula results in the assessment rate of $0.035 per 9-kilo volume-fill container or equivalent. As mentioned earlier, kiwifruit shipments for the year are estimated at 1,944,444 9-kilo volume-fill containers which should provide $68,056 in assessment income. An additional $100 in penalty and interest income is also anticipated, bringing the total projected 2008–09 revenue to $68,156. Income generated through this rate, plus interest income and reserve funds, will provide sufficient funds to meet the anticipated expenses of $76,492 and should result in a July 2009 ending reserve of $54,311 which is within the maximum reserve of approximately one fiscal year's expenses permitted by the order (§ 920.42).

According to NASS, the season average grower price for years 2006 and 2007 were $911 and $950 per ton,

respectively. These prices provide a range within which the 2008–09 season average grower price could fall. Dividing these average grower prices by 2,000 pounds per ton provides a price per pound range of $0.46 to $0.48. Multiplying these per-pound prices by 19.8 pounds (the weight of a 9-kilo volume-fill container) yields a 2008–09 price range estimate of $9.11 to $9.50 per 9-kilo volume-fill container of assessable kiwifruit.

To calculate the percentage of grower revenue represented by the assessment rate, the assessment rate of $0.035 per 9-kilo volume-fill container is divided by the low and high estimates of the price range. The estimated assessment revenue for the 2008–09 fiscal year as a percentage of total grower revenue would thus likely range between 0.368 and 0.384 percent.

This action decreases the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, decreasing the assessment rate reduces the burden on handlers and may reduce the burden on producers. In addition, the Committee's meeting was widely publicized throughout the California kiwifruit industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the October 14, 2008, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

This action imposes no additional reporting or recordkeeping requirements on either small or large California kiwifruit handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the Committee's recommendation and other available information, it is found that this interim final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) This rule should be in place as soon as possible because the 2008–09 fiscal year began on August 1, 2008, handlers began shipping kiwifruit in mid-September, and the order requires that the rate of assessment for each fiscal period apply to all assessable kiwifruit handled during the period; (2) the Committee unanimously recommended this change at a public meeting and all interested parties had an opportunity to provide input; (3) this rule relaxes requirements currently in effect and kiwifruit producers and handlers are aware of this rule and need no additional time to comply with the relaxed requirements; and (4) this rule provides a 60-day comment period and any comments received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 920

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 920 is amended as follows:

PART 920—KIWIFRUIT GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 920 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 920.213 is revised to read as follows:

§ 920.213 Assessment rate.

On and after August 1, 2008, an assessment rate of $0.035 per 9-kilo volume-fill container or equivalent of kiwifruit is established for kiwifruit grown in California.

Dated: December 8, 2008.

James E. Link,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–29573 Filed 12–10–08; 4:15 pm]

BILLING CODE 3410–02–P

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103, 212, 214, 245 and 299

[CIS No. 2134–01; DHS Docket No. USCIS–2006–0067]

RIN 1615–AA60

Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Interim final rule with request for comments.

SUMMARY: The Department of Homeland Security is amending its regulations to permit aliens in lawful T or U nonimmigrant status to apply for adjustment of status to lawful permanent resident. T nonimmigrant status is available to aliens who are victims of a severe form of trafficking in persons and who are assisting law enforcement in the investigation or prosecution of the acts of trafficking. U nonimmigrant status is available to aliens who are victims of certain crimes and are being helpful to the investigation or prosecution of those crimes. This rule provides that family members of a principal T or U nonimmigrant granted or seeking adjustment of status may also apply for adjustment of status to lawful permanent resident. This rule also provides for adjustment of status or approval of an immigrant petition for certain family members of U applicants who were never admitted to the United States in U nonimmigrant status.

DATES: *Effective date:* This interim rule is effective January 12, 2009.

Comment date: Written comments must be submitted on or before February 10, 2009 in order to be assured of consideration.

ADDRESSES: You may submit comments, identified by DHS Docket No. USCIS–2006–0067, by any of the following methods:

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

• *Mail:* Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department

of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529. To ensure proper handling, please reference DHS Docket No. USCIS–2006–0067 on your correspondence. This mailing address may also be used for paper, disk, or CD–ROM submissions.

• *Hand Delivery/Courier:* U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529. Contact Telephone Number (202) 272–8377.

FOR FURTHER INFORMATION CONTACT: Laura Dawkins, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Second Floor, Washington, DC 20529, telephone (202) 272–8350.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. Comments that will provide the most assistance to U.S. Citizenship and Immigration Services in developing these procedures will refer to a specific portion of the rule, suggest changes to the regulation text, discuss the reason for the recommended change, and include data, information, or authority that support the recommended change.

Instructions: All submissions received should include the agency name and Docket No. USCIS–2006–0067 for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including e-mail addresses and any other personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected at the Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529 during normal business hours by contacting the information contact listed above.

II. Background and Legislative Authority

This rule implements the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Public Law No. 106–386, 114 Stat. 1464 (Oct. 28, 2000), as amended, to permit aliens in lawful T or U nonimmigrant status to apply for adjustment of status to lawful permanent resident.

Aliens who are victims of a severe form of trafficking in persons and who have complied with any reasonable requests for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking, or the investigation of a crime where acts of trafficking are at least one central reason for the commission of that crime, may be admitted to the United States under a ''T'' nonimmigrant classification or ''T visa.'' *See* Immigration and Nationality Act of 1952, as amended (INA or Act), sections 101(a)(15)(T) and 214(*o*), 8 U.S.C. 1101(a)(15)(T) and 1184(*o*). The Department of Justice (DOJ), through the former Immigration and Naturalization Service (INS), published regulations implementing the ''T'' nonimmigrant provisions in 2002. 67 FR 4784 (Jan. 31, 2002). Those regulations became effective on March 4, 2002.

Aliens who are victims of specified criminal activity, including trafficking, who assist government officials in investigating or prosecuting those crimes may be admitted to the United States under a ''U'' nonimmigrant classification or ''U visa.'' *See* INA sections 101(a)(15)(U) and 214(p); 8 U.S.C. 1101(a)(15)(U) and 1184(p). DHS published regulations implementing the provisions creating the U nonimmigrant classification on September 17, 2007. 72 FR 53014. The ''U'' regulations became effective October 17, 2007.

This interim final rule implements the provisions of the Act permitting T and U nonimmigrant aliens to apply for an adjustment status to that of lawful permanent resident. *See* INA sections 245(*l*), (m); 8 U.S.C. 1255(*l*), (m). This rule implements the eligibility and application requirements for such aliens to seek adjustment of status to lawful permanent resident.

III. Aliens in T Nonimmigrant Status Seeking Adjustment of Status Under Section 245(*l*) of the Act

A. Eligibility Requirements for T Nonimmigrants Seeking Adjustment of Status

This rule promulgates a new 8 CFR 245.23 to list the eligibility requirements for adjustment of status for T–1 nonimmigrants and their family members in lawful T–2, T–3, T–4, and T–5 status under section 245(*l*) of the Act, 8 U.S.C. 1255(*l*).

1. Admitted as a T Nonimmigrant

All applicants for adjustment of status under section 245(*l*) of the Act must have been lawfully admitted to the United States as a T nonimmigrant and must continue to hold such status at the time of application. New 8 CFR 245.23(a)(2); 245.23(b)(2).

2. Physical Presence for Requisite Period

T–1 nonimmigrant applicants for adjustment of status under section 245(*l*) of the Act must have been physically present in the United States for either: (1) A continuous period of at least 3 years since the date of admission as a T–1 nonimmigrant; or (2) a continuous period during the investigation or prosecution of the acts of trafficking, provided that the Attorney General has determined the investigation or prosecution is complete, whichever period is less. New 8 CFR 245.23(a)(3); *see* INA sec. 245(*l*)(1)(A); 8 U.S.C. 1255(*l*)(1)(A). With respect to the requisite continuous physical presence period, this rule provides that an applicant's date of admission as a T–1 nonimmigrant is the date that the applicant was first admitted as a T–1 nonimmigrant. New 8 CFR 245.23(a)(3). For example, if the applicant traveled outside the United States after being admitted as a T–1 nonimmigrant and reentered using an advance parole document issued under 8 CFR 245.2(a)(4)(ii)(B), the date that the applicant was first admitted as a T–1 nonimmigrant will be the date of admission used by USCIS for determining whether the applicant has satisfied the physical presence requirement, regardless of how the applicant's Form I–94 ''Arrival-Departure Record'' is annotated upon his or her reentry (e.g., as ''T nonimmigrant'' or ''parolee''). New 8 CFR 245.23(a)(3); 245.23(e)(2)(i).

However, this rule also provides that an applicant who travels outside of the United States for a single period in excess of 90 days or 180 days in the aggregate will not maintain the continuous physical presence required to establish eligibility for adjustment. New 8 CFR 245.23(a)(3); *see* INA sec. 245(*l*)(3), 8 U.S.C. 1255(*l*)(3). Unlike for U–1 nonimmigrants, the Act does not permit T–1 nonimmigrants to exceed the 90-day or 180-day limitation to assist in an investigation or prosecution or pursuant to an official certification justifying the excessive absence. *Compare* INA sec. 245(*l*)(3), 8 U.S.C. 1255(*l*)(3), with INA sec. 245(m)(2), 8 U.S.C. 1255(m)(2).

3. Admissible at Time of Adjustment

All applicants for adjustment of status under section 245(*l*) of the Act must be admissible to the United States under the Act, or otherwise have been granted a waiver by USCIS of any applicable ground of inadmissibility, at the time of

examination for adjustment. New 8 CFR 245.23(a)(4), 245.23(b)(4), 245.23(c)(2) and (3); *see* INA sec. 245(*l*)(2), 8 U.S.C. 1255(*l*)(2); INA sec. 212(a), 8 U.S.C. 1182(a) (listing grounds of inadmissibility and available waivers).

4. Good Moral Character

T–1 nonimmigrant applicants for adjustment of status under section 245(*l*) of the Act must establish that they have been persons of good moral character since first being lawfully admitted as a T–1 nonimmigrant and until USCIS completes the adjudication of their applications for adjustment of status. New 8 CFR 245.23(a)(5); *see* INA sec. 245(*l*)(1)(B), 8 U.S.C. 1255(*l*)(1)(B). However, section 101(f) of the Act, 8 U.S.C. 1101(f), precludes establishment of good moral character if, ''during the period for which good moral character is required to be established,'' an applicant falls into certain enumerated categories. The list of enumerated categories, however, is not exclusive. Section 101(f) of the Act also provides that persons who do not fall within any of the enumerated categories may also be found to lack good moral character.

Section 101(f)(3) of the Act specifically bars aliens who have engaged in prostitution or commercialized vice (described in section 212(a)(2)(D) of the Act, 8 U.S.C. 1182(a)(2)(D)), from establishing good moral character ''during the period for which good moral character is required to be established.'' *Id.* The period for which good moral character must be established under section 212(a)(2)(D) of the Act is 10 years from the date of application, but the period for which good moral character must be established under section 245(l) of the Act is a continuous period of at least 3 years since the date of admission or during the period of investigation or prosecution of the acts of trafficking, whichever period of time is less. The interplay of these provisions creates ambiguity and requires interpretation. After considering the necessary interplay between section 101(f)(3) of the Act, the 10-year temporal scope of section 212(a)(2)(D) of the Act, and the more limited period during which good moral character must be shown for purposes of adjustment of status under section 245(l) of the Act, USCIS believes, based on the purpose and history of the statute, that the more limited period is applicable. For example, if an applicant engaged in prostitution or commercialized vice after he or she was first lawfully admitted as a T–1 nonimmigrant, USCIS will consider the applicant to be statutorily precluded under section 101(f)(3) of the Act from establishing that he or she is a person of good moral character. If, on the other hand, the applicant engaged in prostitution or commercialized vice before he or she was first lawfully admitted as a T–1 nonimmigrant (which in many cases will be related to the trafficking of that individual), USCIS will not consider the applicant to be statutorily precluded under section 101(f)(3) of the Act from establishing that he or she is a person of good moral character because the applicant's activities did not occur during the period for which good moral character is required to be established for purposes of section 245(*l*) of the Act. This interpretation is consistent with the primary goal of the statute, which is to provide humanitarian assistance to victims who are assisting law enforcement in the investigation or prosecution of their traffickers. In construing the interplay between the relevant statutory provisions, the proper course is to adopt that sense of words which best harmonizes with the context, and then promotes in the fullest manner the policy and objects of Congress. *United States* v. *Hartwell,* 73 U.S. (6 Wall.) 385, 396 (1868); *see generally* 2A C. Sands, *Sutherland on Statutory Construction* sec. 46.05 (rev. 7th ed. 2008). For example, in cases in which an applicant was forced into sexual slavery or prostitution prior to being granted T–1 nonimmigrant status, it would be contrary to the purpose of the statute to prevent the applicant from showing good moral character for purposes of adjusting status to lawful permanent resident because he or she had engaged in prostitution within 10 years of the date of the application for adjustment of status, but before he or she was granted T–1 nonimmigrant status.

An applicant who is under 14 years of age is generally presumed to be a person of good moral character and is not required to submit evidence of good moral character. However, if there is reason to believe that an applicant who is under 14 years of age may lack good moral character, USCIS may require evidence of good moral character. New 8 CFR 245.23(g)(4).

5. Assistance in the Investigation or Prosecution

T–1 nonimmigrant applicants for adjustment of status under section 245(*l*) of the Act must establish either (i) that during the requisite period of continuous physical presence they have complied with any reasonable request for assistance in an ongoing Federal, State, or local investigation or prosecution of the acts of trafficking, as defined in 8 CFR 214.11(a), by submitting a document issued by the Attorney General or his designee certifying that he or she has complied with any reasonable requests for assistance (new 8 CFR 245.23(d), 245.23(f)(1)), or (ii) that they would suffer extreme hardship involving unusual and severe harm upon removal from the United States (new 8 CFR 245.23(d), 245.23(f)(2)).[1] *See* INA sec. 245(*l*)(1)(C), 8 U.S.C. 1255(*l*)(1)(C).

Although the T nonimmigrant provisions at section 101(a)(15)(T) of the Act, 8 U.S.C. 1101(a)(15)(T), exempt children under the age of 18 from the requirement to comply with reasonable requests for assistance, no similar age-related exemption is included in the adjustment provisions contained in section 245(*l*) of the Act, 8 U.S.C. 1255(*l*). Accordingly, this rule provides that to establish eligibility for adjustment of status, T–1 principal applicants under the age of 18 must either show that they have, since being lawfully admitted as a T nonimmigrant, complied with any reasonable request for assistance in the investigation or prosecution of the acts of trafficking, or meet the alternative ''extreme hardship'' requirement of section 245(*l*)(1)(C)(ii) of the Act. New 8 CFR 245.23(a)(6)(ii). When evaluating the reasonableness of a request for assistance made to a minor since admission as a T nonimmigrant, USCIS will consider the previous application of the exemption at section 101(a)(15)(T)(i)(III)(bb) of the Act.

6. Extreme Hardship Involving Unusual and Severe Harm

As noted above, section 245(*l*)(1)(C) of the Act, 8 U.S.C. 1255(*l*)(1)(C), permits T–1 applicants for adjustment of status the alternative of establishing they would suffer extreme hardship involving unusual and severe harm upon removal, in lieu of establishing assistance in the investigation or prosecution. This rule utilizes existing extreme hardship standards set forth at 8 CFR 214.11(i), which were established in the January 31, 2002, interim T nonimmigrant status rule. New 8 CFR 245.23(a)(6)(ii), 245.23(f)(2). These standards provide that extreme hardship involving unusual and severe harm may not be based upon current or future economic detriment, or the lack of or disruption to social or economic

[1] Section 245(*l*)(1)(C)(i) of the Act requires the Attorney General to determine whether T–1 nonimmigrant applicants have complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking. This rule does not address the Attorney General's authority to adjust status under section 245(*l*)(1)(C)(i) of the Act.

opportunities. Both traditional extreme hardship factors and factors associated with having been a victim of a severe form of trafficking in persons may be considered. Factors such as serious physical or mental illness of the applicant that necessitates medical or psychological attention not reasonably available in the foreign country, the nature and extent of the physical and psychological consequences of severe forms of trafficking in persons, and the likelihood that the trafficker or another acting on behalf of the trafficker in the foreign country would severely harm the applicant may be relevant to such a determination.

B. Application Procedures for T Nonimmigrants Seeking Adjustment of Status

This rule clarifies that the generally applicable adjustment of status provisions in 8 CFR 245.1 and 245.2 do not apply to applications for adjustment of status under the new 8 CFR 245.23. The adjustment provisions contained in section 245(*l*) of the Act, 8 U.S.C. 1255(*l*), are stand-alone provisions and not simply a variation on the general adjustment rules contained in section 245(a) of the Act, 8 U.S.C. 1255(a). New 8 CFR 245.23(k).

1. Filing the Application To Request Adjustment of Status

This rule requires that each applicant for adjustment of status under section 245(*l*) of the Act, 8 U.S.C. 1255(*l*), submit a complete application to USCIS: Form I–485, Application to Register Permanent Residence or Adjust Status, filed in accordance with the form instructions; applicable fees or application for a fee waiver; and any additional evidence to fully support the application. New 8 CFR 245.23(a)(1), 245.23(b)(3), 245.23(e). Derivative T nonimmigrants may not submit an application for adjustment of status before the principal T–1 alien files an application for adjustment of status. New 8 CFR 245.23(b)(1).

2. Timely Filing

Aliens who properly apply for adjustment of status in accordance with 8 CFR 245.23 shall remain eligible for adjustment of status. New 8 CFR 214.11(p)(2). T nonimmigrants who fail to apply for adjustment of status during the prescribed period will lose T nonimmigrant status at the end of the 4-year period unless that status is extended beyond 4 years because a Federal, State, or local law enforcement official, prosecutor, judge, or other authority investigating or prosecuting activity relating to human trafficking certifies that the presence of the alien in the United States is necessary to assist in the investigation or prosecution of such activity. *New* 8 CFR 214.11(p)(1); *see* INA sec. 214(*o*)(7)(B), 8 U.S.C. 1184(*o*)(7)(B).

In 2006, Congress altered several key aspects of the T nonimmigrant provisions and the related adjustment of status requirements, necessitating changes to 8 CFR 214.11(p). Congress extended the duration of status for a T nonimmigrant from 3 to 4 years and made T nonimmigrant status renewable beyond the 4-year maximum duration based on a certification of law enforcement necessity. Public Law No. 109–162, sec. 821(a), 119 Stat. 2960 (Jan. 5, 2006) (amending INA sec. 214(*o*)(7), 8 U.S.C. 1184(*o*)(7)). Without such renewal, however, the statute is clear that T nonimmigrant status may not extend beyond 4 years even if the individual has properly applied for adjustment of status.

This rule provides a transition rule for those T nonimmigrants who accrued 4 years in status prior to promulgation of this rule. Section 214(o)(7) of the Act, 8 U.S.C. 1184(o)(7), prescribes a maximum duration in T nonimmigrant status of 4 years, unless the T nonimmigrant receives a law enforcement certification stating that the T nonimmigrant's presence is necessary to assist in the investigation or prosecution. Therefore, T nonimmigrants who already accrued 4 years in status might not continue to hold such status at the time of application for adjustment of status and would otherwise be ineligible for adjustment of status. USCIS is therefore creating a transition rule to allow these aliens, if otherwise eligible, to adjust status if they file a complete application within 90 days of promulgation of this rule. New 8 CFR 245.23(a)(2)(ii).

Congress also allowed certain applicants to apply for adjustment of status before having accrued 3 years of continuous physical presence in valid T nonimmigrant status. Public Law No. 109–162, sec. 803(a)(1)(B) (amending INA sec. 245(*l*)(1)(A), 8 U.S.C. 1255(*l*)(1)(A)). This rule revises 8 CFR 214.11(p)(2) to implement the statutory changes.

Applicants for adjustment of status under section 245(*l*) of the Act may submit an application for employment authorization (Form I–765, Application for Employment Authorization, in accordance with the form instructions) on the basis of 8 CFR 274a.12(c)(9).

3. Initial Evidence

All applicants for adjustment of status under section 245(*l*) of the Act must submit all required ''initial evidence'' or supporting documentation with the Form I–485. 8 CFR 103.2(b)(1). Otherwise, USCIS will deem the application to be incomplete. If all required initial evidence is not submitted with the application or the evidence does not demonstrate statutory eligibility, USCIS may deny the application for lack of initial evidence, for ineligibility, or for both reasons. In the alternative, USCIS may request that the missing initial evidence be submitted within a specified period of time. 8 CFR 103.2(b)(8).

a. Evidence That Applicant Was Admitted in T Nonimmigrant Status

All applicants must submit a copy of the Form I–797, Notice of Action, granting T nonimmigrant status, with the attached Form I–94 Arrival/Departure Record, or a copy of the applicant's passport with a T nonimmigrant visa along with a copy of the Form I–94 Arrival/Departure Record evidencing that the principal alien was admitted into the United States in T nonimmigrant status. New 8 CFR 245.23(e)(2)(i).

b. Evidence of Continuous Physical Presence

T–1 nonimmigrant applicants may present as evidence of continuity of physical presence in the United States one or more documents issued by any governmental or nongovernmental authority, provided such evidence bears the name of the applicant, was dated at the time it was issued, and bears the signature, seal, or other authenticating instrument of the authorized representative of the issuing authority if the document would normally contain such indicia. New 8 CFR 245.23(e)(2)(i). An applicant may use college transcripts or employment records, including certification of the filing of Federal or state income tax returns, to show that an applicant attended school or worked in the United States throughout the requisite continuous physical presence period. The applicant may also present documents showing installment periods, such as a series of monthly rent receipts or utility bills that cover the same period, to establish continuous physical presence during that period. *See generally* 8 CFR 245.22.

An applicant need not submit documentation to show presence on every single day of the requisite continuous physical presence period, but there should be no significant chronological gaps in documentation. Any absence from the United States, even for one day, is significant for purposes of eligibility because of the

aggregate 180-day restriction on absences from the United States.

Furthermore, if an applicant is aware of documents already contained in his or her DHS file that establish physical presence, he or she may merely list those documents, giving the type and date of the document. Examples of such documents include a written copy of a sworn statement given to a DHS officer, a document from the law enforcement agency attesting to the fact that the T–1 nonimmigrant status holder has continued to comply with requests for assistance, the transcript of a formal hearing, or a Record of Deportable/Inadmissible Alien, Form I–213.

To facilitate USCIS' evaluation of an applicant's physical presence in the United States, this rule provides that an applicant must submit a copy of his or her passport (or equivalent travel document) and documentation regarding any departure from the United States and re-entry, including the dates of departure; time, manner, and place of return. New 8 CFR 245.23(e)(2)(i).

A signed statement from the T–1 applicant attesting to continuous physical presence alone will not be sufficient to establish this eligibility requirement. New 8 CFR 245.23(e)(2)(i). If documentation to establish continuous physical presence is not available, the applicant must explain why in an affidavit and provide additional affidavits from others with first-hand knowledge who can attest to the applicant's continuous physical presence by specific facts. *Id.*

This rule further provides that applicants seeking to meet the alternative continuous physical presence requirement at section 245(*l*)(1)(A) of the Act (less than 3 years of continuous physical presence while in T–1 nonimmigrant status if the investigation or prosecution is complete) must submit a document signed by the Attorney General, or his designee, as an attachment to the Form I–485, Supplement E, stating that the investigation or prosecution is complete. New 8 CFR 245.23(e)(2)(i)(B).

c. Evidence of Admissibility

Applicants who are inadmissible by reason of a ground not waived in connection with the prior application for T nonimmigrant status must file an application for a waiver of inadmissibility under section 245(*l*)(2) of the Act (Form I–601, Application for Waiver of Grounds of Excludability) with the application to adjust status. New 8 CFR 212.18(a). A separate fee for Form I–601 or a fee waiver request must be remitted with the form. This rule clarifies that Form I–601 is used for this purpose and that a fee is charged for waiver of any ground of inadmissibility. 8 CFR 103.7(b)(1).

Applicants who are inadmissible on security related grounds (INA sec. 212(a)(3), 8 U.S.C. 1182(a)(3)), as international child abductors (INA sec. 212(a)(10)(C), 8 U.S.C. 1182(a)(10)(C)), or as former citizens who renounced citizenship to avoid taxation (INA sec. 212(a)(10)(E), 8 U.S.C. 1182(a)(10)(E)), are not eligible for waivers of inadmissibility under section 245(*l*)(2) of the Act. New 8 CFR 245.23(c)(1); *see* INA sec. 245(*l*)(2)(B), 8 U.S.C. 1255(*l*)(2)(B).

USCIS may waive the health-related (INA sec. 212(a)(1), 8 U.S.C. 1182(a)(1)) and public charge (INA sec. 212(a)(4), 8 U.S.C. 1182(a)(4)) grounds of inadmissibility if USCIS determines that a waiver is in the national interest as a matter of discretion. *See* INA sec. 245(*l*)(2)(A). USCIS understands the waiver of the public charge ground in light of two other provisions of law, Pub. L. 106–386, sections 107(b)(1)(A) and (E), 114 Stat. 1464 (Oct. 28, 2000), which provide that victims of a severe form of trafficking in persons who are over 18 years of age may be certified by the Secretary of Health and Human Services (HHS) to receive certain benefits and services ''to the same extent as an alien who is admitted to the United States as a refugee.'' Victims of a severe form of trafficking in persons who are under 18 are also eligible for services, including cash assistance, to the same extent as refugees, but they do not need to be certified by HHS. Refugees are provided with special humanitarian benefits because of their vulnerable circumstances, and are exempt from virtually every aspect of the public charge determination. Congress has recognized that victims of a severe form of trafficking in persons are in much the same position as refugees, and therefore provided specific authority for DHS to exempt them from the public charge ground of inadmissibility when applying for T nonimmigrant status. *See* INA sec. 212(d)(13)(A); 8 U.S.C. 1182(d)(13)(A). However, this statutory exemption does not apply to adjustment of status. Consequently, at that stage, applicants must either demonstrate that they are not likely to become public charges under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), or must apply for a waiver of that ground of inadmissibility under section 245(*l*)(2)(A) of the Act, 8 U.S.C. 1255(*l*)(2)(A). In evaluating waiver requests, if an applicant is receiving or has received public benefits as a trafficking victim, USCIS will not consider that fact as conclusive evidence of the likelihood the applicant will become a public charge.

USCIS also may waive any other ground of inadmissibility, but only if USCIS determines that a waiver is in the national interest and that the activities rendering the applicant inadmissible were caused by or were incident to the principal alien's trafficking victimization. *See* INA sec. 245(*l*)(2)(B). Applicants seeking such a waiver must establish that the activities rendering the applicants inadmissible were caused by or incident to their trafficking victimization, that it is in the national interest to waive the ground(s) of inadmissibility, and that the waiver is warranted as a matter of discretion. New 8 CFR 212.18(b)(3).

Under section 212(a)(9)(B)(iii) of the Act, 8 U.S.C. 1182(a)(9), applicants may be exempted from the unlawful presence ground of inadmissibility if they can establish that their victimization was ''at least one central reason'' for their unlawful presence in the United States. *See* INA sec. 212(a)(9)(B)(iii)(V), 8 U.S.C. 1182(a)(9)(B)(iii)(V). This rule clarifies that to be a ''central reason,'' the victimization need not be the sole reason for the unlawful presence, but the nexus between the victimization and the unlawful presence must be more than tangential, incidental, or superficial. New 8 CFR 245.23(c)(3); *cf. Matter of J-B-N- & S-M-*, 24 I&N 208, 214 (BIA 2007) (interpreting the ''one central reason'' standard in the asylum context). An applicant requesting only an exemption from section 212(a)(9)(B)(B)(iii)(V) of the Act need not file a Form I–601. New 8 CFR 245.23(c)(3). The applicant, however, must submit with his or her Form I–485 evidence sufficient to demonstrate that the victimization suffered was a central reason for the unlawful presence in the United States. *Id.*

As discussed below, applicants whose adjustment of status applications are denied, including the denial of a request for exemption from the application of section 212(a)(9)(B) of the Act, and the denial of an application for a waiver of inadmissibility (Form I–601) may appeal to the USCIS Administrative Appeals Office (AAO). New 8 CFR 245.23(i).

This rule also clarifies that USCIS may revoke its approval of a waiver of inadmissibility. New 8 CFR 212.18(d); *see also* 8 CFR 103.5.

d. Evidence of Good Moral Character

Initial evidence of a T–1 nonimmigrant applicant's good moral character is the applicant's affidavit attesting to his or her good moral

character, accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the applicant has resided for six or more months during the requisite period in T–1 nonimmigrant status. New 8 CFR 245.23(g). If police clearances, criminal background checks, or similar reports are not available for some or all locations, the applicant may include an explanation and submit other evidence with his or her affidavit. *Id.*

A T–1 nonimmigrant applicant who is under 14 years of age is generally presumed to be a person of good moral character and is not required to submit evidence of good moral character. However, if USCIS has reason to believe that an applicant who is under 14 years of age may lack good moral character, USCIS may require evidence of good moral character. *Id.*

e. Evidence of Assistance in the Investigation or Prosecution

To meet the ''assistance'' requirement, T–1 applicants must submit a document signed by the Attorney General or his designee certifying that he or she has complied with any reasonable requests for assistance. New 8 CFR 245.23(d), 245(f)(1).

f. Evidence of Extreme Hardship Involving Unusual and Severe Harm

In lieu of showing continued compliance with requests for assistance, T–1 applicants may establish that they would suffer extreme hardship involving unusual and severe harm upon removal from the United States. Such hardship determinations will be evaluated on a case-by-case basis, in accordance with the factors described in 8 CFR 214.11(i). No particular piece of evidence will guarantee a finding that extreme hardship involving unusual and severe harm would result if the applicant is removed from the United States. To minimize the burden of submitting voluminous documentary evidence and to streamline the adjudication of the adjustment application, this rule provides that where the basis for the hardship claim represents a continuation of the hardship claimed in the previously approved application for T nonimmigrant status, the applicant need not re-document the entire hardship claim, but instead may submit evidence demonstrating that the previously-established hardship is ongoing. New 8 CFR 245.23(f)(2). However, in reaching its decision regarding hardship under this section, USCIS is not bound by its previous hardship determination made under 8 CFR 214.11(i). *Id.*

4. Additional Requirements for Derivative Family Members

Derivative family members may apply for adjustment of status under section 245(*l*)(1) provided the T–1 principal applicant meets the eligibility requirements for adjustment of status and the T–1 principal applicant's adjustment application has been approved, is currently pending, or is concurrently filed. New 8 CFR 245.23(b).

As with T–1 principal applicants, to be eligible for adjustment of status under section 245(*l*) of the Act, derivative family members must be admissible to the United States under the Act, or otherwise have been granted a waiver by USCIS of any applicable ground of inadmissibility, at the time of examination for adjustment. New 8 CFR 245.23(a)(4), 245.23(b)(4), 245.23(c)(2) and (3); *see* INA sec. 245(*l*)(2), 8 U.S.C. 1255(*l*)(2); INA sec. 212(a), 8 U.S.C. 1182(a). Section 245(*l*)(2)(B) of the Act also permits USCIS to waive any ground of inadmissibility that may be applicable to a derivative family member, except for the grounds related to national security, international child abduction, and former citizens who renounced citizenship to avoid taxation. Such a waiver may be granted if USCIS determines that it is in the national interest to do so and that the activities rendering the derivative family member inadmissible were caused by or were incident to the T–1 principal alien's victimization. *See* INA sec. 245(*l*)(2), 8 U.S.C. 1255(*l*)(2). A waiver application for a derivative family member will be adjudicated in accordance with new 8 CFR 212.18.

5. Evidence Relating to Discretion

Consistent with all of the other adjustment of status provisions, section 245(*l*) of the Act makes adjustment of status to that of a lawful permanent resident a discretionary benefit. To enable USCIS to determine whether to exercise discretion favorably, this rule provides that all T adjustment applicants have the burden of showing that discretion should be exercised in their favor. New 8 CFR 245.23(e)(3). Generally, favorable factors such as family ties, hardship, and length of residence in the United States may be sufficient to merit a favorable exercise of administrative discretion. However, where adverse factors are present, the applicant will need to offset these factors by showing sufficient mitigating equities. This rule permits applicants to submit information regarding any mitigating factors they wish to be considered. *Id.* Depending on the nature of an applicant's adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's adverse factors, such a showing might still be insufficient. *Id. See Matter of Jean*, 23 I&N Dec. 373, 383–384 (A.G. 2002), *aff'd Jean* v. *Gonzales*, 452 F.3d 392 (5th Cir. 2006). *See also Pinentel* v. *Mukasey*, 530 F.3d 321 (5th Cir. 2008); *Meija* v. *Gonzales*, 499 F.3d 991 (9th Cir. 2007). For example, only the most compelling positive factors would justify a favorable exercise of discretion in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns. *Id.*

6. Application and Biometric Services Fees

The fee for filing an Application to Register Permanent Residence or Adjust Status (Form I–485) is listed at 8 CFR 103.7(b). USCIS recognizes that some applicants for adjustment of status under section 245(*l*) of the Act may be unable to pay the full application fee. Applicants who are able to show that they are financially unable to pay the application fee may submit an application for a fee waiver as outlined in 8 CFR 103.7(c). This rule also permits a fee waiver for the Form I–601 fee. The decision whether to grant a fee waiver lies within the sole discretion of USCIS. Further guidance on fee waivers can be found on the USCIS Web site currently at *http://www.uscis.gov/feewaiver.*

In addition to the filing fee for the Form I–485 and Form I–601, if applicable, applicants will have to submit the established fee for biometric services, or fee waiver request, for each person ages 14 through 79 inclusive with each application. This fee can also be found at 8 CFR 103.7(b).

C. Traveling While Application for Adjustment of Status Is Pending

T nonimmigrants applying for adjustment of status, and who are not in removal, exclusion, or deportation proceedings, must follow the generally applicable rule that an applicant with a pending adjustment of status application must obtain advance parole from USCIS. New 8 CFR 245.23(j); 8 CFR 245.2(a)(4)(ii)(B). Advance parole can be requested by completing and filing Form I–131, Application for Travel Document, in accordance with the instructions on the form, or any other appropriate form, before departing

the United States. *Id.* If an applicant fails to acquire advance parole prior to departure, USCIS will deem the application for adjustment of status abandoned as of the moment of departure from the United States. If the adjustment of status application of such an individual is subsequently denied, he or she will be treated as an applicant for admission subject to sections 212 and 235 of the Act. *Id.* If a T nonimmigrant applying for adjustment of status is in removal, exclusion, or deportation proceedings, USCIS will deem the application for adjustment of status abandoned as of the moment of the applicant's departure from the United States if the applicant failed to acquire advance parole prior to departure. New 8 CFR 245.23(i); 8 CFR 245.2(a)(4)(ii)(A).

D. Decisions on Applications Under Section 245(l) of the Act

1. Annual Limitation on the Number of Adjustments of T–1 Nonimmigrants

USCIS may adjust the status of no more than 5,000 T–1 principal aliens in a given fiscal year. *See* INA sec. 245(*l*)(4)(A), 8 U.S.C. 1255(*l*)(4)(A). This numerical limitation does not apply to spouses, children, parents, and unmarried siblings in T–2, T–3, T–4, and T–5 status who seek adjustment of status as derivatives. *See* INA sec. 245(*l*)(4)(B), 8 U.S.C. 1255(*l*)(4)(B).

USCIS will adjudicate applications in the order in which they are received. Once the numerical limit has been reached in a particular fiscal year, all pending and subsequently received applications will continue to be reviewed in the normal process to determine eligibility. However, USCIS will not approve adjustment of status prior to the beginning of the next fiscal year and not until a number under the cap becomes available. New 8 CFR 245.23(l)(2). USCIS will place eligible applicants who are not granted adjustment of status due solely to the numerical limit on a waiting list and notify the applicants of that placement. *Id.* Applicants on the waiting list will be given priority in the following fiscal year based on the date the application was properly filed. *Id.*

2. Decisions on Applications

USCIS will notify an applicant in writing of its decision on the adjustment of status and any applicable waiver application. New 8 CFR 245.23(h). If the application is approved, USCIS will issue a notice of approval, instructing the applicant to go to a local USCIS office or an Application Support Center to complete Form I–89, which collects the necessary information to produce the Form I–551 (Alien Registration Receipt Card or ''green card''). The notice of approval will also inform the applicant how to obtain temporary evidence of lawful permanent resident status. Upon approval of an application for adjustment of status, USCIS will record the alien's admission as a lawful permanent resident as of the date of such approval. *See* INA sec. 245(*l*)(5), 8 U.S.C. 1255(*l*)(5).

If the application for adjustment of status is denied, the applicant will be notified in writing of the reasons for the denial and of the right to appeal the decision to the USCIS Administrative Appeals Office. New 8 CFR 245.23(i). Because derivative family members' applications are dependent upon approval of the principal applicant's adjustment application, this rule also provides that denial of the T–1 principal applicant's application will result in the automatic denial of a derivative family member's application. *Id.*

IV. Aliens in U Nonimmigrant Status Adjusting Status Under Section 245(m) of the Act

A. Eligibility Requirements for U Nonimmigrants Seeking Adjustment of Status

This rule promulgates new 8 CFR 245.24 to list the eligibility requirements for adjustment of status for U–1 nonimmigrants and their family members in lawful U–2, U–3, U–4, and U–5 nonimmigrant status under section 245(m) of the Act, 8 U.S.C. 1255(m).

1. Admitted as a U Nonimmigrant

All applicants for adjustment of status under section 245(m) of the Act must have been lawfully admitted to the United States in U nonimmigrant status and must continue to hold such status at the time of the application. New 8 CFR 245.24(b)(2).

This rule provides a transition rule for those aliens who accrued 4 years or more in U interim relief status prior to promulgation of this rule. Section 214(p)(6) of the Act, 8 U.S.C. 1184(p)(6), prescribes a maximum duration in U nonimmigrant status of 4 years, unless the U nonimmigrant receives a law enforcement certification stating that the U nonimmigrant's presence is necessary to assist in the investigation or prosecution. Title 8 CFR 214.14(c)(6) provides that aliens with U interim relief status whose Form I–918, Petition for U Nonimmigrant Status, is approved will be accorded U nonimmigrant status as of the date that a request for U interim relief was initially approved. Therefore, aliens who already accrued 4 years in U interim relief status might not continue to hold such status at the time of application for adjustment of status and would otherwise be ineligible for adjustment of status. USCIS is therefore creating a transition rule to allow these aliens, if otherwise eligible, to apply to adjust status within 120 days of approval of the Form I–918. New 8 CFR 245.24(b)(2)(ii). Recipients of U interim relief may apply for adjustment of status after 4 years in U interim relief status if they have previously filed a complete Form I–918. *Id.* If the Form I–918 is subsequently approved, USCIS will then adjudicate the pending adjustment application. USCIS believes that this transition rule will allow applicants to remain eligible to adjust status and will not penalize those applicants with more than 4 years in U interim relief status.

2. Physical Presence for Requisite Period

All applicants for adjustment of status under section 245(m) of the Act must have maintained continuous physical presence in the United States for at least 3 years since the date of admission as a U nonimmigrant. New 8 CFR 245.24(b)(3); *see* INA sec. 245(m)(1)(A), 8 U.S.C. 1255(m)(1)(A). Applicants who have departed from the United States for any period in excess of 90 days or for any periods exceeding 180 days in the aggregate shall not be considered to have maintained continuous physical presence. New 8 CFR 245.24(a)(1); *see* INA sec. 245(m)(2), 8 U.S.C. 1255(m)(2). An absence for any period in excess of 90 days or for any periods exceeding 180 days is permissible only if the excessive absence is necessary to assist in the investigation or prosecution of persons in connection with the qualifying criminal activity or if an official involved in the investigation or prosecution certifies that the absence is otherwise justified. *Id.* Absences for less than 90 days at one time or 180 days in the aggregate will not be deducted from the requisite continuous physical presence period required to establish eligibility for adjustment of status and will not be deemed an interruption of the period. *Id.*

3. Unreasonable Refusal To Assist in the Investigation or Prosecution

Section 245(m)(1) of the Act, 8 U.S.C. 1255(m)(1), prohibits USCIS from adjusting the status of an otherwise eligible U nonimmigrant if the Attorney General determines, based on affirmative evidence, that the U nonimmigrant unreasonably refused to provide assistance to a Federal, State, or local criminal investigation or prosecution. USCIS interprets this

statutory provision as imposing an ongoing requirement for U–1 nonimmigrants not to refuse unreasonably to provide assistance in an investigation or prosecution. For a derivative family member of a U–1 nonimmigrant (a U–2, U–3, U–4, or U–5 nonimmigrant) who was not required to provide such assistance as a prerequisite for obtaining U nonimmigrant status, USCIS interprets this provision to mean that if the derivative U–2, U–3, U–4, or U–5 nonimmigrant possessed information about the qualifying criminal activity on which the U–1 nonimmigrant petition was based and was asked to assist in the investigation or prosecution, the derivative U nonimmigrant has a responsibility not to unreasonably refuse to provide that assistance.

Thus, this rule defines ''refusal to provide assistance in a criminal investigation or prosecution'' as the refusal by the alien to provide assistance to an official or law enforcement agency that had responsibility for the investigation or prosecution of persons in connection with the qualifying criminal activity after the alien was granted U nonimmigrant status. New 8 CFR 245.24(a)(5).

The rule provides that the determination of whether an alien's refusal to provide assistance was unreasonable will be based on all available affirmative evidence and take into account the totality of the circumstances and such factors as general law enforcement, prosecutorial, and judicial practices; the kinds of assistance asked of other victims of crimes involving an element of force, coercion, or fraud; the nature of the request to the alien for assistance; the nature of the victimization; the applicable guidelines for victim and witness assistance; and the specific circumstances of the applicant, including fear, severe trauma (either mental or physical), and the age and maturity of the applicant. New 8 CFR 245.24(a)(5).

In order to facilitate implementation of this statutory requirement, the rule provides that applicants must submit evidence that demonstrates whether or not they received requests for assistance from an official or law enforcement agency that had responsibility for the investigation or prosecution of persons in connection with the qualifying criminal activity after the applicants were granted U nonimmigrant status and the applicants' response to such requests. New 8 CFR 245.24(d)(8); 245.24(e). The applicant is not required to establish the reasonableness of any refusals to comply with such requests for assistance, as it is a matter for the Attorney General to determine whether any refusal was unreasonable. However, it is appropriate and consistent with the statutory scheme to require the applicants to describe any requests they received for law enforcement assistance, to identify the persons or agencies who made the requests, and to state how they responded to such requests. As a general matter, the alien is in a proper position to identify such basic facts relating to whether any such requests for assistance were made to the alien and how the alien responded to the requests. This information is necessary for the Attorney General to be able to evaluate whether an alien's refusal to provide assistance was unreasonable under the circumstances. Given the range of qualifying offenses for the U visa, USCIS anticipates that the substantial majority of such crimes will be the subject of state or local criminal investigations and prosecutions, rather than cases arising under federal criminal laws, and, in addition, that many of the investigations and prosecutions may already have been closed (perhaps for several years) by the time the alien is applying for adjustment of status, given the requirement that the alien must be in U nonimmigrant status for 3 years before applying for adjustment.

In order to facilitate the adjudication of U adjustment applications, this rule provides an option for applicants to obtain a document signed by an official or law enforcement agency that had responsibility for persons in connection with the investigation or prosecution of the qualifying criminal activity. New 8 CFR 245.24(e)(1). The document should affirm that the applicant complied with (or did not refuse to comply with) reasonable requests for assistance in the investigation or prosecution during the requisite period. *Id.* Applicants, if they so choose, may satisfy this evidentiary requirement by submitting a newly executed Form I–918, Supplement B, ''U Nonimmigrant Status Certification.'' New 8 CFR 245.24(e)(2). If the alien does choose to submit such a document in support of his or her application, USCIS (with the agreement of DOJ) has concluded that there would be no need to refer the application to DOJ absent extraordinary circumstances. This option will thus simplify the evidence aliens are expected to submit in support of their adjustment applications and will avoid delays in the adjudicatory process attributable to the requirement to refer U adjustment applications to DOJ.

USCIS is aware that, in some cases, it may be difficult, if not impossible, for an applicant to obtain such a document. Therefore, if an applicant does not submit such a document, the applicant may submit an affidavit describing the applicant's efforts, if any, to obtain a newly executed Form I–918, Supplement B, or other evidence describing whether or not the alien received any request to provide assistance in a criminal investigation or prosecution and the alien's response to any such request. New 8 CFR 245.24(e)(2). The applicant should include a description of all instances of which the applicant is aware in which the applicant was requested to provide assistance in the criminal investigation or prosecution of persons in connection with the qualifying criminal activity after the applicant was granted U nonimmigrant status and how the alien responded to such requests. *Id.* Applicants should also include, when possible, identifying information about the law enforcement personnel involved in the case and any information of which the applicant is aware about the status of the criminal investigation or prosecution, including any charges filed and the outcome of any criminal proceedings, or whether the investigation or prosecution was dropped and the reasons. *Id.* Depending on the circumstances, evidence might include such documentation as court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits of other witnesses or officials. If applicable, an applicant also may choose to provide a more detailed description of situations where the applicant declined to comply with requests for assistance because the applicant believed that the failure to comply with such requests for assistance was reasonable under the circumstances. *Id.*

The instructions to the Form I–918, Supplement B, U Nonimmigrant Status Certification, require that officials who sign a Supplement B in support of an alien's application for U nonimmigrant status have an obligation to notify USCIS if the alien has refused to assist in the investigation or prosecution of persons in connection with the qualifying criminal activity. At any time, USCIS or DOJ may at its discretion contact the agency that certified the Form I–918, Supplement B, or any other law enforcement authority, for information concerning an applicant's continuing assistance in an investigation or prosecution. New 8 CFR 245.24(e)(3).

Additionally, in accordance with procedures determined by DOJ and DHS, USCIS will refer certain applications for adjustment of status,

including any affirmative evidence of applicants' refusal to provide assistance in a criminal investigation or prosecution, to DOJ for a determination of whether the applicant has unreasonably refused to comply with a request for assistance in an investigation or prosecution. New 8 CFR 245.24(e)(4). USCIS anticipates referring an application to DOJ only if a certifying official or agency has provided evidence that the alien has refused to provide such assistance, or if there is other affirmative evidence in the record suggesting that the applicant may have unreasonably refused to provide assistance to the investigation or prosecution of persons in connection with the qualifying criminal activity. In these instances, USCIS will request that DOJ determine, based on all available affirmative evidence, whether the applicant has unreasonably refused to comply with a request for assistance. DOJ will have 90 days to provide a written determination to USCIS, or where appropriate, request an extension of time to provide such a determination. *Id.* After such time, USCIS may adjudicate the application whether or not DOJ has provided a response. *Id.*

B. Application Procedures for U Nonimmigrants Seeking Adjustment of Status

This rule clarifies that the generally applicable adjustment of status provisions in 8 CFR 245.1 and 8 CFR 245.2 do not apply to applications for adjustment of status under the new 8 CFR 245.24. The adjustment provisions contained in section 245(m) of the Act, 8 U.S.C. 1255(m), are stand-alone provisions and not simply a variation of the general adjustment rules contained in section 245(a) of the Act, 8 U.S.C. 1255(a). New 8 CFR 245.24(*l*).

This rule also provides that USCIS will maintain sole jurisdiction over the adjudication of applications to adjust status under section 245(m) of the Act because the statutory language vests this authority in the Secretary of Homeland Security. New 8 CFR 245.24(f).

This rule designates Form I–485, Application to Register Permanent Residence or Adjust Status, as the form that a U nonimmigrant status holder must use to request adjustment of status. New 8 CFR 245.24(d). The instructions to Form I–485 specify where applicants must file their application packages.

The rule requires applicants to follow the instructions on the form for proper completion and to include the proper fees or a fee waiver request. New 8 CFR 245.24(d). The rule also instructs applicants to submit supporting evidence to establish continuous physical presence, as well as any information the applicant would like USCIS to consider when determining whether adjustment of status is warranted as a matter of discretion on humanitarian grounds or to ensure family unity, or is otherwise in the public interest. *Id.*

1. Evidence That Applicant Was Admitted in U Nonimmigrant Status

All applicants must submit a copy of the Form I–797, Notice of Action, granting U nonimmigrant status, with the attached Form I–94 Arrival/Departure Record, or a copy of the applicant's passport with a U nonimmigrant visa along with a copy of the Form I–94 Arrival/Departure Record evidencing the applicant's admission into the United States in U nonimmigrant status. New 8 CFR 245.24(d).

2. Evidence Relating to Requests for Assistance in an Investigation or Prosecution

An application for adjustment of status under section 245(m) of the Act, 8 U.S.C. 1255(m), may not be approved where the Attorney General or his designee determines based on affirmative evidence that the applicant unreasonably refused to provide assistance to an official or law enforcement agency that had responsibility for the investigation or prosecution of persons in connection with the qualifying criminal activity after the applicant was granted U nonimmigrant status. New 8 CFR 245.24(d)(8); 245.24(e).

As discussed above, an applicant can facilitate the adjudication of the adjustment application by obtaining a document signed by an official or law enforcement agency that had responsibility for the investigation or prosecution of persons in connection with the qualifying criminal activity, affirming that the applicant complied with (or did not unreasonably refuse to comply with) requests for assistance in the investigation or prosecution during the requisite period. New 8 CFR 245.24(e)(1). Applicants may satisfy this option by submitting a newly executed Form I–918, Supplement B, ''U Nonimmigrant Status Certification.'' *Id.*

However, if an applicant does not submit such a document, the applicant may submit an affidavit describing the applicant's efforts, if any, to obtain a newly executed Form I–918, Supplement B, or other evidence describing whether the alien received any request to provide assistance in a criminal investigation or prosecution and the alien's response to any such request. New 8 CFR 245.24(e)(2).

3. Evidence of Continuous Physical Presence

All applicants must submit evidence, including an affidavit, attesting that they have accrued 3 years of continuous physical presence in the United States since admission in U nonimmigrant status. New 8 CFR 245.24(d)(9). Such evidence may include one or more documents issued by any governmental or nongovernmental authority, provided such evidence bears the name of the applicant, was dated at the time it was issued, and bears the signature, seal, or other authenticating instrument of the authorized representative of the issuing authority if the document would normally contain such indicia. An applicant also may submit college transcripts or employment records, including certification of the filing of Federal or state income tax returns, to show that he or she attended school or worked in the United States throughout the entire 3-year U nonimmigrant status period. The applicant also may submit documents showing installment payments, such as a series of monthly rent receipts or utility bills that cover the same 3-year period, to establish continuous physical presence. *See generally* 8 CFR 245.22.

An applicant need not submit documentation to show presence on every single day of the 3-year U nonimmigrant status period, but there should be no significant chronological gaps in documentation. Any absence from the United States, even for one day, is significant for purposes of eligibility because of the aggregate 180-day restriction on absences from the United States.

If the applicant is aware of documents already contained in his or her DHS file that establish physical presence, he or she need only list those documents, giving the type and date of the document. Examples of such documents might include a written copy of a sworn statement given to a DHS officer, a document from a law enforcement agency attesting to the fact that the U nonimmigrant has continued to comply with requests for assistance, the transcript of a formal hearing, or a Record of Deportable/Inadmissible Alien, Form I–213.

To facilitate USCIS' evaluation of physical presence in the United States, applicants must submit documentation regarding any departure and re-entry, including a copy of their passport (or equivalent travel document) with dates of departure and corresponding time, manner, and place of return. New 8 CFR

245.24(d)(5) and (6). Applicants who were absent from the United States for any period in excess of 90 days or for any periods in the aggregate of 180 days or more must submit a statement from the investigating or prosecuting agency certifying that the absences were necessary to assist in the investigation or prosecution, or were otherwise justified. *Id.* The omission of such certification will result in denial of the application.

A signed statement from the applicant attesting to continuous physical presence alone will not be sufficient to establish this eligibility requirement. *Id.* If documentation to establish continuous physical presence is not available, the applicant must explain why in an affidavit and provide additional affidavits from other individuals with first-hand knowledge who can attest to the applicant's continuous physical presence by specific facts. *Id.*

4. Evidence Relating to Admissibility and Discretion

The only ground of inadmissibility applicable to U nonimmigrants applying for adjustment of status under section 245(m) of the Act is section 212(a)(3)(E) of the Act, 8 U.S.C. 1182(a)(3)(E), which relates to participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing. This ground of inadmissibility is not waivable for purposes of adjustment of status of U nonimmigrants. *See* INA sec. 245(m)(1), 8 U.S.C. 1255(m)(1). Otherwise, U adjustment applicants are not required to establish that they are admissible on any of the grounds set forth in section 212(a) of the Act.

Nevertheless, as with all of the other adjustment of status provisions, section 245(m) of the Act makes adjustment of status under that section a discretionary benefit. To enable USCIS to determine whether to exercise discretion favorably, applicants have the burden of showing that discretion should be exercised in their favor. New 8 CFR 245.24(d)(11). Although U adjustment applicants are not required to establish that they are admissible, USCIS may take into account all adverse factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application. Generally, favorable factors such as family ties, hardship, and length of residence in the United States may be sufficient to merit a favorable exercise of administrative discretion. However, where adverse factors are present, it will be necessary for the applicant to offset these factors by showing sufficient mitigating factors. This rule permits applicants to submit information regarding any mitigating factors they would like USCIS to consider when determining whether a favorable exercise of discretion is appropriate. *Id.* Depending on the nature of an applicant's adverse factors, the applicant may be required to demonstrate clearly that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's adverse factors, such a showing might still be insufficient. *Id. See Matter of Jean*, 23 I&N Dec. 373, 383–384 (A.G. 2002), aff'd *Jean* v. *Gonzales*, 452 F.3d 392 (5th Cir. 2006). *See also Pinentel* v. *Mukasey*, 530 F.3d 321 (5th Cir. 2008); *Meija* v. *Gonzales*, 499 F.3d 991 (9th Cir. 2007). For example, only the most compelling positive factors would justify a favorable exercise of discretion in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns. 8 CFR 245.24(d)(11).

C. Decisions on Adjustment of Status Applications From U Nonimmigrants

USCIS will give written notice of its decision on the adjustment of status application to the applicant. New 8 CFR 245.24(f). If the application is approved, USCIS will issue a notice of approval instructing the applicant to go to a local USCIS office or Application Support Center to complete Form I–89, which collects the necessary information to produce the Form I–551 (Alien Registration Receipt Card or ''green card''). The notice of approval will also inform the applicant how to obtain temporary evidence of lawful permanent resident status. Upon approval of an application for adjustment of status, USCIS will record the alien's admission as a lawful permanent resident as of the date of such approval. New 8 CFR 245.24(f)(1); *see* INA sec. 245(m)(4), 8 U.S.C. 1255(m)(4).

If the application for adjustment of status is denied, the applicant will be notified in writing of the reasons for the denial and of the opportunity to appeal the decision to the Administrative Appeals Office (AAO). New 8 CFR 245.24(f)(2). Because section 245(m) of the Act gives the Secretary of Homeland Security exclusive authority over applications for adjustment of status of U nonimmigrants, such applications may not be renewed or otherwise filed before an immigration judge in removal proceedings. New 8 CFR 245.24(k). The Attorney General will publish companion rules amending 8 CFR parts 1240 and 1245.

D. Qualifying Family Members Who Have Never Held U Nonimmigrant Status

Section 245(m) of the Act, 8 U.S.C. 1255(m), allows two categories of qualifying family members of principal U–1 nonimmigrants to apply for adjustment of status or an immigrant visa: (1) Family members in lawful U–2, U–3, U–4, or U–5 nonimmigrant status; and (2) certain qualifying family members who have never held U nonimmigrant status. Because the procedures for family members in lawful U status are the same as those for principal applicants and have already been discussed above, this section will only discuss those qualified family members who have never held U nonimmigrant status.

1. Eligibility Requirements

After granting adjustment of status to a U–1 principal applicant, USCIS may grant lawful permanent resident status to certain spouses, children, and parents based upon their relationship to the principal applicant. *See* INA sec. 245(m)(3), 8 U.S.C. 1255(m)(3). The statute allows USCIS to extend these derivative benefits only if: (1) The qualifying family member was never admitted to the United States in U nonimmigrant status, and (2) it is established that either the family member or the U–1 principal applicant would suffer extreme hardship if the qualifying family member is not allowed to remain in or be admitted to the United States. *Id.* Because qualifying family members' applications are dependent upon approval of the principal applicant's adjustment of status application, this rule provides that denial of the U–1 principal applicant's application would result in the automatic denial of a derivative family member's application. New 8 CFR 245.24(h)(2)(ii).

This rule establishes a two-stage application process (described in detail below) for qualifying family members to obtain lawful permanent residence. First, the principal applicant must file an immigrant petition on behalf of the qualifying family member. New 8 CFR 245.24(h). Second, if the immigrant petition is approved, qualifying family members who are present in the United States may adjust their status to that of lawful permanent residents, and qualifying family members outside the United States may go to a U.S. embassy

or consulate to obtain their immigrant visas. *Id.*

2. Immigrant Petition Process

This rule establishes a new form for U–1 principal applicants to file on behalf of qualifying family members: USCIS Form I–929, ''Petition for Qualifying Family Member of a U–1 Nonimmigrant'' (I–929). New 8 CFR 245.24(h)(1). U–1 principals may file Form I–929 concurrently with, or at any time after they have filed, their Form I–485 under section 245(m) of the Act. This rule provides, however, that a Form I–929 may not be approved until the U–1 principal's application to adjust status is approved. New 8 CFR 245.24(h)(2).

Form I–929 must be filed with the applicable fee, or fee waiver request, and in accordance with the form instructions. New 8 CFR 245.24(h)(1)(ii). It must be submitted with evidence establishing the relationship, such as a birth or marriage certificate. New 8 CFR 245.24(h)(1)(iii). If primary evidence is not available, secondary evidence or affidavits may be submitted in accordance with 8 CFR 103.2(b)(2).

Section 245(m)(3) of the Act, 8 U.S.C. 1255(m)(3), requires the Secretary to determine whether the U–1 principal or a qualifying family member would suffer extreme hardship if the family member is not allowed to remain in or join the U–1 principal in the United States. This rule, therefore, requires Form I–929 to be submitted with evidence establishing that the qualifying family member, or the principal U–1 alien, would suffer extreme hardship as described in new 8 CFR 245.24(h)(1)(iv) (to the extent the factors listed are applicable). USCIS will consider all credible relevant evidence of extreme hardship and will evaluate each application on a case-by-case basis in accordance with the factors outlined in new 8 CFR 245.24(h)(1)(iv). The decision that an applicant has met his or her burden of demonstrating extreme hardship is a matter of discretion. No particular piece of evidence will guarantee a finding that extreme hardship would result if the applicant's family members were not allowed to enter or remain in the United States.

As discussed above, U adjustment applicants are not required to establish that they are admissible on any of the grounds set forth in section 212(a) of the Act, 8 U.S.C. 1182(a), other than on section 212(a)(3)(E) of the Act (relating to participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing), and the companion restrictions set forth in sections 245(a) and (c) of the Act, 8 U.S.C. 1255(a) and (c), do not apply to applicants for lawful permanent residence under section 245(m). Nevertheless, approval of adjustment of status under that section is a discretionary determination of the Secretary. Consequently, this rule provides that the qualifying family member has the burden of showing that discretion should be exercised in his or her favor. Although U adjustment applicants are not required to establish that they are admissible on any of the grounds set forth in section 212(a) of the Act except under section 212(a)(3)(E) of the Act, USCIS may take into account all adverse factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application. Generally, favorable factors such as family ties, hardship, and length of residence in the United States may be sufficient to merit a favorable exercise of administrative discretion. However, where adverse factors are present, the applicant must offset these factors by showing sufficient mitigating equities. This rule permits applicants to submit information regarding any mitigating factors they would like USCIS to consider when determining whether a favorable exercise of discretion is appropriate. New 8 CFR 245.24(h). Depending on the nature of an applicant's adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's adverse factors, such a showing might still be insufficient. *Id. See Matter of Jean*, 23 I&N Dec. 373, 383–384 (A.G. 2002), aff'd *Jean* v. *Gonzales*, 452 F.3d 392 (5th Cir. 2006). *See also Pinentel* v. *Mukasey*, 530 F.3d 321 (5th Cir. 2008); *Meija* v. *Gonzales*, 499 F.3d 991 (9th Cir. 2007). For example, only the most compelling positive factors would justify a favorable exercise of discretion in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns. *Id.*

This rule provides that USCIS will provide written notice of its decision on the Form I–929 to the applicant. New 8 CFR 245.24(h)(2). If USCIS denies the Form I–929, the applicant will be notified in writing of the reasons for the denial and of the opportunity to appeal the decision to the USCIS Administrative Appeals Office. New 8 CFR 245.24(h)(2)(ii).

Upon approval of a Form I–929 for a qualifying family member who is outside of the United States, USCIS will forward the notice of approval either to the Department of State's National Visa Center so the applicant can apply to the consular post for an immigrant visa, or to the appropriate port of entry for a visa exempt alien. New 8 CFR 245.24(h)(2)(i)(A). Those family members issued immigrant visas under section 245(m)(3) of the Act, 8 U.S.C. 1255(m)(3), must still establish admissibility before a U.S. Customs and Border Protection (CBP) officer when applying for admission to the United States at a port of entry. Once a Form I–929 is approved for a qualifying family member who is in the United States, the family member becomes eligible to apply for adjustment of status.

3. Adjustment of Status for Qualifying Family Members Who Never Held U Nonimmigrant Status

This rule allows a U–1 principal to file the Form I–929 for qualifying family members either concurrently with or at a later date than their Form I–485 application for adjustment of status. Form I–485 must be filed with the appropriate fee or fee waiver request and in accordance with the form instructions. Upon approval of a Form I–485, USCIS will issue a notice of approval, instructing the applicant to go to a local USCIS office or Application Support Center to complete Form I–89, which collects the necessary information to produce the Form I–551. The notice of approval also will inform the applicant how to obtain temporary evidence of lawful permanent resident status. USCIS will record the alien's admission for lawful permanent residence as of the date of such approval. New 8 CFR 245.24(i)(2)(i).

If either the Form I–929 or the Form I–485 is denied, USCIS will notify the applicant in writing of the reasons for the denial and of the opportunity to appeal the decision to the USCIS Administrative Appeals Office. New 8 CFR 245.24(i)(2)(ii). Because qualifying family members' applications depend on approval of the principal applicant's adjustment application, this rule also provides that denial of the U–1 principal applicant's application will result in the automatic denial of a qualifying family member's application. *Id.*

4. Fee To Be Charged for Form I–929, Petition for Qualifying Family Member of a U–1 Nonimmigrant

USCIS is proposing to charge a fee to recover the costs incurred to adjudicate

the petitions for qualifying family members of U–1 nonimmigrants. USCIS is authorized by law to recover the full cost of processing every Form I–929. However, the resources required to deliver this benefit are difficult to estimate due to the small number of potential applicants and the differing level of complexity involved in the determination of each application.

To determine a reasonable fee, USCIS reviewed the requirements of other programs that provide special benefits to the same or similar user populations as the new Form I–929. Information on other forms, such as the quantity of information that must be researched, collected, completed, submitted, and analyzed were used as an indication of the resources expended by USCIS to deliver the benefit. Those indicators were compared with that of the Form I–929 to arrive at a fee for the Form I–929.

The reasonable fee for USCIS to charge a petitioner for adjudication of a Form I–929 was calculated using several methods. For ease of administration, USCIS has decided to charge the same fee for each Form I–929. The one fee policy will be revisited if inequities to certain groups are noted. The analysis indicated that USCIS should collect a fee of $215 for each Form I–929 adjudication. A copy of the detailed fee determination is available from USCIS upon request. USCIS recognizes that some applicants for adjustment of status may be unable to pay the full application fee. Applicants who are financially unable to pay the application fee may submit an application for a fee waiver, as outlined in 8 CFR 103.7(c). The granting of a fee waiver will be at the sole discretion of USCIS. Further guidance on USCIS fee waivers can be found on the USCIS Web site currently at *http://www.uscis.gov/feewaiver*.

E. Traveling While Application for Adjustment of Status Is Pending

U nonimmigrants who are applying for adjustment of status, and who are not under exclusion, deportation, or removal proceedings, must follow the generally applicable rule that an applicant with a pending adjustment of status application must obtain advance parole from USCIS. 8 CFR 245.2(a)(4)(ii)(B). Advance parole can be requested by completing and filing Form I–131, Application for Travel Document, in accordance with the instructions on the form, or any other appropriate form, before departing the United States. New 8 CFR 245.24(j), 245.2(a)(4)(ii)(B). If such an applicant fails to acquire advance parole prior to departure, USCIS will deem the application for adjustment of status abandoned as of the moment of departure from the United States. If the adjustment of status application of such an individual is subsequently denied, he or she will be treated as an applicant for admission subject to sections 212 and 235 of the Act, 8 U.S.C. 1182, 1225. *Id.* If a U nonimmigrant applying for adjustment of status is under exclusion, deportation, or removal proceedings, USCIS will deem the application for adjustment of status abandoned as of the moment of the applicant's departure from the United States if the applicant failed to acquire advance parole prior to departure. New 8 CFR 245.24(j), 245.2(a)(4)(ii)(A).

F. Employment Authorization While Adjustment of Status Application Is Pending

Applicants for adjustment of status under section 245(m) of the Act may apply for employment authorization on the basis of 8 CFR 274a.12(c)(9). Applicants must submit a Form I–765, Application for Employment Authorization, in accordance with the form instructions.

G. Application and Biometric Services

As stated above, section 286(m) of the Act, 8 U.S.C. 1356(m), requires that USCIS collect fees to recover the cost of providing certain immigration and naturalization benefits.

The required fee for filing an Application to Register Permanent Residence or Adjust Status (Form I–485) is listed at 8 CFR 103.7(b). USCIS recognizes that some applicants for adjustment of status may be unable to pay the full application fee. Applicants who are financially unable to pay the application fee may submit an application for a fee waiver as outlined in 8 CFR 103.7(c). The decision whether to grant a fee waiver lies within the sole discretion of USCIS. Further guidance on fee waivers can be found on the USCIS Web site currently at *http://www.uscis.gov/graphics/formsfee/forms/index.htm*.

In addition to the filing fee for the Form I–485, applicants must submit the established fee for biometric services, or a fee waiver request, for each person age 14 through 79 inclusive. New 8 CFR 245.24(d)(3). This fee can also be found at 8 CFR 103.7(b).

V. Regulatory Requirements

A. Administrative Procedure Act

USCIS has determined that delaying the effect of this rule during the period of public comment would be impracticable and contrary to the public interest. This rule is being published as an interim final rule and is effective 30 days after publication. USCIS invites comments and will address those comments in the final rule.

If the implementation of the provisions of this rule were delayed pending public comments, many aliens could be required to depart the United States because of the automatic termination of their nonimmigrant status even though they would become eligible for adjustment of status upon promulgation of this rule.

An interim rule, New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for ''T'' Nonimmigrant Status, provided for T nonimmigrant status. 67 FR 4784 (Jan. 31, 2002). As stated above, a T nonimmigrant's failure to timely apply for adjustment of status will result in termination of that T status at the end of that 4-year period unless the T status is extended because law enforcement certifies that the presence of the alien in the United States is necessary to assist in an investigation or prosecution. *See* INA sec. 214(*o*)(7)(B), 8 U.S.C. 1184 (*o*)(7)(B). Currently, approximately 330 principal T–1 nonimmigrants have been in T nonimmigrant status for more than 3 years and therefore are eligible to apply for adjustment of status under this rule immediately upon its effective date. There is a risk that the 4-year limitation for T nonimmigrant status will run out for these aliens, resulting in termination of T nonimmigrant status. Therefore, USCIS has determined that this rule needs to become effective as soon as possible to ensure that these aliens can apply for adjustment of status and avoid falling out of lawful immigration status.

Likewise, U nonimmigrants may apply for adjustment of status after they have been in lawful U nonimmigrant status for at least 3 years. *See* INA sections 101(a)(15)(U), 214(p), and 245(m); 8 U.S.C. 1101(a)(15)(U), 1184(p), and 1255(m). The interim final rule implementing U nonimmigrant classification was recently published. 72 FR 53014 (Sept. 17, 2007). A U nonimmigrant is eligible to apply for adjustment of status if the alien was admitted in either U–1, U–2, U–3, U–4, or U–5 nonimmigrant status and has continuous physical presence for at least 3 years. New 8 CFR 245.24. Currently, there are approximately 5,000 aliens who were granted interim benefits before they could apply for U nonimmigrant status. These aliens were deemed prima facie eligible for U nonimmigrant status prior to publication of the regulations for U nonimmigrant status. The U-visa rule provides that the time spent in interim

relief will count toward the 3 years of physical presence required for adjustment of status purposes, 8 CFR 214.14(a)(13), and U nonimmigrant status will be granted as of the date that a request for U interim relief was initially approved, 8 CFR 214.14(c)(6). USCIS estimates that 2,100 of the 5,412 aliens currently granted interim benefits pending publication of the U nonimmigrant regulations will have been in the United States for 3 years when this rule is published. Therefore, a similar problem exists for those granted U nonimmigrant status as with T nonimmigrants if the effective date of this rule is delayed pending public notice and comment.

B. Regulatory Flexibility Act

DHS has reviewed this rule in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities because of the following factors. The rule applies to individuals, not small entities, and allows certain aliens who are victims of severe forms of trafficking in persons or victims of crimes listed in section 101(a)(15)(U) of the Act to adjust their status to lawful permanent residents; it has no effect on small entities as that term is defined in 5 U.S.C. 601(6).

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based companies to compete with foreign-based companies in domestic and export markets.

E. Executive Order 12866 (Regulatory Planning and Review)

This rulemaking is a ''significant'' regulatory action under Executive Order 12866. As required by section 6(a)(3)(C) of the Executive Order, USCIS prepared an assessment of the benefits and costs anticipated to occur as a result of this rule for the Office of Management and Budget.

The VTVPA was intended to combat trafficking in persons with preventative measures, prosecution of traffickers, and protection of victims. USCIS adjudicates applications for immigration benefits filed by victims of a severe form of trafficking in persons and other specified crimes. According to findings from the National Crime Victimization Survey, in 2005, U.S. residents age 12 or older experienced approximately 23 million crimes; 22% (5.2 million) were crimes of violence. For every 1,000 persons age 12 or older, there occurred: 1 rape or sexual assault, 1 assault with injury, and 3 robberies. However, only 49.9 percent of all violent crimes are reported to police.[2] Aliens, especially those without legal immigration status, are often reluctant to help in the investigation or prosecution of those crimes. And, while there is no specific data on alien victims of crime, demographic statistics indicate that aliens may be victimized at even higher rates than citizens. For example, in 2005, persons in households with an annual income under $7,500 experienced higher rates of robbery and assault than persons in households with higher income levels. In addition, Hispanics were victims of overall violence at a rate higher than non-Hispanics, making up 15% of all violent crime victims, but only 13% of the population. U visas are intended, in part, to help overcome this reluctance to aid in law enforcement.

As of May 2004, the U.S. Government estimated that 14,500 to 17,500 people are trafficked annually into the United States and 600,000 to 800,000 are trafficked globally. Also, 80 percent of trafficking victims are female, 70 percent of those are trafficked for commercial sex, and most victims trafficked to the U.S. come from East Asia and the Pacific.

1. Economic Impacts—Fees

This rule and the VTVPA, as amended, are intended to enhance the ability of law enforcement and to advance humanitarian goals. The main benefits of a rule change imposed by Congress to address such concerns tend to be intangible. Nonetheless, DHS has assessed both the costs and benefits of this rule and they are as follows:

USCIS uses fees to fund the cost of processing applications and associated support benefits, providing benefits to asylum and refugee applicants, and providing benefits to other immigrants at no charge. The fees to be collected as a result of this rule will be approximately $2,955,880 in the first year after this rule is published, $1,932,880 in the second year, and average about $32,472,880 per year in the third and subsequent years. To estimate the new fee collections to be generated by this rule, USCIS estimated the fees to be collected for new applications for adjustment of status from T and U nonimmigrants and their eligible family members. After that, we estimated fees from associated applications that are required such as biometrics, and others that are likely to occur in direct connection with applications for adjustment, such as employment authorization or travel authorization.

T adjustment. Currently, there are 787 persons with T nonimmigrant status as principals (T–1) and 682 in the United States who are derivatives (relatives) of the principal (T–2, T–3, T–4, T–5), for a total of 1,469 persons with T visas.

Primary T–1. Approximately 330 T–1 nonimmigrants have been in such status for 3 years and are therefore eligible to apply for adjustment of status to that of a lawful permanent resident under this rule. Thus, at least those 330 T–1 nonimmigrants are expected to apply for adjustment of status in the year after this rule takes effect. The fee for Form I–485 is $930.[3] Thus, an estimated annual fee collection of $306,900 for adjustment for T status for primary T nonimmigrants will result directly from this rule. The numbers of applications and fees collected are expected to be similar in future years.

Derivatives. Of the 682 derivatives of the principal (T–2, T–3, T–4, T–5 nonimmigrants), it is estimated that 286 have been in the country for 3 years or more, using the same ratio of T–1 nonimmigrants who have been in the U.S. for 3 years (330 of 787, or 42%). As a result, 286 primary T–1 derivatives are eligible and will apply for adjustment of status under this rule. This would result in fees collected from applications for adjustment of status for T–1 derivative nonimmigrants of $265,980 in the first

[2] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Criminal Victimization, *http://www.ojp.gov/bjs/cvictgen.htm.*

[3] Children under 14 applying with a parent must pay $600 and the fee is waivable for certain applicants, but for this analysis, no adjustments are made in this analysis for any fee waivers or reduced fees for children under 14.

year this interim rule is effective (286 × $930 Form I–485 fee). This figure is expected to be similar in future years.

U-adjustment (U–1). In the supporting documents for the rule ''New Classification for Victims of Criminal Activity; Eligibility for 'U' Nonimmigrant Status'' (''U-visa rule''), USCIS estimated that approximately 12,000 people will apply for U nonimmigrant status in the first year after that rule is effective. However, no more than 10,000 principal aliens may be granted U nonimmigrant status in a given fiscal year (October 1 through September 30). For the purposes of this rule and this accompanying analysis, USCIS estimates that the 10,000 cap will be reached each year. USCIS also estimates that every U nonimmigrant will apply for adjustment of status as soon as he or she can, if they can and if still in the country, following publication of this interim rule. Thus, USCIS expects that 10,000 aliens will be eligible to apply for adjustment of status after they have been in U status for 3 years. USCIS estimates that each such U–1 nonimmigrant will apply and submit Form I–485, and the prescribed fee, although most U adjustments will not occur until 3 years after the U-visa rule was effective. In year 3, therefore, additional fees expected to be collected by USCIS under this rule are $9,300,000 ($930 fee for form I–485 × 10,000). Results are expected to be similar in subsequent years.

Interim relief. Approximately 5,412 people were granted deferred action and work authorization benefits by USCIS based on a determination that they were prima facie eligible for U nonimmigrant status prior to publication of the regulations for U status. The U-visa rule provides that the time spent in interim relief will be counted toward the 3-year physical presence required for adjustment of status. Of those 5,412 people, USCIS estimates that 2,100 will have been continuously present for 3 years when this rule is published; 1,000 more will qualify in year 2 of this rule being effective. This will result in fee income from petitions for U adjustments of $1,953,000 (2,100 × $930) in year 1, and $930,000 in year 2. The additional 1,312 will qualify in future years.

Derivatives (U–2). The 10,000 per fiscal year limitation does not apply to spouses, children, parents, and unmarried siblings who are accompanying or following to join the principal alien victim. Thus, it is estimated that relatives of U nonimmigrants will apply for adjustment of status approximately 3 years following the effective date of their approval for U nonimmigrant status. USCIS estimates that each U nonimmigrant will bring an average of about two family members to the United States and that those family members will want to adjust their status when they are eligible. The fee income generated by the resulting 20,000 applicants each remitting a fee of $930 results in fee income of $18,600,000 in year 3 after the rule becomes effective, and thereafter.

Family members who are not U nonimmigrants—''Qualifying Family Members.'' New Form I–929, Petition for Qualifying Family Member of a U–1 nonimmigrant, will be used by U nonimmigrants to request derivative benefits for qualifying family members who never held U nonimmigrant status. U nonimmigrants may also petition for derivative status on behalf of resident family members by submitting a Form I–918, Supplement A, ''Petition for Qualifying Family Member of U–1 Recipient,'' for each qualifying family member either at the same time or after filing his or her own Form I–918. To apply for adjustment, U nonimmigrants must submit Form I–485. For those family members in the United States who have never had U nonimmigrant status, the U nonimmigrant may apply for adjustment for those family members by submitting Form I–929, after or concurrently with their own request for adjustment of status submitted on Form I–485 with both fees, plus the biometric services fee or fee waiver requests.

Family members never admitted to the United States. Qualifying family members who are present in the United States may apply for immigrant visas on behalf of qualifying family members outside the United States. If the Form I–929 is approved for such family members, the family members may go to a U.S. embassy or consulate to obtain their immigrant visa. USCIS estimates that 20,000 people will apply for derivative U visas annually as nonresidents, because the principal can apply to bring a family member to the United States as soon as the principal applies for a U nonimmigrant visa. It is logical that many aliens will do that on their initial Forms I–918 rather than wait until they apply for a visa or seek to bring them to the United States after they apply for adjustment of status. Thus, it is estimated that only 2,000 of the 20,000 people who will apply for U visas will have family members who apply for this benefit, and that they will only apply for an average of one family member each. Consequently, the new Form I–929, ''Petition for Qualifying Family Member of a U–1 Nonimmigrant,'' will result in additional fee collections of about $430,000 per year, beginning in the first year that this rule is in effect, and continuing consistently thereafter.

Employment authorization. USCIS charges no additional fee for an employment authorization request by an applicant who has paid the I–485 fee. Thus, no fee income is estimated from primary or secondary T or U nonimmigrants applying for adjustment of status under this rule for employment authorizations.

Travel document. USCIS charges no fee for an I–131 filed by an applicant who has paid the Form I–485 application fee. Therefore, an I–131 fee will only be charged to U derivatives who will be submitting the new Form I–929 without a concurrent Form I–485. However, very few applicants are expected to do so. Thus, no fee income is estimated from Form I–131 as a result of this rule.

Biometric services fees. USCIS will collect a fee for biometrics services for adjustment applications from T and U nonimmigrants and their derivative family members. For the purposes of this analysis it is assumed that all of the 31,000 estimated applications submitted per year under this rule will have to submit biometrics. Also, all of the 2,000 estimated annual Forms I–929 are estimated to require the collection of biometrics and payment of the applicable fee. The USCIS biometrics services fee is $80. The resultant fee income will be $2,480,000.

Waiver of grounds of inadmissibility. T nonimmigrants who apply for adjustment of status may need an inadmissibility waiver before they may be granted adjustment of status. As a result, such applicants must submit Form I–601, Application for Waiver of Grounds of Inadmissibility, and pay the applicable $545 fee or request a fee waiver as outlined in 8 CFR 103.7(c). USCIS estimates that this requirement will apply to about 2,000 nonimmigrants who apply for adjustment of status. Therefore, this will result in additional fee collections per year of $1,090,000.

2. Benefits

The benefits of this rule stem mainly from an understanding of the problems that this rule and the underlying statutes are intended to address.

Trafficking. The U.S. government has condemned human trafficking as an affront to human dignity and a heinous crime. By authorizing adjustment of status for T and U nonimmigrants and their eligible family members, this rule is another step in the U.S. government's efforts to combat human trafficking in the United States. Recent cases point

out the magnitude of human trafficking, efforts of law enforcement to combat the problem, the personal toll it can take on its victims, and the real need to address the problem:

• In January 2008, Jimmie Lee Jones was sentenced to serve 15 years on federal charges of conspiring to engage in sex trafficking and transporting young women across state lines for purposes of prostitution. Jones conspired to force six victims, including two juveniles, to engage in commercial sex acts through force, fraud and coercion. He lured and recruited the minor and adult victims into prostitution with promises of legitimate modeling or exotic dancing work and used physical violence, threats of violence, deception, and other forms of coercion to compel the victims to work as prostitutes.

• In 2005 in New Jersey, at least 30 girls and young women—some as young as 14—were smuggled from Honduras to Hudson County, where they were forced into virtual slavery in bars and beaten if they tried to leave. On July 21, 2005, ten members of this smuggling ring were indicted. Subsequently, 3 traffickers were sentenced to the maximum sentence, 3 more traffickers have entered guilty pleas and are awaiting sentencing and four more are awaiting trial in Honduras.

• In January 2004, Juan Carlos Soto was sentenced to 23 years in prison for smuggling women from Honduras and El Salvador into the U.S., and forcing them to stay in his so-called ''safe houses'' until they had ''worked off'' their debt to him. During the day, these women were forced to perform domestic work, while at night they were repeatedly raped and forced to provide sexual services.

• In the largest trafficking case in U.S. history, Kil Soo Lee ran the Daewoosa garment factory in American Samoa. The government charged that Kil brought over 250 Vietnamese and Chinese nationals into American Samoa, mostly young women, to work as sewing machine operators. Victims were held for up to two years and forced to work through extreme food deprivation, beatings, and physical restraint. The victims were held in barracks on a guarded company compound, threatened with confiscation of their passports, deportation, economic bankruptcy, severe economic hardship to family members, false arrest, and other consequences. On February 21, 2003, Kil was convicted of numerous federal criminal violations, including involuntary servitude, and was later sentenced to 40 years in prison.

• In 1997, the New York City Police Department unearthed an immigrant smuggling scheme involving as many as 62 deaf-mute Mexican immigrants who had been persuaded to come to the United States with promises of jobs. These immigrants were forced to beg on the streets of New York City for eighteen hours a day, seven days a week and meet a $600 per week quota. They were subjected to beatings, electrocution, mental abuse, and sexual molestation.

• In 1995, El Monte, California police raided a garment factory and discovered 72 Thai nationals who had been lured to the United States with promises of employment, forced to work in a garment shop up to eighteen hours a day, seven days a week, and were paid less than sixty cents an hour. The owners restrained them by threats and physical violence.

Moreover, human trafficking is often intertwined with other illicit activities such as fraud, extortion, racketeering, money laundering, bribery of public officials, drug trafficking, document forgery, and gambling.

Authorizing adjustment of status for such victims uses USCIS benefits as part of a collaborative federal effort incorporating immigration status issues, which are often at the forefront of a victim's concern. The VTVPA, as amended, takes a victim-centered approach to addressing trafficking. Trafficking victims are often reluctant to testify due to fear of reprisals against themselves or their family members, or fear of removal from the United States to countries where they can face additional hardships, retribution, or alienation. Additionally, trafficking victims not familiar with their rights may be afraid to report their abusers for fear of their own detention, prosecution, or deportation. This effort is coupled with additional state and federal criminal laws, government benefits, services, and protections for victims.

By passing the VTVPA, and subsequent amendments thereto, Congress recognized that victims of severe trafficking should be protected if they assist in prosecution of the traffickers, rather than be punished and deported for unlawful entry, or unauthorized employment. The protections provided by this law address the lack of legal rights, protection, and access to the legal system because of the illegal presence of trafficking victims.

Violent crime. Congress created the U nonimmigrant status (''U visa'') to provide immigration protection to crime victims who assist in the investigation and prosecution of those crimes. Although there are no specific data on alien crime victims, statistics maintained by DOJ have shown that aliens, especially those aliens without legal status, are often reluctant to help in the investigation or prosecution of crimes. U visas are intended to help overcome this reluctance and aid law enforcement accordingly.

3. Costs

Government costs. This rule requires no outlays of congressionally-appropriated funds. The requirements of this rule and the associated benefits are funded by fees collected from persons requesting these benefits. The fees are deposited into the Immigration Examinations Fee Account. These fees are used to fund the full cost of processing immigration and naturalization benefit applications and petitions, biometric services, and associated support services.

Paperwork costs. The T nonimmigrant adjustment of status provisions of this rule will increase the information collection burden hours imposed on the public. First, as indicated above, USCIS estimates that 31,000 adjustment applications will be received per year. USCIS estimates that each applicant will need an average of 7.25 hours to complete and submit the information required under this rule. Thus, the public burden (in hours) will increase by approximately 224,750 burden hours as a result of the additional Forms I–485 that will be submitted as a result of this rule.

By adding the new Form I–929, the U nonimmigrant adjustment of status provisions are estimated to add an estimated 2,000 applicants per year to the burden currently required for the U visa program. USCIS estimates that it will require an average of one hour per applicant to complete and submit the information required under this rule. Thus, the public burden (in hours) will increase by approximately 2,000 burden hours as a result of the additional Forms I–929 that will be submitted as a result of this rule.

USCIS estimates that 13,000 U–2 nonimmigrants will apply for employment authorization by submitting Form I–765. The public reporting burden for this form is estimated to average 3 hours and 25 minutes per response. Thus, the public burden will increase by approximately 44,417 hours as a result of the additional Forms I–765 that will be submitted as a result of this rule.

USCIS estimates that it also will receive about 2,970 requests per year for advance parole, on average, beginning in the third year following the effective date of this rule that would not be

received otherwise. The public reporting burden for Form I–131 is estimated to average 55 minutes per application. Thus, the public burden will increase by approximately 2,723 burden hours as a result of the additional Forms I–131 that will be submitted as a result of this rule.

For the estimate of the per hour cost of time spent on the forms resulting from this rule, USCIS used the hourly wage from the Bureau of Labor Statistics, Employment Cost Trends, Private Industry, All Workers, Wages and Salaries, Cost of Compensation (Cost per hour worked), Third Quarter, 2006. That figure is $18.04 per hour. Thus, the paperwork burden that this rule adds on the public is estimated to cost respondents $4,940,976 in time spent on preparing and submitting the required information [$18.04 × 273,890 (224,750 + 2,000 + 44,417 + 2,723)].

4. Analysis of Alternatives

Some alternatives exist as cost-effective means for administering the T and U nonimmigrant adjustment provisions from the standpoint of government outlays and burden on applicants. However, many alternatives are not realistic if USCIS is to achieve its legislative mandate and when considered in the interest of consistency with how the current T and U nonimmigrant programs are administered.

T nonimmigrant adjustment of status: No more than 5,000 T–1 principal aliens may have their status adjusted to that of a lawful permanent resident in a given fiscal year (October 1 through September 30). This numerical limitation does not apply to relatives in derivative status who seek adjustment of status. Therefore, the potential exists that the number of approvable petitions per fiscal year will exceed the numerical limit (*i.e.*, cap). However, USCIS has not come close to reaching the cap in all of the fiscal years combined since the T nonimmigrant rule was promulgated 4.5 years ago. Since that time, only 787 aliens have been granted principal T–1 nonimmigrant status. Thus, it is unlikely that the numerical cap will be reached in any fiscal year in the near future.

USCIS did not consider alternatives to handling applications for adjustment of status. Ease of administration dictates that adjustment of status applications from T nonimmigrants would be best handled on a first in, first out basis, because that is the way applications for T status are currently handled. If petitions are received after the limit is reached, they will be reviewed to determine whether they are approvable but for the numerical cap. Approvable petitions reviewed after the numerical cap has been reached will be placed on a waiting list, and written notice will be sent to the petitioners. Priority on the waiting list will be based upon the date on which the petition is filed. At the beginning of the next fiscal year, petitions on the waiting list will be granted first. Advantages to this approach include allowing the alien victim to remain in the United States to assist in the investigation or prosecution of criminal activity. If petitions for adjustment of status exceed the annual cap, USCIS must maintain a waiting list; however, that is not projected to occur. Thus, incremental implementation and additional alternatives were not considered or analyzed.

U nonimmigrant adjustment of status: The number of grants of U nonimmigrant status that may be made in a fiscal year is limited by an annual cap of 10,000. In the U nonimmigrant rule, USCIS decided to adjudicate petitions on a first in, first out basis with additional procedures for petitions received after the numerical cap has been reached. There are no numerical caps on the applications for adjustment of status for U nonimmigrants. Therefore, adjustment of status applications from U nonimmigrants and their derivatives will be handled on a first in, first out basis, with no procedures for dealing with U adjustment retrogression.[4] Additional alternatives that would have provided that applications for adjustment of status from U nonimmigrants would be handled differently than those of U nonimmigrants were not considered.

5. Summary

The provisions of this rule are essential to the effective administration of the T and U nonimmigrant adjustment of status provisions. This rule will further humanitarian interests by protecting victims of human trafficking and victims of other serious crimes who have provided assistance to U.S. law enforcement in the investigation or prosecution of such crimes. Also, this rule will strengthen the ability of the law enforcement agencies to investigate and prosecute crimes by providing immigration benefits to victims.

The estimated economic effects of this rule are summarized as follows:

- The estimated fees to be collected as a result of this rule will be approximately $2,955,880 in the first year after this rule is published, $1,932,880 in the second year, and an average about $32,472,880 per year in the third and subsequent years after taking effect.
- No more than 5,000 T–1 principal aliens may have their status adjusted to that of a lawful permanent resident in a given fiscal year, but this numerical limitation does not apply to adjustment of status of U nonimmigrants or qualifying relatives of T or U nonimmigrants.
- An estimated 330 T nonimmigrants are expected to apply for adjustment of status in the year following the effective date of this rule.
- An estimated 286 family members of T nonimmigrants are expected to apply for adjustment of status in the year following the effective date of this rule.
- After the U nonimmigrant rule has been in effect for 3 years, an estimated 10,000 principal U nonimmigrants are expected to apply for adjustment of status.
- An estimated 20,000 relatives of U nonimmigrants will apply for adjustment of status within approximately 3 years following receipt of derivative U nonimmigrant status.
- An estimated 2,000 aliens will apply for immigrant visas or adjustment of status under special provisions for certain family members of aliens who adjusted their status as U nonimmigrants where the qualifying family members are not physically present in the United States or are in the United States, but not currently in U nonimmigrant status.
- With respect to the paperwork burden on the public, this rule is estimated to cost respondents $4,940,976 in time spent on preparing and submitting the required information.

This rule requires no outlay of congressionally-appropriated funds. All costs will be covered by fees collected by the agency.

F. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation

[4] When visas are limited by statute, a petitioner's priority is determined by the date the petition was filed and visas are often available only to applicants whose priority dates are before a certain cut-off date. This roll-back in priority dates is what is commonly referred to as ''visa number retrogression.''

of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. Family Assessment

I have reviewed this regulation and determined that it may affect family well-being as that term is defined in section 654 of the Treasury General Appropriations Act, 1999, Public Law No. 105–277, Div. A. Accordingly, I have assessed this action in accordance with the criteria specified by section 654(c)(1). This regulation will positively affect family well-being by encouraging vulnerable individuals who have been victims of a severe form of trafficking in persons or other specified criminal activity to report the trafficking and criminal activity and to aid law enforcement in the investigation and prosecution of cases and by providing critical assistance and benefits to victims. Additionally, this regulation provides the means for both victims and qualified family members to adjust their status to lawful permanent residence, thereby ensuring family unity and stability.

I. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995) (PRA), all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or record-keeping requirements inherent in a rule. The information collection requirements contained in this rule have been cleared by OMB under the provisions of the Paperwork Reduction Act. 44 U.S.C. Chapter 35; 5 CFR 1320. Clearance numbers for these collections are contained in 8 CFR 299.5, Display Control Numbers and are noted herein. Form I–131, Application for Travel Document, OMB Control Number 1615–0013; Form I–290B, Notice of Appeal to the Administrative Appeals Office, OMB Control Number 1615–0095; Form I–485, Application to Register Permanent Residence or Adjust Status, OMB Control Number 1615–0023; Form I–601, Application for Waiver of Grounds of Excludability, OMB Control Number 1615–0029; Form I–765, Application for Employment Authorization, OMB Control Number 1615–0040.

However, the current number of respondents listed for these information collections on the OMB's inventory of approved information collections will have to be increased to reflect the increase in the number of respondents and burden hours as a result of this rule. In addition, since this rule requires applicants submitting those forms to pay the corresponding fees, the annual costs for these information collections will also increase. Accordingly, USCIS has submitted an update for the annual cost burden and number of respondents using OMB's automated Office of Information and Regulatory Affairs Consolidated Information System (ROCIS).

Additionally, USCIS will make non-substantive minor edits to Forms I–131, I–601, and I–765, to reflect the new usage by T and U nonimmigrants applying for adjustment of status. These forms, with the minor edits, have been submitted to OMB for review and approval.

This interim rule permits certain T and U nonimmigrants to adjust their status to that of lawful permanent residents. In addition to the evidence required by Form I–485, this rule at 8 CFR 245.23(a) requires T adjustment applicants to demonstrate continuous physical presence in the United States for a requisite period, good moral character for a requisite period, and continued cooperation with law enforcement authorities or extreme hardship, by supplying the evidence outlined in 8 CFR 245.23(e)(2). For U adjustment applicants, in addition to the evidence required by Form I–485, the rule at 8 CFR 245.24(a) requires applicants to demonstrate continuous physical presence for at least 3 years and that they have not unreasonably refused to provide assistance in the criminal investigation or prosecution by supplying the evidence outlined in 8 CFR 245.24(d)(1) and 245.24(e)(2). These additional documentation requirements are considered an information collection and will be included on new Supplement E to Form I–485.

This rule also requires that U–1 nonimmigrants who are applying for adjustment of status and wish to petition for immigrant visas or lawful permanent residence on behalf of family members who have never held U nonimmigrant status submit new Form I–929, Petition for Qualifying Family Member of a U–1 Nonimmigrant, with fee in accordance with the instructions on the form. This requirement is considered a new information collection.

Since this is an interim rule, these information collections have been submitted and approved by OMB under the emergency review and clearance procedures covered under the PRA. USCIS is requesting comments on these two information collections until February 10, 2009. When submitting comments on the information collection(s), your comments 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 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 the information on those who are to respond, including through the use of any and all 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 for Form I–485, and Supplement A, and Supplement E:

a. *Type of information collection:* Revision of currently approved collection.

b. *Title of Form/Collection:* Application to Register Permanent Residence or Adjust Status.

c. *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–485, and Supplement A and E; U.S. Citizenship and Immigration Services.

d. *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals. Sections 245(*l*) and (m) of the Act allow certain T and U nonimmigrants to adjust status to that of lawful permanent residents. This interim rule designates Form I–485 as the form for use by applicants for such benefits. (Supplement A of Form I–485 is used by persons seeking to adjust their status under the provisions of section 245(i) of the Act and therefore will not be used by T and U nonimmigrants who are applying to adjust their status.) Supplement E of Form I–485 provides additional instructions to T and U nonimmigrants seeking to adjust their status and includes documentation requirements not found on Form I–485 itself. The information collection is necessary in order for USCIS to make a determination that the eligibility requirements and conditions are met regarding the applicant.

e. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* Form I–485—617,033 respondents at 6.25 hours per response, Supplement A—3,888 respondents at 0.216 hours per response, Supplement E—33,112 at 0.75 hours per response.

f. *An estimate of the total of public burden (in hours) associated with the collection:* Approximately 3,882,129 burden hours.

Overview of Information Collection for Form I–929:

a. *Type of information collection:* New information collection.

b. *Title of Form/Collection:* Petition for Qualifying Family Member of a U–1 Nonimmigrant.

c. *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–929; U.S. Citizenship and Immigration Services.

d. *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals. Section 245(m) of the Act allows certain qualifying family members who have never held U nonimmigrant status to seek lawful permanent residence or apply for immigrant visas. Before such family members may apply for adjustment of status or seek immigrant visas, the U–1 nonimmigrant who has been granted adjustment of status must file an immigrant petition on behalf of the qualifying family member using Form I–929. The information collection is necessary in order for USCIS to make a determination that the eligibility requirements and conditions are met regarding the qualifying family member.

e. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 2,000 respondents at 1 hour per response.

f. *An estimate of the total of public burden (in hours) associated with the collection:* Approximately 2,000 burden hours.

All comments and suggestions or questions regarding additional information should be directed to the Department of Homeland Security, U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529, Attention: Chief, 202–272–8377.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Immigration, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 299

Immigration, Reporting and recordkeeping requirements.

■ Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 103—POWERS AND DUTIES; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

■ 2. Section 103.7 is amended by revising the entry for Form I–601 and adding the entry for ''Form I–929'' in proper alpha-numeric sequence in paragraph (b)(1), and revising paragraph (c)(5) to read as follows:

§ 103.7 Fees.

* * * * *

(b) * * *

(1) * * *

Form I–601. For filing an application for waiver of ground of inadmissibility—$545.

* * * * *

Form I–929. For U–1 principal applicant to submit for each qualifying family member who plans to seek an immigrant visa or adjustment of U status—$215.

* * * * *

(c) * * *

(5) No fee relating to any application, petition, appeal, motion, or request made to U.S. Citizenship and Immigration Services may be waived under paragraph (c)(1) of this section except for the following:

(i) Biometrics; Form I–90; Form I–751; Form I–765; Form I–817; I–929; Form N–300; Form N–336; Form N–400; Form N–470; Form N–565; Form N–600; Form N–600K; and Form I–290B and motions filed with U.S. Citizenship and Immigration Services relating to the specified forms in this paragraph (c); and

(ii) Only in the case of an alien in lawful nonimmigrant status under sections 101(a)(15)(T) or (U) of the Act; an applicant under section 209(b) of the Act; an approved VAWA self-petitioner; or an alien to whom section 212(a)(4) of the Act does not apply with respect to adjustment of status: Form I–485 and Form I–601; and

(iii) Form I–192 and Form I–193 (only in the case of an alien applying for lawful nonimmigrant status under sections 101(a)(15)(T) or (U)).

* * * * *

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 3. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1187, 1225, 1226, 1227; 8 CFR part 2.

■ 4. Section 212.18 is added to read as follows:

§ 212.18 Applications for waivers of inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders.

(a) *Filing the waiver application.* An alien applying for a waiver of inadmissibility under section 245(*l*)(2) of the Act in connection with an application for adjustment of status under 8 CFR 245.23(a) or (b) must submit:

(1) A completed Form I–485 application package;

(2) The appropriate fee in accordance with 8 CFR 103.7(b)(1) or an application for a fee waiver; and, as applicable,

(3) Form I–601, Application for Waiver of Grounds of Excludability.

(b) *Treatment of waiver application.* (1) USCIS may not waive an applicant's inadmissibility under sections 212(a)(3), 212(a)(10)(C), or 212(a)(10)(E) of the Act.

(2) If an applicant is inadmissible under sections 212(a)(1) or (4) of the Act, USCIS may waive such inadmissibility if it determines that granting a waiver is in the national interest.

(3) If any other provision of section 212(a) renders the applicant inadmissible, USCIS may grant a waiver of inadmissibility if the activities rendering the alien inadmissible were caused by or were incident to the victimization and USCIS determines that it is in the national interest to waive

the applicable ground or grounds of inadmissibility.

(c) *Other waivers.* Nothing in this section shall be construed as limiting an alien's ability to apply for any other waivers of inadmissibility for which he or she may be eligible.

(d) *Revocation.* The Secretary of Homeland Security may, at any time, revoke a waiver previously granted through the procedures described in 8 CFR 103.5.

PART 214—NONIMMIGRANT CLASSES

■ 5. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185 (pursuant to E.O. 13323, 69 FR 241), 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1372, 1379, 1731–32, section 643, Pub. L. 104–208, 110 Stat. 3009–708; 48 U.S.C. 1901, note, and 1931 note; 8 CFR part 2.

■ 6. Sections 214.11(p)(1) and (2) are revised to read as follows:

§ 214.11 Alien victims of severe forms of trafficking in persons.

* * * * *

(p) *Duration of T nonimmigrant status.*

(1) *In general.* An approved T nonimmigrant status shall expire after 4 years from the date of approval. The status may be extended if a Federal, State, or local law enforcement official, prosecutor, judge, or other authority investigating or prosecuting activity relating to human trafficking certifies that the presence of the alien in the United States is necessary to assist in the investigation or prosecution of such activity. At the time an alien is approved for T nonimmigrant status or receives an extension, USCIS shall notify the alien when his or her nonimmigrant status will expire. The applicant shall immediately notify USCIS of any changes in the applicant's circumstances that may affect eligibility under section 101(a)(15)(T)(i) of the Act and this section.

(2) *Information pertaining to adjustment of status.* USCIS will notify an alien granted T nonimmigrant status of the requirement to timely apply for adjustment of status, and that the failure to apply for adjustment of status in accordance with 8 CFR 245.23 will result in termination of the alien's T nonimmigrant status at the end of the 4-year period unless that status is extended in accordance with paragraph (p)(1) of this section. Aliens who properly apply for adjustment of status to that of a person admitted to permanent residence in accordance with 8 CFR 245.23 shall remain eligible for adjustment of status.

* * * * *

PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

■ 7. The authority citation for part 245 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1255; sec. 202, Pub. L. 105–100, 111 Stat. 2160, 2193; sec. 902, Pub. L. 105–277, 112 Stat. 2681; 8 CFR part 2.

■ 8. Section 245.23 is added to read as follows:

§ 245.23 Adjustment of aliens in T nonimmigrant classification.

(a) *Eligibility of principal T–1 applicants.* Except as described in paragraph (c) of this section, an alien may be granted adjustment of status to that of an alien lawfully admitted for permanent residence, provided the alien:

(1) Applies for such adjustment;

(2)(i) Was lawfully admitted to the United States as a T–1 nonimmigrant, as defined in 8 CFR 214.11(a)(2); and

(ii) Continues to hold such status at the time of application, or accrued 4 years in T–1 nonimmigrant status and files a complete application before April 13, 2009;

(3) Has been physically present in the United States for a continuous period of at least 3 years since the first date of lawful admission as a T–1 nonimmigrant or has been physically present in the United States for a continuous period during the investigation or prosecution of acts of trafficking and the Attorney General has determined that the investigation or prosecution is complete, whichever period of time is less; provided that if the applicant has departed from the United States for any single period in excess of 90 days or for any periods in the aggregate exceeding 180 days, the applicant shall be considered to have failed to maintain continuous physical presence in the United States for purposes of section 245(*l*)(1)(A) of the Act;

(4) Is admissible to the United States under the Act, or otherwise has been granted a waiver by USCIS of any applicable ground of inadmissibility, at the time of examination for adjustment;

(5) Has been a person of good moral character since first being lawfully admitted as a T–1 nonimmigrant and until USCIS completes the adjudication of the application for adjustment of status; and

(6)(i) Has, since first being lawfully admitted as a T–1 nonimmigrant and until the conclusion of adjudication of the application, complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, as defined in 8 CFR 214.11(a), or

(ii) Would suffer extreme hardship involving unusual and severe harm upon removal from the United States, as provided in 8 CFR 214.11(i).

(b) *Eligibility of derivative family members.* A derivative family member of a T–1 nonimmigrant status holder may be granted adjustment of status to that of an alien lawfully admitted for permanent residence, provided:

(1) The T–1 principal nonimmigrant has applied for adjustment of status under this section and meets the eligibility requirements described under subsection (a);

(2) The derivative family member was lawfully admitted to the United States in T–2, T–3, T–4, or T–5 nonimmigrant status as the spouse, parent, sibling, or child of a T–1 nonimmigrant, and continues to hold such status at the time of application;

(3) The derivative family member has applied for such adjustment; and

(4) The derivative family member is admissible to the United States under the Act, or otherwise has been granted a waiver by USCIS of any applicable ground of inadmissibility, at the time of examination for adjustment.

(c) *Exceptions.* An alien is not eligible for adjustment of status under paragraphs (a) or (b) of this section if:

(1) The alien's T nonimmigrant status has been revoked pursuant to 8 CFR 214.11(s);

(2) The alien is described in sections 212(a)(3), 212(a)(10)(C), or 212(a)(10)(E) of the Act; or

(3) The alien is inadmissible under any other provisions of section 212(a) of the Act and has not obtained a waiver of inadmissibility in accordance with 8 CFR 212.18 or 214.11(j). Where the applicant establishes that the victimization was a central reason for the applicant's unlawful presence in the United States, section 212(a)(9)(B)(iii) of the Act is not applicable, and the applicant need not obtain a waiver of that ground of inadmissibility. The applicant, however, must submit with the Form I–485 evidence sufficient to demonstrate that the victimization suffered was a central reason for the unlawful presence in the United States. To qualify for this exception, the victimization need not be the sole reason for the unlawful presence but the nexus between the victimization and the unlawful presence must be more than tangential, incidental, or superficial.

(d) *Jurisdiction.* USCIS shall determine whether a T–1 applicant for adjustment of status under this section was lawfully admitted as a T–1 nonimmigrant and continues to hold such status, has been physically present in the United States during the requisite period, is admissible to the United States or has otherwise been granted a waiver of any applicable ground of inadmissibility, and has been a person of good moral character during the requisite period. The Attorney General shall determine whether the applicant received a reasonable request for assistance in the investigation or prosecution of acts of trafficking as defined in 8 CFR 214.11(a), and, if so, whether the applicant complied in such request. If the Attorney General determines that the applicant failed to comply with any reasonable request for assistance, USCIS shall deny the application for adjustment of status unless USCIS finds that the applicant would suffer extreme hardship involving unusual and severe harm upon removal from the United States.

(e) *Application.*

(1) *General.* Each T–1 principal applicant and each derivative family member who is applying for adjustment of status must file Form I–485, Application to Register Permanent Residence or Adjust Status, and

(i) Accompanying documents, in accordance with the form instructions;

(ii) The fee prescribed in 8 CFR 103.7(b)(1) or an application for a fee waiver;

(iii) The biometric services fee prescribed by 8 CFR 103.7(b)(1) or an application for a fee waiver;

(iv) A photocopy of the alien's Form I–797, Notice of Action, granting T nonimmigrant status;

(v) A photocopy of all pages of the alien's most recent passport or an explanation of why the alien does not have a passport;

(vi) A copy of the alien's Form I–94, Arrival-Departure Record; and

(vii) Evidence that the applicant was lawfully admitted in T nonimmigrant status and continues to hold such status at the time of application. For T nonimmigrants who traveled outside the United States and re-entered using an advance parole document issued under 8 CFR 245.2(a)(4)(ii)(B), the date that the alien was first admitted in lawful T status will be the date of admission for purposes of this section, regardless of how the applicant's Form I–94 ''Arrival-Departure Record'' is annotated.

(2) *T–1 principal applicants.* In addition to the items in paragraph (e)(1) of this section, T–1 principal applicants must submit:

(i) Evidence, including an affidavit from the applicant and a photocopy of all pages of all of the applicant's passports valid during the required period (or equivalent travel document or a valid explanation of why the applicant does not have a passport), that he or she has been continuously physically present in the United States for the requisite period as described in paragraph (a)(2) of this section. Applicants should submit evidence described in 8 CFR 245.22. A signed statement from the applicant attesting to the applicant's continuous physical presence alone will not be sufficient to establish this eligibility requirement. If additional documentation is not available, the applicant must explain why in an affidavit and provide additional affidavits from others with first-hand knowledge who can attest to the applicant's continuous physical presence by specific facts.

(A) If the applicant has departed from and returned to the United States while in T–1 nonimmigrant status, the applicant must submit supporting evidence showing the dates of each departure from the United States and the date, manner and place of each return to the United States.

(B) Applicants applying for adjustment of status under this section who have less than 3 years of continuous physical presence while in T–1 nonimmigrant status must submit a document signed by the Attorney General or his designee, attesting that the investigation or prosecution is complete.

(ii) Evidence of good moral character in accordance with paragraph (g) of this section; and

(iii)(A) Evidence that the alien has complied with any reasonable request for assistance in the investigation or prosecution of the trafficking as described in paragraph (f)(1) of this section since having first been lawfully admitted in T–1 nonimmigrant status and until the adjudication of the application; or

(B) Evidence that the alien would suffer extreme hardship involving unusual and severe harm if removed from the United States as described in paragraph (f)(2) of this section.

(3) *Evidence relating to discretion.* Each T applicant bears the burden of showing that discretion should be exercised in his or her favor. Where adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider. Depending on the nature of adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. For example, only the most compelling positive factors would justify a favorable exercise of discretion in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns.

(f) *Assistance in the investigation or prosecution or a showing of extreme hardship.* Each T–1 principal applicant must establish, to the satisfaction of the Attorney General, that since having been lawfully admitted as a T–1 nonimmigrant and up until the adjudication of the application, he or she complied with any reasonable request for assistance in the investigation or prosecution of the acts of trafficking, as defined in 8 CFR 214.11(a), or establish, to the satisfaction of USCIS, that he or she would suffer extreme hardship involving unusual and severe harm upon removal from the United States.

(1) Each T–1 applicant for adjustment of status under section 245(*l*) of the Act must submit a document issued by the Attorney General or his designee certifying that the applicant has complied with any reasonable requests for assistance in the investigation or prosecution of the human trafficking offenses during the requisite period; or

(2) In lieu of showing continued compliance with requests for assistance, an applicant may establish, to the satisfaction of USCIS, that he or she would suffer extreme hardship involving unusual and severe harm upon removal from the United States. The hardship determination will be evaluated on a case-by-case basis, in accordance with the factors described in 8 CFR 214.11(i). Where the basis for the hardship claim represents a continuation of the hardship claimed in the application for T nonimmigrant status, the applicant need not re-document the entire claim, but rather may submit evidence to establish that the previously established hardship is ongoing. However, in reaching its decision regarding hardship under this section, USCIS is not bound by its previous hardship determination made under 8 CFR 214.11(i).

(g) *Good moral character.* A T–1 nonimmigrant applicant for adjustment of status under this section must demonstrate that he or she has been a person of good moral character since

first being lawfully admitted as a T–1 nonimmigrant and until USCIS completes the adjudication of their applications for adjustment of status. Claims of good moral character will be evaluated on a case-by-case basis, taking into account section 101(f) of the Act and the standards of the community. The applicant must submit evidence of good moral character as follows:

(1) An affidavit from the applicant attesting to his or her good moral character, accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the applicant has resided for 6 or more months during the requisite period in continued presence or T–1 nonimmigrant status.

(2) If police clearances, criminal background checks, or similar reports are not available for some or all locations, the applicant may include an explanation and submit other evidence with his or her affidavit.

(3) USCIS will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the applicant's good moral character.

(4) An applicant who is under 14 years of age is generally presumed to be a person of good moral character and is not required to submit evidence of good moral character. However, if there is reason to believe that an applicant who is under 14 years of age may lack good moral character, USCIS may require evidence of good moral character.

(h) *Filing and decision.* An application for adjustment of status from a T nonimmigrant under section 245(*l*) of the Act shall be filed with the USCIS office identified in the instructions to Form I–485. Upon approval of adjustment of status under this section, USCIS will record the alien's lawful admission for permanent residence as of the date of such approval and will notify the applicant in writing. Derivative family members' applications may not be approved before the principal applicant's application is approved.

(i) *Denial.* If the application for adjustment of status or the application for a waiver of inadmissibility is denied, USCIS will notify the applicant in writing of the reasons for the denial and of the right to appeal the decision to the Administrative Appeals Office (AAO) pursuant to the AAO appeal procedures found at 8 CFR 103.3. Denial of the T–1 principal applicant's application will result in the automatic denial of a derivative family member's application.

(j) *Effect of Departure.* If an applicant for adjustment of status under this section departs the United States, he or she shall be deemed to have abandoned the application, and it will be denied. If, however, the applicant is not under exclusion, deportation, or removal proceedings, and he or she filed a Form I–131, Application for Travel Document, in accordance with the instructions on the form, or any other appropriate form, and was granted advance parole by USCIS for such absences, and was inspected and paroled upon returning to the United States, he or she will not be deemed to have abandoned the application. If the adjustment of status application of such an individual is subsequently denied, he or she will be treated as an applicant for admission subject to sections 212 and 235 of the Act. If an applicant for adjustment of status under this section is under exclusion, deportation, or removal proceedings, USCIS will deem the application for adjustment of status abandoned as of the moment of the applicant's departure from the United States.

(k) *Inapplicability of 8 CFR 245.1 and 245.2.* Sections 245.1 and 245.2 of this chapter do not apply to aliens seeking adjustment of status under this section.

(l) *Annual cap of T–1 principal applicant adjustments.* (1) *General.* The total number of T–1 principal applicants whose status is adjusted to that of lawful permanent residents under this section may not exceed the statutory cap in any fiscal year.

(2) *Waiting list.* All eligible applicants who, due solely to the limit imposed in section 245(*l*)(4) of the Act and paragraph (m)(1) of this section, are not granted adjustment of status will be placed on a waiting list. USCIS will send the applicant written notice of such placement. Priority on the waiting list will be determined by the date the application was properly filed, with the oldest applications receiving the highest priority. In the following fiscal year, USCIS will proceed with granting adjustment of status to applicants on the waiting list who remain admissible and eligible for adjustment of status in order of highest priority until the available numbers are exhausted for the given fiscal year. After the status of qualifying applicants on the waiting list has been adjusted, any remaining numbers for that fiscal year will be issued to new qualifying applicants in the order that the applications were properly filed.

■ 9. Section 245.24 is added to read as follows:

§ 245.24 Adjustment of aliens in U nonimmigrant status.

(a) *Definitions.* As used in this section, the term:

(1) *Continuous Physical Presence* means the period of time that the alien has been physically present in the United States and must be a continuous period of at least 3 years since the date of admission as a U nonimmigrant continuing through the date of the conclusion of adjudication of the application for adjustment of status. If the alien has departed from the United States for any single period in excess of 90 days or for any periods in the aggregate exceeding 180 days, the applicant must include a certification from the agency that signed the Form I–918, Supplement B, in support of the alien's U nonimmigrant status that the absences were necessary to assist in the criminal investigation or prosecution or were otherwise justified.

(2) *Qualifying Family Member* means a U–1 principal applicant's spouse, child, or, in the case of an alien child, a parent who has never been admitted to the United States as a nonimmigrant under sections 101(a)(15)(U) and 214(p) of the Act.

(3) *U Interim Relief* means deferred action and work authorization benefits provided by USCIS or the Immigration and Naturalization Service to applicants for U nonimmigrant status deemed *prima facie* eligible for U nonimmigrant status prior to publication of the U nonimmigrant status regulations.

(4) *U Nonimmigrant* means an alien who is in lawful U–1, U–2, U–3, U–4, or U–5 status.

(5) *Refusal to Provide Assistance in a Criminal Investigation or Prosecution* is the refusal by the alien to provide assistance to a law enforcement agency or official that had responsibility for the investigation or prosecution of persons in connection with the qualifying criminal activity after the alien was granted U nonimmigrant status. The Attorney General will determine whether the alien's refusal was unreasonable under the totality of the circumstances based on all available affirmative evidence. The Attorney General may take into account such factors as general law enforcement, prosecutorial, and judicial practices; the kinds of assistance asked of other victims of crimes involving an element of force, coercion, or fraud; the nature of the request to the alien for assistance; the nature of the victimization; the applicable guidelines for victim and witness assistance; and the specific circumstances of the applicant, including fear, severe traumatization (both mental and physical), and the age and maturity of the applicant.

(b) *Eligibility of U Nonimmigrants.* Except as described in paragraph (c) of this section, an alien may be granted

adjustment of status to that of an alien lawfully admitted for permanent residence, provided the alien:

(1) Applies for such adjustment;

(2)(i) Was lawfully admitted to the United States as either a U–1, U–2, U–3, U–4 or U–5 nonimmigrant, as defined in 8 CFR 214.1(a)(2), and

(ii) Continues to hold such status at the time of application; or accrued at least 4 years in U interim relief status and files a complete adjustment application within 120 days of the date of approval of the Form I–918, Petition for U Nonimmigrant Status;

(3) Has continuous physical presence for 3 years as defined in paragraph (a)(1) of this section;

(4) Is not inadmissible under section 212(a)(3)(E) of the Act;

(5) Has not unreasonably refused to provide assistance to an official or law enforcement agency that had responsibility in an investigation or prosecution of persons in connection with the qualifying criminal activity after the alien was granted U nonimmigrant status, as determined by the Attorney General, based on affirmative evidence; and

(6) Establishes to the satisfaction of the Secretary that the alien's presence in the United States is justified on humanitarian grounds, to ensure family unity, or is in the public interest.

(c) *Exception.* An alien is not eligible for adjustment of status under paragraph (b) of this section if the alien's U nonimmigrant status has been revoked pursuant to 8 CFR 214.14(h).

(d) *Application Procedures for U nonimmigrants.* Each U nonimmigrant who is requesting adjustment of status must submit:

(1) Form I–485, Application to Register Permanent Residence or Adjust Status, in accordance with the form instructions;

(2) The fee prescribed in 8 CFR 103.7(b)(1) or an application for a fee waiver;

(3) The biometric services fee as prescribed in 8 CFR 103.7(b)(1) or an application for a fee waiver;

(4) A photocopy of the alien's Form I–797, Notice of Action, granting U nonimmigrant status;

(5) A photocopy of all pages of all of the applicant's passports valid during the required period (or equivalent travel document or a valid explanation of why the applicant does not have a passport) and documentation showing the following:

(i) The date of any departure from the United States during the period that the applicant was in U nonimmigrant status;

(ii) The date, manner, and place of each return to the United States during the period that the applicant was in U nonimmigrant status; and

(iii) If the applicant has been absent from the United States for any period in excess of 90 days or for any periods in the aggregate of 180 days or more, a certification from the investigating or prosecuting agency that the absences were necessary to assist in the investigation or prosecution of the criminal activity or were otherwise justified;

(6) A copy of the alien's Form I–94, Arrival-Departure Record;

(7) Evidence that the applicant was lawfully admitted in U nonimmigrant status and continues to hold such status at the time of application;

(8) Evidence pertaining to any request made to the alien by an official or law enforcement agency for assistance in an investigation or prosecution of persons in connection with the qualifying criminal activity, and the alien's response to such request;

(9) Evidence, including an affidavit from the applicant, that he or she has continuous physical presence for at least 3 years as defined in paragraph (a)(1) of this section. Applicants should submit evidence described in 8 CFR 245.22. A signed statement from the applicant attesting to continuous physical presence alone will not be sufficient to establish this eligibility requirement. If additional documentation is not available, the applicant must explain why in an affidavit and provide additional affidavits from others with first-hand knowledge who can attest to the applicant's continuous physical presence by specific:

(10) *Evidence establishing that approval is warranted.* Any other information required by the instructions to Form I–485, including whether adjustment of status is warranted as a matter of discretion on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

(11) *Evidence relating to discretion.* An applicant has the burden of showing that discretion should be exercised in his or her favor. Although U adjustment applicants are not required to establish that they are admissible, USCIS may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application. Where adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate. Depending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns.

(e) *Continued assistance in the investigation or prosecution.* Each applicant for adjustment of status under section 245(m) of the Act must provide evidence of whether or not any request was made to the alien to provide assistance, after having been lawfully admitted as a U nonimmigrant, in an investigation or prosecution of persons in connection with the qualifying criminal activity, and his or her response to any such requests.

(1) An applicant for adjustment of status under section 245(m) of the Act may submit a document signed by an official or law enforcement agency that had responsibility for the investigation or prosecution of persons in connection with the qualifying criminal activity, affirming that the applicant complied with (or did not unreasonably refuse to comply with) reasonable requests for assistance in the investigation or prosecution during the requisite period. To meet this evidentiary requirement, applicants may submit a newly executed Form I–918, Supplement B, ''U Nonimmigrant Status Certification.''

(2) If the applicant does not submit a document described in paragraph (e)(1) of this section, the applicant may submit an affidavit describing the applicant's efforts, if any, to obtain a newly executed Form I–918, Supplement B, or other evidence describing whether or not the alien received any request to provide assistance in a criminal investigation or prosecution, and the alien's response to any such request.

(i) The applicant should also include, when possible, identifying information about the law enforcement personnel involved in the case and any information, of which the applicant is aware, about the status of the criminal investigation or prosecution, including any charges filed and the outcome of any criminal proceedings, or whether the investigation or prosecution was dropped and the reasons.

(ii) If applicable, an applicant may also provide a more detailed description

of situations where the applicant refused to comply with requests for assistance because the applicant believed that the requests for assistance were unreasonable.

(3) In determining whether the applicant has satisfied the continued assistance requirement, USCIS or the Department of Justice may at its discretion contact the certifying agency that executed the applicant's original Form I–918, Supplement B, ''U Nonimmigrant Status Certification'' or any other law enforcement agency.

(4) In accordance with procedures determined by the Department of Justice and the Department of Homeland Security, USCIS will refer certain applications for adjustment of status to the Department of Justice for determination of whether the applicant unreasonably refused to provide assistance in a criminal investigation or prosecution. If the applicant submits a document described in paragraph (e)(1) of this section, USCIS will not refer the application for consideration by the Department of Justice absent extraordinary circumstances. In other cases, USCIS will only refer an application to the Department of Justice if an official or law enforcement agency has provided evidence that the alien has refused to comply with requests to provide assistance in an investigation or prosecution of persons in connection with the qualifying criminal activity or if there are other affirmative evidence in the record suggesting that the applicant may have unreasonably refused to provide such assistance. In these instances, USCIS will request that the Department of Justice determine, based on all available affirmative evidence, whether the applicant unreasonably refused to provide assistance in a criminal investigation or prosecution. The Department of Justice will have 90 days to provide a written determination to USCIS, or where appropriate, request an extension of time to provide such a determination. After such time, USCIS may adjudicate the application whether or not the Department of Justice has provided a response.

(f) *Decision.* The decision to approve or deny a Form I–485 filed under section 245(m) of the Act is a discretionary determination that lies solely within USCIS's jurisdiction. After completing its review of the application and evidence, USCIS will issue a written decision approving or denying Form I–485 and notify the applicant of this decision.

(1) *Approvals.* If USCIS determines that the applicant has met the requirements for adjustment of status and merits a favorable exercise of discretion, USCIS will approve the Form I–485. Upon approval of adjustment of status under this section, USCIS will record the alien's lawful admission for permanent residence as of the date of such approval.

(2) *Denials.* Upon the denial of an application for adjustment of status under section 245(m) of the Act, the applicant will be notified in writing of the decision and the reason for the denial in accordance with 8 CFR part 103. If an applicant chooses to appeal the denial to the Administrative Appeals Office pursuant to the provisions of 8 CFR 103.3, the denial will not become final until the appeal is adjudicated.

(g) *Filing petitions for qualifying family members.* A principal U–1 applicant may file an immigrant petition under section 245(m)(3) of the Act on behalf of a qualifying family member as defined in paragraph (a)(2) of this section, provided that:

(1) The qualifying family member has never held U nonimmigrant status;

(2) The qualifying family relationship, as defined in paragraph (a)(2) of this section, exists at the time of the U–1 principal's adjustment and continues to exist through the adjudication of the adjustment or issuance of the immigrant visa for the qualifying family member;

(3) The qualifying family member or the principal U–1 alien, would suffer extreme hardship as described in 8 CFR 245.24(g) (to the extent the factors listed are applicable) if the qualifying family member is not allowed to remain in or enter the United States; and

(4) The principal U–1 alien has adjusted status to that of a lawful permanent resident, has a pending application for adjustment of status, or is concurrently filing an application for adjustment of status.

(h) *Procedures for filing petitions for qualifying family members.*

(1) *Required documents.* For each qualifying family member who plans to seek an immigrant visa or adjustment of status under section 245(m)(3) of the Act, the U–1 principal applicant must submit, either concurrently with, or after he or she has filed, his or her Form I–485:

(i) Form I–929 in accordance with the form instructions;

(ii) The fee prescribed in 8 CFR 103.7(b)(1) or an application for a fee waiver;

(iii) Evidence of the relationship listed in paragraph (a)(2) of this section, such as a birth or marriage certificate. If primary evidence is unavailable, secondary evidence or affidavits may be submitted in accordance with 8 CFR 103.2(b)(2);

(iv) Evidence establishing that either the qualifying family member or the U–1 principal alien would suffer extreme hardship if the qualifying family member is not allowed to remain in or join the principal in the United States. Extreme hardship is evaluated on a case-by-case basis, taking into account the particular facts and circumstances of each case. Applicants are encouraged to document all applicable factors in their applications, as the presence or absence of any one factor may not be determinative in evaluating extreme hardship. To establish extreme hardship to a qualifying family member who is physically present in the United States, an applicant must demonstrate that removal of the qualifying family member would result in a degree of hardship beyond that typically associated with removal. Factors that may be considered in evaluating whether removal would result in extreme hardship to the alien or to the alien's qualifying family member include, but are not limited to:

(A) The nature and extent of the physical or mental abuse suffered as a result of having been a victim of criminal activity;

(B) The impact of loss of access to the United States courts and criminal justice system, including but not limited to, participation in the criminal investigation or prosecution of the criminal activity of which the alien was a victim, and any civil proceedings related to family law, child custody, or other court proceeding stemming from the criminal activity;

(C) The likelihood that the perpetrator's family, friends, or others acting on behalf of the perpetrator in the home country would harm the applicant or the applicant's children;

(D) The applicant's needs for social, medical, mental health, or other supportive services for victims of crime that are unavailable or not reasonably accessible in the home country;

(E) Where the criminal activity involved arose in a domestic violence context, the existence of laws and social practices in the home country that punish the applicant or the applicant's child(ren) because they have been victims of domestic violence or have taken steps to leave an abusive household;

(F) The perpetrator's ability to travel to the home country and the ability and willingness of authorities in the home country to protect the applicant or the applicant's children; and

(G) The age of the applicant, both at the time of entry to the United States and at the time of application for adjustment of status; and

(v) Evidence, including a signed statement from the qualifying family member and other supporting documentation, to establish that discretion should be exercised in his or her favor. Although qualifying family members are not required to establish that they are admissible on any of the grounds set forth in section 212(a) of the Act other than on section 212(a)(3)(E) of the Act, USCIS may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application. Where adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate. Depending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns.

(2) *Decision.* The decision to approve or deny a Form I–929 is a discretionary determination that lies solely within USCIS's jurisdiction. The Form I–929 for a qualifying family member may not be approved, however, until such time as the principal U–1 applicant's application for adjustment of status has been approved. After completing its review of the application and evidence, USCIS will issue a written decision and notify the applicant of that decision in writing.

(i) *Approvals.* (A) For qualifying family members who are outside of the United States, if the Form I–929 is approved, USCIS will forward notice of the approval either to the Department of State's National Visa Center so the applicant can apply to the consular post for an immigrant visa, or to the appropriate port of entry for a visa exempt alien.

(B) For qualifying family members who are physically present in the United States, if the Form I–929 is approved, USCIS will forward notice of the approval to the U–1 principal applicant.

(ii) *Denials.* If the Form I–929 is denied, the applicant will be notified in writing of the reason(s) for the denial in accordance with 8 CFR part 103. If an applicant chooses to appeal the denial to the Administrative Appeals Office pursuant to 8 CFR 103.3, the denial will not become final until the appeal is adjudicated. Denial of the U–1 principal applicant's application will result in the automatic denial of a qualifying family member's Form I–929. There shall be no appeal of such an automatic denial.

(i) *Application procedures for qualifying family members who are physically present in the United States to request adjustment of status.* (1) *Required documents.* Qualifying family members in the United States may request adjustment of status by submitting:

(i) Form I–485, Application to Register Permanent Residence or Adjust Status, in accordance with the form instructions;

(ii) An approved Form I–929, Petition for Qualifying Family Member of a U–1 Nonimmigrant;

(iii) The fee prescribed in 8 CFR 103.7(b)(1) or an application for a fee waiver; and

(iv) The biometric services fee as prescribed in 8 CFR 103.7(b)(1) or an application for a fee waiver.

(2) *Decision.* The decision to approve or deny Form I–485 is a discretionary determination that lies solely within USCIS's jurisdiction. After completing its review of the application and evidence, USCIS will issue a written decision approving or denying Form I–485 and notify the applicant of this decision in writing.

(i) *Approvals.* Upon approval of a Form I–485 under this section, USCIS shall record the alien's lawful admission for permanent residence as of the date of such approval.

(ii) *Denial.* Upon the denial of any application for adjustment of status, the applicant will be notified in writing of the decision and the reason for the denial in accordance with 8 CFR part 103. If an applicant chooses to appeal the denial to the Administrative Appeals Office pursuant to the provisions of 8 CFR 103.3, the denial will not become final until the appeal is adjudicated. During the appeal period, the applicant may not obtain or renew employment authorization under 8 CFR 274a.12(c)(9). Denial of the U–1 principal applicant's application will result in the automatic denial of a qualifying family member's Form I–485; such an automatic denial is not appealable.

(j) *Effect of departure.* If an applicant for adjustment of status under this section departs the United States, he or she shall be deemed to have abandoned the application, and it will be denied. If, however, the applicant is not under exclusion, deportation, or removal proceedings, and he or she filed a Form I–131, Application for Travel Document, in accordance with the instructions on the form, or any other appropriate form, and was granted advance parole by USCIS for such absences, and was inspected and paroled upon returning to the United States, he or she will not be deemed to have abandoned the application. If the adjustment of status application of such an individual is subsequently denied, he or she will be treated as an applicant for admission subject to sections 212 and 235 of the Act. If an applicant for adjustment of status under this section is under exclusion, deportation, or removal proceedings, USCIS will deem the application for adjustment of status abandoned as of the moment of the applicant's departure from the United States.

(k) *Exclusive jurisdiction.* USCIS shall have exclusive jurisdiction over adjustment applications filed under section 245(m) of the Act.

(l) *Inapplicability of 8 CFR 245.1 and 245.2.* The provisions of 8 CFR 245.1 and 245.2 do not apply to aliens seeking adjustment of status under section 245(m) of the Act.

PART 299—PRESCRIBED FORMS

■ 10. The authority citation in part 299 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103; 8 CFR part 2.

■ 11. Section 299.1 is amended in the table by adding the entries ''I–485, Supplement E'' and ''I–929'', in proper alpha/numeric sequence to read as follows:

§ 299.1 Prescribed forms.

* * * * *

Form No.	Edition date	Title
* * *	* * *	* * * * *
I–485, Supplement E	10/31/08	T and U Nonimmigrant Supplement to Form I–485 Instructions.
* * *	* * *	* * * * *
I–929	10/31/08	Petition for Qualifying Family Member of a U–1 Nonimmigrant.
* * *	* * *	* * * * *

■ 12. Section 299.5 is amended in the table by adding the entries ''I–485, Supplement E'' and ''I–929'', in proper alpha/numeric sequence to read as follows:

§ 299.5 Display of control numbers.

* * * * *

Form No.	Form title	Currently assigned OMB control No.
* * *	* * * * * *	*
I–485, Supplement E	T and U Nonimmigrant Supplement to Form I–485 Instructions	1615–0023
* * *	* * * * * *	*
I–929	Petition for Qualifying Family Member of a U–1 Nonimmigrant	1615–0106
* * *	* * * * * *	*

Paul A. Schneider,

Deputy Secretary.

[FR Doc. E8–29277 Filed 12–11–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 317 and 381

[Docket No. FSIS–2008–0040]

RIN 0583–AD05

Uniform Compliance Date for Food Labeling Regulations

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is establishing January 1, 2012, as the uniform compliance date for new meat and poultry product labeling regulations that are issued between January 1, 2009, and December 31, 2010. FSIS periodically announces uniform compliance dates for new meat and poultry product labeling regulations to minimize the economic impact of label changes.

DATES: This rule is effective December 12, 2008. Comments on this final rule must be received on or before January 12, 2009.

ADDRESSES: FSIS invites interested persons to submit comments on this final rule. Comments may be submitted by either of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the online instructions at that site for submitting comments.
- *Mail, including floppy disks or CD–ROMs, and hand- or courier-delivered items:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue, SW., Room 2534, South Agriculture Building, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2008–0040. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

Docket: For access to background documents or comments received, go to the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Rosalyn Murphy-Jenkins, Food Safety and Inspection Service, USDA, 1400 Independence Avenue, SW., Washington, DC 20250–3700; Telephone 202–205–0623, Fax 202/205–0145 or 202/205–0271.

SUPPLEMENTARY INFORMATION:

Background

FSIS periodically issues regulations that require changes in the labeling of meat and poultry food products. Many meat and poultry establishments also produce non-meat and non-poultry food products subject to the jurisdiction of the Food and Drug Administration (FDA). FDA also periodically issues regulations that require changes in the labeling of such products.

On December 14, 2004, FSIS issued the final rule that provided that the Agency will set uniform compliance dates for new meat and poultry product labeling regulations in two year increments and will periodically issue final rules announcing those dates. That final rule also established January 1, 2008, as the uniform compliance date for meat and poultry product labeling regulations that issued between January 1, 2005, and December 31, 2006 (69 FR 74405). Consistent with the 2004 final rule, FSIS issued a subsequent final rule, on March 5, 2007, that established January 1, 2010, as the uniform compliance date for meat and poultry product labeling regulations that issued between January 1, 2007, and December 31, 2008 (72 FR 9651).

The Final Rule

This final rule establishes January 1, 2012, as the uniform compliance date for new meat and poultry product labeling regulations that are issued between January 1, 2009 and December 31, 2010, is consistent with the previous final rules establishing uniform

compliance dates. In addition, FSIS' approach for establishing uniform compliance dates for new food labeling regulations is consistent with FDA's approach. FDA is also establishing January 1, 2012, as the uniform compliance date for new food labeling regulations that are issued between January 1, 2009, and December 31, 2010.

Two year increments enhance the industry's ability to make orderly adjustments to new labeling requirements without unduly exposing consumers to outdated labels. With this approach to effecting compliance, the meat and poultry industry is able to plan for use of label inventories and to develop new labeling materials that meet the requirements of all labeling regulations made within the two year period, thereby minimizing the economic impact of labeling changes. By establishing a uniform compliance date that is the same as FDA's, FSIS is providing meat and poultry manufacturers with a greater ability to adjust production plans to new labeling requirements across all of their product lines.

This policy also serves consumers' interests because the cost of multiple short-term label revisions that would otherwise occur would likely be passed on to consumers in the form of higher prices.

It will remain FSIS' policy, however, to encourage industry to comply with new labeling regulations as quickly as feasible. Thus, when industry members voluntarily change their labels, they should consider incorporating any new requirements that have been published as final regulations up to that time.

The new uniform compliance date will apply only to final FSIS regulations that require changes in the labeling of meat and poultry products and that are published after January 1, 2009, and before December 31, 2010. In each of these regulations, FSIS will specifically identify January 1, 2012, as the compliance date. All meat and poultry food products that are subject to labeling regulations promulgated between January 1, 2009 and December 31, 2010, will be required to comply with these regulations when introduced into commerce on or after January 1, 2012. If any food labeling regulation involves special circumstances that justify a compliance date other than January 12, 2012, the Agency will determine for that regulation an appropriate compliance date, which will be specified when the final regulation is published.

In rulemaking that began with the publication of a proposed rule on May 4, 2004, FSIS provided notice and solicited comment on the concept of establishing uniform compliance dates for labeling requirements (69 FR 24539). In the March 5, 2007, final rule, FSIS noted that the Agency received only four comments in response to the proposal, all fully supportive of the policy to set uniform compliance dates. Therefore, in the March 5, 2007, final rule, FSIS determined that further rulemaking for the establishment of uniform compliance dates for labeling requirements is unnecessary (72 FR 9651). Consistent with its statement in 2007, FSIS finds at this time that further rulemaking on this matter is unnecessary. However, FSIS is providing an opportunity for comment on whether the uniform compliance date established in this final rule should be modified or revoked.

Executive Order 12988

This final rule has been reviewed under the Executive Order 12988, Civil Justice Reform. Under this final rule: (1) All state and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) no retroactive proceedings will be required before parties may file suit in court challenging this rule.

Executive Order 12866

FSIS has examined the impacts of the final rule under Executive Order 12866, which directs agencies to assess costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). This action has been determined to be not significant and, therefore, has not been reviewed by the Office of Management and Budget.

Establishing a uniform compliance date for all future Federal food product labeling regulations affecting the meat and poultry industry that are issued by FSIS over a two year period will eliminate potentially burdensome requirements otherwise faced by the industry.

The regulation also greatly limits the possibility of potentially conflicting compliance dates for labeling requirements developed for meat and poultry products and labeling requirements developed for non-meat and non-poultry products. It thus provides for an orderly industry adjustment to any new labeling requirements. Labeling changes in response to Federal regulations will likely be less frequent, and establishments will be able to plan for full utilization of their labeling stocks.

Need for the Rule

Establishing uniform compliance dates for food labeling regulations issued within specified time periods minimizes the economic impact of label changes for industry and may indirectly benefit consumers if cost savings are passed on in the form of lower prices.

Regulatory Flexibility Analysis

This rule does not have a significant economic impact on a substantial number of small entities. Consequently, an initial regulatory flexibility analysis is not required (5 U.S.C. 601–612). The uniform compliance date does not impose any burden on small entities. The Agency will conduct regulatory flexibility of future labeling regulations if such analyses are required.

Paperwork Requirements

There are no paperwork or recordkeeping requirements associated with this policy under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

E-Government Act Compliance

FSIS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services for other purposes.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that minorities, women, and persons with disabilities are aware of this final rule, FSIS will announce it on-line through the FSIS Web page located at *http://www.fsis.usda.gov/regulations_&_policies/2008_Interim_&_Final_Rules_Index/index.asp*. FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals and other individuals who have asked to be included. The Update is available on the FSIS Web page. Through the Listserv and the Web page, FSIS is able to

provide information to a much broader and more diverse audience.

In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/*. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC, on December 9, 2008.

Alfred V. Almanza,

Administrator.

[FR Doc. E8–29485 Filed 12–11–08; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9434]

RIN 1545–BC88

Creditor Continuity of Interest

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations providing guidance regarding when and to what extent creditors of a corporation will be treated as proprietors of the corporation in determining whether continuity of interest (''COI'') is preserved in a potential reorganization. These final regulations are necessary to provide clarity to parties engaging in reorganizations of insolvent corporations, both inside and outside of bankruptcy. These final regulations affect corporations, their creditors, and their shareholders.

DATES: *Effective Date:* These final regulations are effective on December 12, 2008.

Applicability Date: For dates of applicability see § 1.368–1(e)(8).

FOR FURTHER INFORMATION CONTACT: Jean Brenner (202) 622–7790, Douglas Bates (202) 622–7550, or Bruce Decker (202) 622–7550 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On March 10, 2005, the IRS and Treasury Department published a notice of proposed rulemaking (REG–163314–03) in the **Federal Register** (70 FR 11903) proposing regulations that would provide guidance regarding the application of the nonrecognition rules of subchapter C of the Internal Revenue Code (Code) to transactions involving insolvent corporations and to other transactions that raise similar issues. No public hearing regarding the proposed regulations was requested or held. The IRS and Treasury Department have carefully considered the comments regarding the proposed regulations. The IRS and Treasury Department continue to consider the issues raised and to evaluate the complexity and necessity for valuation under the exchange of net value requirement. In the interim, these final regulations adopt the portion of the proposed regulations that deals with the circumstances in which (and the extent to which) creditors of a corporation will be treated as proprietors of the corporation in determining whether continuity of interest is preserved in a potential reorganization.

Explanation of Provisions

These final regulations provide that, in certain circumstances, stock received by creditors may count for continuity of interest purposes both inside and outside of bankruptcy proceedings. The expansion of the application of the G reorganization rules to reorganizations of insolvent corporations outside of bankruptcy is consistent with Congress' intent to facilitate the rehabilitation of troubled corporations. S. Rep. No. 96–1035, 96th Sess. 35 (1980). Accordingly, the final regulations adopt the rules proposed for creditors of an insolvent target corporation outside of a title 11 or similar case in new § 1.368–1(e)(6) with only minor modifications and clarifications. The final regulations treat claims of the most senior class of creditors to receive a proprietary interest in the issuing corporation and claims of all equal classes of creditors (together, the senior claims) differently from the claims of classes of creditors junior to the senior claims (the junior claims). The final regulations treat such senior claims as representing proprietary interests in the target corporation. While such senior claims, and all junior claims, are treated as representing a proprietary interest in the target corporation, the determination of the value of proprietary interests in the target corporation represented by the senior claims is made by calculating the average treatment for all senior claims. The final regulations provide that the value of a proprietary interest in the target corporation represented by a senior claim is determined by multiplying the fair market value of the creditor's claim by a fraction, the numerator of which is the fair market value of the proprietary interests in the issuing corporation that are received in the aggregate in exchange for the senior claims, and the denominator of which is the sum of the amount of money and the fair market value of all other consideration (including the proprietary interests in the issuing corporation) received in the aggregate in exchange for such claims. In contrast to the treatment of the senior creditor class that receives stock of the issuing corporation, the value of the proprietary interest in the target corporation represented by a junior claim is the fair market value of the junior claim. The effect of this rule is that there is 100 percent continuity of interest if each senior claim is satisfied with the same ratio of stock to nonstock consideration and no junior claim is satisfied with nonstock consideration.

An example was added to the COI rule in response to a suggestion that the final regulations demonstrate the bifurcation of senior claims when the creditors of the class receive disproportionate amounts of acquiring corporation stock and other property. Also, in response to comments, a rule was added to the final regulations requiring that in the situation where there is only one class of creditors receiving stock, more than a de minimis amount of acquiring corporation stock must be exchanged for the creditors' proprietary interests relative to the total consideration received by the insolvent target corporation, its shareholders, and its creditors, before the stock will be counted for purposes of COI.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these final regulations and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Jean Brenner, Douglas Bates, and Bruce Decker of the Office of

Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.368–1 is amended by:
■ 1. Adding a sentence after the fifth sentence of paragraph (e)(1)(i).
■ 2. Adding a sentence at the end of paragraph (e)(1)(ii).
■ 3. Revising paragraph (e)(3).
■ 4. Redesignating paragraphs (e)(6), (e)(7), and (e)(8) as paragraphs (e)(7), (e)(8), and (e)(9) respectively, and adding a new paragraph (e)(6).
■ 5. Adding *Example 10* to the end of newly designated paragraph (e)(8).
■ 6. Adding a sentence at the end of newly designated paragraph (e)(9)(i).

The additions and revisions read as follows:

§ 1.368–1 Purpose and scope of exception to reorganization exchanges.

* * * * *

(e) * * *

(1) * * *

(i) * * * See paragraph (e)(6) of this section for rules related to when a creditor's claim against a target corporation is a proprietary interest in the corporation. * * *

(ii) * * * A proprietary interest in the target corporation is not preserved to the extent that creditors (or former creditors) of the target corporation that own a proprietary interest in the corporation under paragraph (e)(6) of this section (or would be so treated if they had received the consideration in the potential reorganization) receive payment for the claim prior to the potential reorganization and such payment would be treated as other property or money received in the exchange for purposes of section 356 had it been a distribution with respect to stock.

(3) *Related persons acquisitions.* A proprietary interest in the target corporation is not preserved if, in connection with a potential reorganization, a person related (as defined in paragraph (e)(4) of this section) to the issuing corporation acquires, for consideration other than stock of the issuing corporation, either a proprietary interest in the target corporation or stock of the issuing corporation that was furnished in exchange for a proprietary interest in the target corporation. The preceding sentence does not apply to the extent those persons who were the direct or indirect owners of the target corporation prior to the potential reorganization maintain a direct or indirect proprietary interest in the issuing corporation.

* * * * *

(6) *Creditors' claims as proprietary interests*—(i) *In general.* A creditor's claim against a target corporation may be a proprietary interest in the target corporation if the target corporation is in a title 11 or similar case (as defined in section 368(a)(3)) or the amount of the target corporation's liabilities exceeds the fair market value of its assets immediately prior to the potential reorganization. In such cases, if any creditor receives a proprietary interest in the issuing corporation in exchange for its claim, every claim of that class of creditors and every claim of all equal and junior classes of creditors (in addition to the claims of shareholders) is a proprietary interest in the target corporation immediately prior to the potential reorganization to the extent provided in paragraph (e)(6)(ii) of this section.

(ii) *Value of proprietary interest*—(A) *Claims of most senior class of creditors receiving stock.* A claim of the most senior class of creditors receiving a proprietary interest in the issuing corporation and a claim of any equal class of creditors will be treated as a proprietary interest in accordance with the rules of this paragraph (e)(6)(ii). For a claim of the most senior class of creditors receiving a proprietary interest in the issuing corporation, and a claim of any equal class of creditors, the value of the proprietary interest in the target corporation represented by the claim is determined by multiplying the fair market value of the claim by a fraction, the numerator of which is the fair market value of the proprietary interests in the issuing corporation that are received in the aggregate in exchange for the claims of those classes of creditors, and the denominator of which is the sum of the amount of money and the fair market value of all other consideration (including the proprietary interests in the issuing corporation) received in the aggregate in exchange for such claims. If only one class (or one set of equal classes) of creditors receives stock, such class (or set of equal classes) is treated as the most senior class of creditors receiving stock. When only one class (or one set of equal classes) of creditors receives issuing corporation stock in exchange for a creditor's proprietary interest in the target corporation, such stock will be counted for measuring continuity of interest provided that the stock issued by the acquiring corporation is not de minimis in relation to the total consideration received by the insolvent target corporation, its shareholders, and its creditors.

(B) *Claims of junior classes of creditor receiving stock.* The value of a proprietary interest in the target corporation held by a creditor whose claim is junior to the claims of other classes of target claims which are receiving proprietary interests in the issuing corporation is the fair market value of the junior creditor's claim.

(iii) *Bifurcated claims.* If a creditor's claim is bifurcated into a secured claim and an unsecured claim pursuant to an order in a title 11 or similar case (as defined in section 368(a)(3)) or pursuant to an agreement between the creditor and the debtor, the bifurcation of the claim and the allocation of consideration to each of the resulting claims will be respected in applying the rules of this paragraph (e)(6).

(iv) *Effect of treating creditors as proprietors.* The treatment of a creditor's claim as a proprietary interest in the target corporation shall not preclude treating shares of the target corporation as proprietary interests in the target corporation.

* * * * *

(8) * * *

Example 10. Creditors treated as owning a proprietary interest. (i) *More than one class of creditor receives issuing corporation stock.* T has assets with a fair market value of $150x and liabilities of $200x. T has two classes of creditors: two senior creditors with claims of $25x each; and one junior creditor with a claim of $150x. T transfers all of its assets to P in exchange for $95x in cash and shares of P stock with a fair market value of $55x. Each T senior creditor receives $20x in cash and P stock with a fair market value of $5x in exchange for his claim. The T junior creditor receives $55x in cash and P stock with a fair market value of $45x in exchange for his claim. The T shareholders receive no consideration in exchange for their T stock. Under paragraph (e)(6) of this section, because the amount of T's liabilities exceeds the fair market value of its assets immediately prior to the potential reorganization, the claims of the creditors of T may be proprietary interests in T. Because the senior creditors receive proprietary interests in P in the transaction in exchange for their claims, their claims and the claim of the junior creditor and the T stock are

treated as proprietary interests in T immediately prior to the transaction. Under paragraph (e)(6)(ii)(A) of this section, the value of the proprietary interest of each of the senior creditors' claims is $5x (the fair market value of the senior creditor's claim, $25x, multiplied by a fraction, the numerator of which is $10x, the fair market value of the proprietary interests in the issuing corporation, P, received in the aggregate in exchange for the claims of all the creditors in the senior class, and the denominator of which is $50x, the sum of the amount of money and the fair market value of all other consideration (including the proprietary interests in P) received in the aggregate in exchange for such claims). Accordingly, $5x of the stock that each of the senior creditors receives is counted in measuring continuity of interest. Under paragraph (e)(6)(ii)(B) of this section, the value of the junior creditor's proprietary interest in T immediately prior to the transaction is $100x, the value of his claim. Thus, the value of the creditors' proprietary interests in total is $110x and the creditors received $55x worth of P stock in total in exchange for their proprietary interests. Therefore, P acquired 50 percent of the value of the proprietary interests in T in exchange for P stock. Because a substantial part of the value of the proprietary interests in T is preserved, the continuity of interest requirement is satisfied.

(ii) *One class of creditor receives issuing corporation stock and cash in disproportionate amounts.* T has assets with a fair market value of $80x and liabilities of $200x. T has one class of creditor with two creditors, A and B, each having a claim of $100x. T transfers all of its assets to P for $60x in cash and shares of P stock with a fair market value of $20x. A receives $40x in cash in exchange for its claim. B receives $20x in cash and P stock with a fair market value of $20x in exchange for its claim. The T shareholders receive no consideration in exchange for their T stock. The P stock is not de minimis in relation to the total consideration received. Under paragraph (e)(6) of this section, because the amount of T's liabilities exceeds the fair market value of its assets immediately prior to the potential reorganization, the claims of the creditors of T may be proprietary interests in T. Because the creditors of T received proprietary interests in P in the transaction in exchange for their claims, their claims and the T stock are treated as proprietary interests in T immediately prior to the transaction. Under paragraph (e)(6)(ii)(A) of this section, the value of the proprietary interest of each of the senior creditors is $10x (the fair market value of a senior creditor's claim, $40x, multiplied by a fraction, the numerator of which is $20x, the fair market value of the proprietary interests in the issuing corporation, P, received in the aggregate in exchange for the claims of all the creditors in the class, and the denominator of which is $80x, the sum of the amount of money and the fair market value of all other consideration (including the proprietary interests in P) received in the aggregate in exchange for such claims). Accordingly, $10x of the cash that was received by A and $10x of the P stock that was received by B are counted in measuring continuity of interest. Thus, the value of the creditors' proprietary interests in total is $20x and the creditors received $10x worth of P stock in total in exchange for their proprietary interests. Therefore, P acquired 50 percent of the value of the proprietary interests in T in exchange for P stock. Because a substantial part of the value of the proprietary interests in T is preserved, the continuity of interest requirement is satisfied.

(9) * * * The sixth sentence of paragraph (e)(1)(i) of this section, the last sentence of paragraph (e)(1)(ii) of this section, paragraph (e)(3) of this section, paragraph (e)(6) of this section, and *Example 10* of paragraph (e)(8) of this section apply to transactions occurring after December 12, 2008.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

Approved: December 3, 2008.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E8–29271 Filed 12–11–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918 and 1926

[Docket No. OSHA–2008–0031]

RIN 1218–AC42

Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Final rule.

SUMMARY: In this rulemaking, OSHA is amending its standards to add language clarifying that the personal protective equipment (PPE) and training requirements impose a compliance duty to each and every employee covered by the standards and that noncompliance may expose the employer to liability on a per-employee basis. The amendments consist of new paragraphs added to the introductory sections of the listed Parts and changes to the language of some existing respirator and training requirements. This action, which is in accord with OSHA's longstanding position, is being taken in response to recent decisions of the Occupational Safety and Health Review Commission indicating that differences in wording among the various PPE and training provisions in OSHA safety and health standards affect the Agency's ability to treat an employer's failure to provide PPE or training to each covered employee as a separate violation. The amendments add no new compliance obligations. Employers are not required to provide any new type of PPE or training, to provide PPE or training to any employee not already covered by the existing requirements, or to provide PPE or training in a different manner than that already required. The amendments simply clarify that the standards apply to each employee.

DATES: This final rule becomes effective on January 12, 2009.

ADDRESSES: In accordance with 28 U.S.C. 2112(a), the Agency designates Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor of Labor, Room S–4004, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, to receive petitions for review of the final rule.

FOR FURTHER INFORMATION CONTACT: Contact Ms. Jennifer Ashley, Director, Office of Communications, OSHA, U.S. Department of Labor, Room N–3647, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1999 or fax (202) 693–1634.

SUPPLEMENTARY INFORMATION:

I. Table of Contents

I. Table of Contents
II. Background
III. Legal Authority
IV. Summary and Explanation of the Final Rule
V. Final Economic Analysis
VI. Regulatory Flexibility Certificate
VII. Environmental Impact Assessment
VIII. Federalism
IX. Unfunded Mandates
X. OMB Review Under the Paperwork Reduction Act
XI. State Plan States
XII. Authority and Signature

II. Background

A. Personal Protective Equipment (PPE)

The use of personal protective equipment, including respirators, is often necessary to protect employees from injury or illness caused by exposure to toxic substances and other workplace hazards. Many OSHA standards in Parts 1910 through 1926 require employers to provide PPE to their employees and ensure the use of PPE. Some general standards require the employer to provide appropriate PPE wherever necessary to protect employees from hazards. *See, e.g.*, §§ 1910.132(a); 1915.152(a); 1926.95(a). Other standards require the employer to

provide specific types of PPE or to provide PPE in specific circumstances. For example, the logging standard requires employers to provide cut-resistant leg protection to employees operating a chainsaw, 29 CFR 1910.266(d)(1)(iv); the coke oven emissions standard requires the employer to provide flame resistant clothing and other specialized protective equipment, § 1910.1029(h); and the methylene chloride standard requires the employer to provide protective clothing and equipment that is resistant to methylene chloride, § 1910.1052(h). OSHA's respirator standards follow a similar pattern. Section 1910.134, revised in 1998, requires employers to provide respirators ''when such equipment is necessary to protect the health of the employee.'' § 1910.134(a)(2). The section includes additional paragraphs requiring employers to establish a respiratory protection program, to select an appropriate respirator based upon the hazard(s) to which the employee is exposed, to provide a medical examination to determine the employee's ability to use a respirator, to fit-test the respirator to the individual employee and to take other actions to ensure that respirators are properly selected, used and maintained. *E.g.*, § 1910.134(c) through (m); 63 FR 1152–1300 January 8, 1998 (Respiratory Protection rule). A variety of other standards require the employer to provide respirators when employees are or may be exposed to specific hazardous substances. *See, e.g.*, § 1910.1101(g)(asbestos); § 1910.1027(g)(cadmium). The 1998 Respiratory Protection rule revised the substance-specific standards then in existence to simplify and consolidate their respiratory protection provisions. 63 FR 1265–68. Except for a limited number of respirator provisions unique to each substance-specific standard, the regulatory text on respirators for these standards is virtually the same. The construction industry asbestos standard's initial respirator paragraph, which is virtually identical to the initial respirator paragraphs in most substance specific standards, states that, ''[f]or employees who use respirators required by this section, the employer must provide respirators that comply with the requirements of this paragraph.'' § 1926.1101(h)(1). The standard also states that, ''the employer must implement a respiratory protection program in accordance with [certain requirements in § 1910.134].'' § 1926.1101(h)(2).

B. Training

Training is also an important component of many OSHA standards. Training is necessary to enable employees to recognize the hazards posed by toxic substances and dangerous work practices and protect themselves from these hazards. Virtually all of OSHA's toxic-substance standards, such as the asbestos, vinyl chloride, lead, chromium, cadmium and benzene standards, require the employer to train or provide training to employees who may be exposed to the substance. Many safety standards also contain training requirements. The lockout/tagout standard, for example, requires the employer to provide training on the purpose and function of the energy control program, § 1910.147(c)(7), and the electric power generation standard requires that employees be trained in and familiar with pertinent safety requirements and procedures. § 1910.269(a)(2).

The regulatory text on training varies from standard to standard. Some standards explicitly state that ''each employee shall be trained'' or ''each employee shall receive training'' or contain similar language that makes clear that the training must be provided to each individual employee covered by the requirement. *E.g.*, process safety management, § 1910.119(g)(i) (each employee shall be trained); lockout/tagout, § 1910.147(c)(7)(A) (each employee shall receive training); vinyl chloride, § 1910.1017(j) (each employee shall be provided training); construction general safety and health provisions, § 1926.20(b) (instruct each employee); construction fall protection, § 1926.503(a) (provide a training program for each employee).

Other standards contain a slight variation; they state that ''employees shall be trained'' or that the employer must ''provide employees with information and training.'' *E.g.*, Electric power generation, § 1910.269(a)(2) (employees shall be trained); Benzene, § 1910.1028(j)(3)(i) (provide employees with information and training); Hazard communication, § 1910.1200(h) (provide employees with effective information and training).

Finally, some standards state that the employer must ''institute a training program [for exposed employees] and ensure their participation in the program'' or contain similar language. For example, the asbestos standard's initial training section states that ''[t]he employer shall institute a training program for all employees who are exposed to airborne concentrations of asbestos at or above the PEL and/or excursion limit and ensure their participation in the program.'' § 1910.1001(j)(7). *See also, e.g.*, § 1926.1101(k)(9) (Construction asbestos); § 1910.1025(l) (Lead); § 1910.1027(m)(4) (Cadmium).

The Agency interprets its PPE and training provisions to impose a duty upon the employer to comply for each and every employee subject to the requirement regardless of whether the provision expressly states that PPE or training must be provided to ''each employee.'' Neither the Commission nor any court has ever suggested that an employer can comply with the PPE and training provisions in safety and health standards by providing PPE to some employees covered by the requirement but not others, or that the employer can train some employees covered by the training requirement but not others. The basic nature of the employer's obligation is the same in all of these provisions; each and every employee must receive the required protection.

Therefore, the agency's position is that a separate violation occurs for each employee who is not provided required PPE or training, and that a separate citation item and proposed penalty may be issued for each. However, as discussed in the Legal Authority section, a recent decision of the Review Commission in the *Ho* case suggests that minor variations in the wording of the provisions affect the Secretary's authority to cite and penalize separate violations. *Secretary of Labor* v. *Erik K. Ho, Ho Ho Ho Express, Inc. and Houston Fruitland, Inc.*, 20 O.S.H. Cas. (BNA) 1361 (Rev. Comm'n 2003), *aff'd, Chao* v. *OSHRC and Erik K. Ho*, 401 F.3d 355 (5th Cir. 2005). The agency is proposing to amend its standards to make it unmistakably clear that each covered employee is required to receive PPE and training, and that each instance when an employee subject to a PPE or training requirement does not receive the required PPE or training may be considered a separate violation subject to a separate penalty.

Where an employer commits multiple violations of a single standard or regulation, OSHA either groups the violations and proposes a single penalty, or cites and proposes a penalty for each discrete violation. Although ''grouping'' is the more common method, OSHA proposes separate ''per-instance'' penalties in cases where the resulting heightened aggregate penalty is appropriate to deter flagrant violators and increase the impact of OSHA's limited resources. Per-employee penalties for violations of PPE and training requirements are no different in kind than other types of per-instance

penalties the agency has proposed under this policy. OSHA's current policies for issuing instance-by-instance violations are described in OSHA Instruction CPL 2.80 issued on October 21, 1990. These detailed instructions to OSHA's field offices and the National Office ensure that the policy is only used when a particularly flagrant violation is discovered, and that each case receives careful review by the Agency's senior officials before such citations are issued. Approximately seven instance-by-instance, or egregious, citations are issued each year (Ex. 69).

Accordingly, on August 19, 2008, OSHA proposed to amend the respirator and training provisions in the standards in Parts 1910 through 1926 to: (1) Revise the language of the initial respirator paragraphs adopted in the 1998 respiratory protection rule to explicitly state that the employer must provide each employee an appropriate respirator and implement a respiratory protection program for each employee, (2) revise the language of those initial training paragraphs that require the employer to institute or provide a training program to explicitly state that the employer must train each employee, and (3) add a new section to the introductory Subparts of each Part to clarify that standards requiring the employer to provide PPE, including respirators, or to provide training to employees, impose a separate compliance duty to each employee covered by the requirement and that each instance of an employee who does not receive the required PPE or training may be considered a separate violation (73 FR 48335–48350).

OSHA received approximately 50 comments on the proposal, and, in response to several requests, held a hearing on October 6, 2008. A 30-day period was established for post-hearing comments and briefs, and seven post-hearing submissions were received by the Agency.

Following the notice and comment period, an informal rulemaking hearing, and careful Agency deliberation, OSHA finds that its preliminary conclusions are appropriate and is therefore issuing this final standard clarifying employers' responsibilities to provide required PPE and training to each and every one of their employees.

Federal Register documents, comments, the transcript from the hearing, and post hearing submissions can be accessed electronically at *http://www.regulations.gov*, docket No. OSHA–2008–0031. Comments received are identified at regulations.gov as Exhibits ''OSHA–2008–0031–XXX''. However, in the discussion below, comments will simply be referenced as ''Ex. XXX'' to shorten the references and make the document more readable.

Please note that the title of the final rulemaking has been changed from the title used in the proposal. The proposed rulemaking title ''Clarification of Remedy for Violation of Requirements to Provide Personal Protective Equipment and Train Each Employee'' caused some confusion as to the nature of the rulemaking. Therefore, OSHA has changed the title to ''Clarification of Employer Duty to Provide Personal Protective Equipment and Training to Each Employee'' to show that the rulemaking does not impose penalties, but rather clarifies each employer's duty to provide PPE and training to each and every employee covered by the standards and informs employers that the failure to provide PPE or training to an employee may be considered a separate violation.

III. Legal Authority

A. Introduction

The final rule does not impose any new substantive requirements. The regulatory text clarifies that the duty to provide personal protective equipment of all types, including respirators, and training to employees is a duty owed to each employee covered by the requirement. This adds no new compliance burden; the nature of the employer's duty to protect each employee is inherent in the existing provisions. To comply with existing PPE and training provisions, the employer must provide PPE to each employee who needs it and train each employee who must be informed of job hazards. The employer is not in compliance if some employees are without personal protection or are untrained. The final rule achieves greater consistency in the regulatory text of the various respirator and training provisions in Parts 1910 through 1926, provides clearer notice of the nature of the employer's duty under existing PPE and training provisions, and addresses the Commission's interpretation that the language of some respirator and training provisions does not allow separate per-employee citations and penalties.

Before OSHA can issue a new more protective standard, the agency must find that the hazard being regulated poses a significant risk of material health impairment and that the new standard is reasonably necessary and appropriate to reduce that risk. *Industrial Union Department, AFL–CIO* v. *American Petroleum Institute*, 448 U.S. 607 (1980). OSHA must also show that the new standard is technologically and economically feasible, and cost effective. *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490 (1980). These requirements are not implicated in this final rule because the amendments merely clarify the obligations under the existing PPE and training provisions and add no additional requirements. See sections V and VI *infra*. The agency met its burden of showing significant risk, feasibility and cost effectiveness in promulgating the existing PPE and training requirements.

B. General Principles Governing Per-Instance Penalties

Section 9(a) of the Act authorizes the Secretary to issue a citation when ''an employer has violated a requirement of * * * any standard.'' 29 U.S.C. 658(a). A separate penalty may be assessed for ''each violation.'' *Id.* at 666(a), (b), (c). ''The plain language of the Act could hardly be clearer'' in authorizing a separate penalty for each discrete instance of a violation of a duty imposed by a standard. *Kaspar Wire Works, Inc.* v. *Secretary of Labor*, 268 F.3d 1123, 1130 (DC Cir. 2001).

What constitutes an instance of a violation for which a separate penalty may be assessed depends upon the nature of the duty imposed by the standard or regulation at issue. If the standard ''prohibits individual acts rather than a single course of action,'' each prohibited act constitutes a violation for which a penalty may be assessed. *Secretary of Labor* v. *General Motors Corp., CPCG Oklahoma City Plant*, 2007 WL 4350896, 35 (*GM*) (Rev. Comm'n 2007); *Sanders Lead Co.* 17 O.S.H. Cas. (BNA) 1197, 1203 (Rev. Comm'n 1995). Applying this test, the Commission has held that the recordkeeping regulation's requirement to record each injury or illness is violated each time the employer failed to record an injury or illness, *Secretary of Labor* v. *Caterpillar Inc.*, 15 O.S.H. Cas. (BNA) 2153, 2172–73 (Rev. Comm'n 1993); the machine guarding standard's requirement for point-of-operation guards on machine parts that could injure employees is violated at each unguarded machine, *Hoffman Constr. Co.* v. *Secretary of Labor*, 6 O.S.H. Cas. (BNA) 1274, 1275 (Rev. Comm'n 1975); the fall protection standard's requirement to guard floor and wall openings is violated at each location on a construction site where appropriate fall protection is lacking, *Secretary of Labor* v. *J.A. Jones Constr. Co.*, 15 O.S.H. Cas. (BNA) 2201, 2212 (Rev. Comm'n 1993); the trenching standard's shoring or shielding requirement is violated at each

unprotected trench, *Secretary of Labor* v. *Andrew Catapano Enters., Inc.*, 17 O.S.H. Cas. (BNA) 1776, 1778 (Rev. Comm'n 1996) and the electrical safety standard is violated at each location where non-complying electrical equipment is installed. *A.E. Staley Mfg. Co.* v. *Secretary of Labor*, 295 F.3d 1341, 1343 (DC Cir. 2002).

The failure to protect an employee is a discrete act for which a separate penalty may be assessed when the standard imposes a specific duty on the employer to protect individual employees:

> Some standards implicate the protection, etc. of individual employees to such an extent that the failure to have the protection in place for each employee permits the Secretary to cite on a per-instance basis. However, where a single practice, method or condition affects multiple employees, there can be only one violation of the standard.

Secretary of Labor v. *Hartford Roofing Co.*, 17 O.S.H. Cas. (BNA) 1361, 1365 (Rev. Comm'n 1995). In *Hartford Roofing*, the Commission held that abatement of an unguarded roof edge required the single action of installing a motion stopping system or line that would constitute compliance for all employees exposed to a fall. *Id.* at 1367. Accordingly, the failure to abate the hazard could be cited only once regardless of the number of exposed employees. *Ibid.* However, where the employer fails to protect employees from falls at several different locations in the same building, a violation exists at each such location. *J.A. Jones*, 15 O.S.H. Cas. (BNA) at 2212. Thus, what constitutes an ''instance'' of a violation varies depending upon the standard. ''Per-instance'' can mean per-machine, or per-injury, or per-location depending upon the nature of the employer's compliance obligation.

Per-employee violations are no different from other types of per-instance violations. Just as the employer must ensure that electrical equipment is safe in each location where it is installed, *Staley*, 295 F.3d at 1343, the employer must ensure that each employee who requires PPE or training receives it. *Hartford Roofing*, 17 O.S.H. Cas. (BNA) at 1366. The failure to provide an individual employee with an appropriate respirator is a discrete instance of a violation of the general respirator standard, 29 CFR 1910.134, because the standard requires an individual act for each employee:

> As long as employees are working in a contaminated environment, the failure to provide each of them with appropriate respirators could constitute a separate and discrete violation * * *. [T]he condition or practice to which the standard is directed * * * [is] the individual and discrete failure to provide an employee working within a contaminated environment with a proper respirator.

17 O.S.H. Cas. (BNA) at 1366. *Hartford Roofing* reflects the guiding principle that provisions requiring the employer to ''provide'' respirators to employees because of environmental or other hazards to which they are exposed are intrinsically employee-specific because such provisions require protection for employees as individuals. The Commission reaffirmed this principle in subsequent cases. In *Secretary of Labor* v. *Sanders Lead Co.*, 17 O.S.H. Cas. (BNA) 1197, 1203 (Rev. Comm'n 1995), the Commission held that the lead standard's requirement for semiannual respirator fit-tests could be cited on a per-employee basis because it involved evaluation of individual employees' respirators under certain conditions peculiar to each employee. Furthermore, in *Catapano*, 17 O.S.H. Cas. (BNA) at 1780, the Commission indicated that the general construction training standard, § 1926.21(b)(2), clearly supported per-employee citations for each individual employee not trained. However, the Commission in *Catapano* found that the Secretary had not cited training violations on a per-employee basis, but rather, had impermissibly cited the employer for each inspection in which employees were found not to have been trained. Thus, the Commission affirmed only a single violation of the standard. *Ibid.*

In the *Ho* decision, the Commission veered from these principles and adopted an analysis focused on the presence or absence of certain specific words in the respirator or training provision at issue. 20 O.S.H. Cas. (BNA) at 1369–1380. Under this approach, the agency's ability to enforce respirator and training violations using per-employee citations in appropriate cases turns on minor variations in the wording of the requirements.

Erik Ho, a Texas businessman, was cited for multiple violations of the construction asbestos standard's respirator and training provisions. Ho's conduct was particularly flagrant. He hired eleven undocumented Mexican employees to remove asbestos from a vacant building without providing any of them with appropriate protective equipment, including respirators, and without training them on the hazards of asbestos. Ho persisted in exposing the unprotected, untrained employees to asbestos even after a city building inspector shut down the worksite, at which point Ho began operating secretly at night behind locked gates. The citations charged Ho with separate violations for each of the eleven employees not provided a respirator. The respirator provision then in effect stated, in relevant part, that ''[t]he employer shall provide respirators and ensure that they are used * * * [d]uring all Class I asbestos jobs.'' § 1926.1101(h)(1)(i). Ho was also charged with separate violations for each of the eleven employees not trained in accordance with § 1926.1101(k)(9)(i) and (k)(9)(viii). Paragraph (k)(9)(i) requires the employer to ''institute a training program for all [exposed] employees and * * * ensure their participation in the program;'' paragraph (k)(9)(viii) states that ''[t]he training program shall be conducted in a manner that the employee is able to understand * * * [and] the employer shall ensure that each such employee is informed of [specific hazard information].''

A divided Occupational Safety and Health Review Commission vacated all but one of the respirator and one of the training violations. According to the majority, the requirement to provide respirators and ensure their use involved the single act of providing respirators to the employees in the group performing the specified asbestos work. 17 O.S.H. Cas. (BNA) at 1372. Thus, the majority concluded, ''the plain language of the standard addresses employees in the aggregate, not individually.'' *Ibid.* The majority reached this conclusion despite acknowledging that various subparagraphs immediately following the cited provision required particularly employee-specific actions, such as fit-testing individual employees. *Ibid.* n. 12.

The majority adopted an equally narrow interpretation of the requirement in § 1926.1101(k)(9)(i) to ''institute a training program'' for all [exposed] employees and ensure their participation in the program.'' According to the majority, this language requires the employer to have a single training program for all exposed employees and imposes a single duty to train employees generally. *Id.* at 1374. Although paragraph (k)(9)(viii) explicitly states that, ''the employer shall ensure that each such employee is informed of [specific hazard information],'' the majority found that ''the mere use of the terminology 'each such employee' under (k)(9)(viii) does not demonstrate that these [training] provisions define the relevant workplace exposure in terms of exposure of individual employees.'' *Ibid.* One Commissioner dissented, arguing that the plain wording of the respirator and training provisions

authorizes OSHA to treat as a discrete violation each employee not provided and required to use an appropriate respirator, and each employee not trained in asbestos hazards. *Id.* at 1380–86 (Rodgers, Comm'r dissenting).

A divided panel of the U.S. Court of Appeals for the Fifth Circuit affirmed the result reached by the Commission, in part on different grounds than those articulated by the Commission majority. 401 F.3d at 368–376. The majority agreed with the Commission that the language of the respirator provision did not support per-employee penalties for Ho's failure to provide a respirator to each employee who performed covered asbestos work. *Id.* at 373–74. Disagreeing with the Commission, the majority found that the language of the training provision permits per-employee citations. *Id.* at 372. However, the majority concluded that the agency's decision to cite and penalize Ho for each untrained employee was unreasonable absent circumstances showing that different training actions would have been required because of uniquely employee-specific factors. *Id.* at 373. Judge Garza dissented. He read the respirator provision to require action on a per-employee basis. *Id.* at 379 (Garza J. dissenting). He also found no support for the majority's ''employee-specific unique circumstances'' requirement under the training provision and concluded that, in any event, the requirement was met by Ho's failure to train the employees and ensure that they understood the training. *Id.* at 379–80.

In two subsequent decisions, the Commission stated that respirator and training requirements worded slightly differently from those at issue in *Ho* may be cited on a per-employee basis. In *Secretary of Labor* v. *Manganas Painting Co.*, 21 O.S.H. Cas. (BNA) 1964, 1998–99 (Rev. Comm'n 2007), the Commission indicated that the initial respiratory protection paragraph of the 1993 construction lead standard, § 1926.62(f)(1), authorizes per-employee citations. That paragraph states, in relevant part, ''[w]here the use of respirators is required under this section the employer shall provide * * * and assure the use of respirators which comply with the requirements of this paragraph.'' The Commission distinguished *Ho* on the ground that the language in the cited provision requiring the employer to provide respirators ''which comply with the requirements of this paragraph'' means that compliance with paragraph (f)(1) is predicated upon compliance with all of the requirements in paragraph (f), including fit-testing requirements in another section of the paragraph that are uniquely employee-specific.[1] *Ibid.* In contrast, in *Ho* the language requiring compliance with such provisions immediately followed the cited initial provision, and the Commission declined to read the initial provision in light of the subsequent requirements. However, the Commission's interpretation in *Manganas* that the lead standard authorizes per-employee violations may not be part of the holding of the case. After stating that the standard could be cited on a per-employee basis, the Commission then stated that it declined to determine whether Manganas's failure to provide respirators to multiple employees constituted a single violation or multiple violations on the ground that the amount of the total penalty would not be affected under the circumstances of that case. *Id.* at 1999.

In December 2007, the Commission decided *GM.* 2007 WL 4350896. The case involved citations issued in 1991 charging GM, *inter alia*, with separate violations for each of six employees not trained in accordance with the lockout/tagout (LOTO) standard's initial training paragraph, § 1910.147(c)(7)(i). This paragraph states, in relevant part, that ''[t]he employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees * * *. (A) Each authorized employee shall receive training * * *.'' The citation also charged GM with separate violations for each of twelve employees not retrained in accordance with the standard's retraining provision, § 1910.147(c)(7)(iii)(B), which requires retraining whenever the employer is aware of inadequacies in the employee's knowledge or use of the energy control procedures.

The Commission affirmed all of these per-employee violations. It held that the LOTO training paragraph, unlike the initial paragraph at issue in *Ho*, states that ''each employee'' is to be trained and therefore ''imposes a specific duty on the employer to train each individual employee.'' 2007 WL 4350896 at 36. The Commission also noted that other requirements in paragraph (c)(7) clarify the individualized nature of the training duty, such as the requirement to record the employees' names and dates of training; that the preamble indicates that training involves consideration of employee-specific factors, and that ''the core concept of lockout/tagout is *personal protection*.'' *Id.* at 37 (emphasis added). The Commission did not refer to the portion of its *Ho* decision that rejected reliance on ''each employee'' language in the training requirement at issue there or that refused to consider any requirements in the standard other than the cited initial provision in deciding the nature of the employer's duty.

For similar reasons, the Commission affirmed separate violations of the requirement to retrain whenever the employer becomes aware of deviations from or inadequacies in the employee's knowledge or use of the energy control procedures. *Ho* (construing 29 CFR 1910.147(c)(7)(iii)(B)). This provision, the Commission found, ''specifically targets deviations from or inadequacies in the employee's knowledge or use of the energy control procedures, an occurrence that would trigger an employer's obligation to retrain only that particular employee.'' *Ibid.* (internal quotations omitted).

The Commission held that because the training provisions impose a specific duty on the employer to train each employee, it is irrelevant whether the employer may choose to provide the required training collectively, such as holding a single training session for all employees. *Id.* at 36. Under the wording of the standard, the Commission concluded, ''any failure to train would be a separate abrogation of the employer's duty to train each untrained employee.'' *Ibid.* The Commission distinguished the *Ho* decision on the ground that the language at issue there, requiring ''a training program for all employees,'' pertained to a single group of employees collectively exposed to identical hazards. *Ibid.*

C. The Agency's Interpretation

The Agency's position is that despite minor differences in their wording, all PPE and training provisions in safety and health standards impose the same basic duty on the employer to protect employees individually—by providing personal protective equipment, such as a respirator, or by communicating hazard information through training. The individualized nature of the duty to comply does not change because of the presence or absence of the words ''each employee,'' or other words explicitly stating that the employer's duty runs to each individual employee. Thus, the existing PPE provisions may be cited separately for each employee who requires PPE but does not receive it, and the training provisions may be cited separately for each employee who requires training but does not receive it.

[1] The current version of § 1926.62(f)(1) is virtually identical to the 1993 version at issue in *Manganas.* The provision now states in relevant part, ''[f]or employees who use respirators required by this section, the employer must provide respirators that comply with the requirements of this paragraph.''

The employee-specific nature of the employer's duty to provide PPE and training may be demonstrated in several different ways. First, the employer must take a separate abatement action for each individual employee. Where respirators are required, the employer must give a separate respirator to each individual employee. Where training is required, the employer must impart specific hazard information to each individual employee. The employee-specific nature of the training requirements is not altered because the employer may choose to conduct training in a group session. As the Commission held in *GM,* the duty to provide training is specific to each individual employee subject to the requirement. 2007 WL 4350896. Thus regardless of how the training is conducted, the employer must ensure that each individual employee receives the required information at the appropriate time.

Second, unlike standards that do not permit per-employee citations, the PPE and training requirements logically permit the employer to comply for one employee and not another. In *Hartford Roofing,* the Commission found that installation of a motion stopping system at a roof edge was a single discrete action unaffected by the number of employees on the roof, and therefore could not be cited on a per-employee basis. 17 O.S.H. Cas. (BNA) at 1368–69. The employer could not have complied for one employee without also complying for all other employees exposed to the hazard.

By contrast, the actions necessary to comply with PPE and training requirements for one employee do not constitute compliance for any other employee. To fully comply with these requirements the employer must take as many abatement actions as there are employees to be protected. The fact that the employer may comply for one or a few employees, while leaving many others unprotected, strongly supports the availability of per-employee citations. *Ho*, 401 F.3d at 379 (Garza, J. dissenting).

Finally, compliance with PPE and training provisions requires the employer to account for differences among individual employees. To comply with respirator requirements, the employer must, among other things, select respirators based on the specific respiratory hazards to which the employee is exposed and perform individual face-fit tests. *E.g.*, § 1910.134(d), (f). To comply with training requirements, the employer must ensure that each employee receives the required information. *E.g.*, § 1910.1001(j)(7)(iii) (asbestos). The employer must therefore account for factors such as when individual employees commence work subject to the training requirement and when they are available for training. Individual language differences also play a role. For example, if one employee understands only English, and another employee understands only Spanish, training must account for this difference. The actions necessary to fit a respirator to an individual employee's face and to ensure that hazard information is received by an employee therefore clearly entail consideration of individual factors.

1. The Ho Decision

The Secretary believes that the Commission majority's analysis in *Ho* is fundamentally flawed for several reasons discussed below. We discuss this issue because it is important to an understanding of the Secretary's interpretation of her standards and of the clarifying amendments to the PPE and training provisions. This final rule confirms the Secretary's interpretation of standards of this kind.

a. The Ho majority's analysis is inconsistent with the proper analytical framework outlined above. The requirement to provide respirators because of environmental hazards involves a separate discrete act for each employee exposed to the hazard. *Hartford Roofing,* 17 O.S.H. Cas. (BNA) at 1367. Eric Ho had eleven employees performing Class I asbestos work; therefore, he had to provide eleven separate respirators and ensure that each of the eleven employees used the devices. Ho also had to ensure that each employee received training on asbestos hazards. The cited asbestos respirator and training provisions required analytically distinct acts for each employee, and therefore permitted per-employee citations.

b. The majority's analysis does not reflect either Commission precedent preceding *Ho*, or more recent Commission caselaw. *Hartford Roofing* reflects the guiding principle distinguishing between requirements that apply individually to each employee, such as respirator provisions, and those that address hazardous conditions affecting employees as a group. 17 O.S.H. Cas. (BNA) at 1366–67. *Manganas* recognizes the principle that a requirement to provide respirators should be read in light of the associated provisions requiring individualized actions such as individual fit-testing. 21 O.S.H. Cas. (BNA) at 1998. And *GM* holds that a training requirement containing ''each employee'' language, which was also contained in the standard cited in *Ho,* imposes a specific duty to train each individual employee and may be cited on a per-employee basis. 2007 WL 4350896 at 24. *Ibid.*

c. The majority's analysis amounts to a ''magic words'' test for determining the nature of the duty to comply with PPE and training requirements that is at odds with the Secretary's intention and does not make practical sense. There is only a minor difference between the language of the respirator requirement in *Manganas* and that in *Ho*. In *Manganas* the requirement to comply with the provisions of the standard as a whole is stated explicitly in the standard's first sentence, while in *Ho* the requirement was implicit in that sentence and was explicitly stated by the remaining provisions of the standard. Similarly, in *GM* the ''each employee'' language was in the first enumerated subsection of the training standard, while in *Ho* it was in a later subsection. As the preceding discussion makes clear, the agency did not intend that minor wording variations among various PPE and training provisions affect the agency's ability to cite on a per-employee basis. Furthermore, there is no sound reason for distinguishing among the various PPE and training requirements based on minor differences in wording when all such requirements impose the same basic duty—provision of appropriate respirators and training to each employee covered by the requirements. The requirements at issue in *Ho* were not substantively different than those in *Manganas* and *GM*, and there should be no difference in the availability of per-employee citations under these requirements. Moreover, applying the *Ho* majority's analysis creates perverse incentives in that an employer who provides no respirators at all is eligible for only a single citation under the respirator provision at issue in *Ho*, while the employer who provides respirators, but fails to comply with the specific fit-test requirements is liable for per-employee violations.

Although the Secretary does not acquiesce in the *Ho* majority's interpretation of the asbestos respirator and training requirements at issue, the agency is modifying the language of most of the initial respirator provisions adopted in the 1998 rule to expressly state that the employer must provide each employee an appropriate respirator. There are several reasons for this. First, although the Secretary believes that the respirator requirements clearly support per-employee citations, employers may have some uncertainty in light of the *Ho* decision. Second,

although the Commission indicated in *Manganas* that language similar to that in the 1998 rule permits per-employee penalties, that aspect of the decision could be viewed as dicta. Finally, the 1998 respirator language is virtually the same in all standards with respirator requirements, and the same wording can be used to amend all of the standards. The agency intends the new language to clearly convey that the respirator provisions in all OSHA standards impose a duty to provide an appropriate respirator to each individual employee who requires respiratory protection. The failure to provide an appropriate respirator to each such employee may expose the employer to per-employee citations.

OSHA also believes that the existing language of the training provisions in safety and health standards makes reasonably clear that the training obligation extends to each individual employee. Some of these provisions explicitly state that ''each employee'' must be trained. For example, the process safety management standard states that ''each employee presently involved in operating a process * * * must be trained.'' 29 CFR 1910.119(g)(i); 29 CFR 1926.64(g) (construction); the logging standard states that ''[t]he employer shall provide training for each employee,'' § 1910.266(i); the vinyl chloride standard states that ''[e]ach employee engaged in vinyl chloride or polyvinyl chloride operations shall be provided training,'' § 1910.1017(j); and the chromium standard states that ''[t]he employer shall ensure that each employee can demonstrate knowledge of [the § 1926.1126(j)(2) (construction). The Commission in *GM* held that provisions that explicitly require training for ''each employee'' may be cited separately for each employee not trained. 2007 WL 4350896 at 36. Accordingly, these provisions require no amendatory action.

Some standards contain provisions stating that the employer must train ''employees'' exposed to the hazard addressed by the standard. For example, the hazardous waste operations standard states that ''[a]ll employees [exposed to hazardous substances] shall receive training,'' § 1910.120 (e)(1); while the benzene standard states that ''the employer shall provide employees with information and training at the time of their initial assignment to a work area where benzene is present.'' § 1910.1028(j)(3)(i). There is no substantive difference between the requirement to train ''employees'' exposed to a hazard and the requirement to train ''each employee'' exposed to the hazard. Under both formulations, the exposed employee is the subject of the training requirement, and compliance cannot be achieved unless and until each such employee receives the required training. Therefore provisions requiring the employer to provide training to employees exposed to a hazard, or to ensure that employees receive training, or that contain similar language, are plainly susceptible to per-employee citations in appropriate cases. *GM*, 2007 WL 4350896 at 36. No additional language is needed to clarify the intent of these provisions.

A minority of training provisions state that the employer must ''institute a training program for all [exposed] employees and ensure their participation in the program'' or contain similar language. *See e.g.*, § 1910.1001(j)(7)(i) (asbestos); § 1910.1018(o)(1)(i) (inorganic arsenic); § 1910.1025(l)(1)(ii) (lead); § 1910.1027(m)(4)(i) (cadmium). The Agency disagrees with the *Ho* majority's conclusion that this language requires the employer to have a training program, but does not impose a specific duty to train each exposed employee. The requirement that the employer ''institute'' the training program and ensure employee ''participation'' indicates that the focus of the provision is on the communication of hazard information to each employee. Furthermore, virtually all of the provisions requiring a training program also contain language explicitly stating that ''each employee'' must be informed of specific hazard information. *See* § 1910.1001(j)(7)(iii) (asbestos); § 1910.1018(o)(1)(ii) (inorganic arsenic); § 1910.1025(l)(1)(v) (lead); § 1910.1027(m)(4)(iii) (cadmium). Accordingly, the duty to ''institute a training program'' runs to each individual employee subject to the training requirement, and a discrete violation occurs for each such employee who does not receive training.

Ho, however, states the Commission's current interpretation as to the meaning of the construction asbestos standard's training provision. The *Ho* majority considered the language in § 1926.1101(k)(9)(i) to impose a duty to have a training program for employees collectively. The failure to train each of a number of individual employees on asbestos hazards was therefore considered a single violation. Although the Secretary does not accept the *Ho* majority's interpretation, the decision may be a significant impediment to the consistent and effective enforcement of the asbestos standard and other standards that contain similar wording. Accordingly, OSHA believes it is appropriate to amend those standards that require the employer to ''institute a training program'' to clarify that the employer's duty is to train each employee in accordance with the training program. The revised language expressly identifies the subject of the training requirement as ''each employee'' and therefore imposes a ''specific duty on the employer to train each individual employee.'' *GM*, 2007 WL 430896 at 36. The agency intends the revision to clarify without question that the failure to train each individual employee covered by the training requirement may be considered a separate violation with a separate penalty.

2. Comments of the U.S. Chamber of Commerce

The U.S. Chamber of Commerce, joined by the Associated Builders and Contractors, Inc. and the National Association of Home Builders, submitted comments challenging the Secretary's legal authority to promulgate the final rule. (Exs. 28.1, 40.1, 82.1). The Chamber agrees with OSHA that insubstantial differences in the wording of the PPE and training standards should not affect resolution of the unit of violation, and appears to question the correctness of the Commission's analysis in *Ho.* (Ex. 28.1 at 1). Nevertheless, the Chamber argues that the Secretary lacks authority under section 6(b) of the Act to issue a rule clarifying that each employee not provided PPE or training as required by the PPE and training standards may be considered a separate violation for penalty purposes. (Ex. 28.1 at 1–3). In the Chamber's view, section 6(b) limits the Secretary's rulemaking authority to defining the conditions or practices required to provide safe and healthful workplaces, while section 17 commits to the Commission alone the determination whether one or more violations of standards have occurred. The Administrative Procedure Act is a further limitation on the Secretary's authority, the Chamber argues, as section 558(b) states that ''[a] sanction may not be imposed * * * except within jurisdiction delegated to the agency and as authorized by law.'' 5 U.S.C. 558(b) (1994).

The Chamber also disagrees with the proposition in the proposed rule's preamble that a separate violation occurs for each employee who is not provided PPE or training. The Chamber maintains that there might be only one violation if the employer failed to cover a certain point in training a group of employees or failed to provide the right cartridge for the respirators provided a group of similarly exposed employees.

(Ex. 28.1 at 4, 5). In light of these asserted legal defects in the proposed rule, the Chamber recommends that the Secretary address the problem presented by the Ho case by continuing to litigate the issue before the Commission. (*Id.* at 4).

a. OSHA disagrees with these arguments for the following reasons. First, the Chamber fundamentally misinterprets both the rule and the Act in suggesting that the amendments usurp the Commission's authority under Section 17 to determine the amount of penalties. As the new paragraphs to the introductory sections of the subparts make clear, the final rule does not purport to set penalty amounts. Instead it clarifies that the employer's substantive duty under existing PPE and training standards is to comply with respect to each individual employee who must use PPE or receive training, and it provides clear notice that employers may be cited on a per-employee basis for violations. For example, § 1910.9 states ''[s]tandards in this part requiring personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees *impose a separate compliance duty with respect to each employee covered by the requirement.* The employer must *provide PPE to each employee required to use the PPE and each failure to provide PPE may be considered a separate violation.*'' (emphasis added).

Section 6(b) of the Act authorizes the Secretary to ''promulgate, modify or revoke any occupational safety or health standard'' by following certain procedures, and the Secretary is exercising this express authority here. As explained in the preceding subsections, current Commission precedent indicates that the specific wording of some respirator and training provisions may not support per-employee citations while the slightly different wording of other respirator and training provisions does support such citations. While the Secretary believes that the PPE and training standards already support her interpretation, she is amending the standards to conform to the Commission's view that precise language is necessary. The amendments also address the Commission's concern that the current language of some standards may not provide fair notice. Only the Secretary has the authority to amend her standards in this manner.

The Secretary's exercise of her express authority to amend her standards to add language the Commission has indicated is necessary is hardly a usurpation of the Commission's authority. To the contrary, the final rule amendments recognize and respect the Commission's adjudicative role under section 10(c) of the Act.

The Commission's authority under section 17 to assess penalties is not implicated by this final rule. Where the Secretary has cited separate violations of the same standard, the Commission may be required to determine whether the standard authorizes the type of per-instance violations charged. That issue, however, turns entirely on the proper interpretation of the standard's text. *Hartford Roofing,* 17 O.S.H. Cas. (BNA) at 1367. The Commission's role is limited to determining whether the Secretary's interpretation that the standard permits per-instance violations is reasonable. *Martin* v. *OSHRC,* 499 U.S. 144 (1991). Where a standard is reasonably susceptible to citation on a per-instance basis, the Secretary's authority to propose a separate penalty for each such violation is clear. ''The plain language of the Act could hardly be clearer'' in authorizing a separate penalty for each discrete instance of a violation of a duty imposed by a standard. *Kaspar Wire Works, Inc.* v. *Secretary of Labor,* 268 F.3d 1123, 1130 (DC Cir. 2001).

The Commission's authority under section 17(j) to ''assess all civil penalties provided in this section'' does not permit it to review the Secretary's prosecutorial decision to cite and propose a separate penalty for each discrete violation of a standard. *Chao* v. *OSHRC (Saw Pipes USA, Inc. and Jindal United Steel Corp.),* 480 F.3d 320, 324 n. 3 (5th Cir. 2007). The Commission's adjudicative functions are to determine whether the facts support the multiple violations charged, and to apply the statutory criteria to determine the amount of the penalty to be assessed for each proven violation. *Id.* at 325. These functions are not affected by the final rule, which concerns only the Secretary's interpretation that the PPE and training standards are susceptible to per-employee citations.

Reich v. *Arcadian Corp.,* 110 F.3d 1192 (5th Cir. 1997), does not support the Chamber's argument. There, the Fifth Circuit observed that OSHA standards address ''conditions'' and ''practices'' and that the unit of violation of a standard must reflect the particular hazardous conditions regulated. 110 F.3d at 1198. While most standards require abatement of hazardous conditions affecting employees collectively, the condition or practice to which the PPE and training standards are directed is the protection of individual employees. *Hartford Roofing,* 17 O.S.H. Cas. (BNA) at 1366–67 (''[T]he condition or practice to which [the general respirator] standard is directed, within the meaning of section 3(8) of the Act, is * * * the individual and discrete failure to provide an employee working in a contaminated environment with a proper respirator.''). The *Arcadian* court expressly recognized that an individual employee may be the unit of prosecution ''if the regulated condition or practice is unique to the employee (*i.e.*, failure to train or remove a worker)''. 110 F.3d at 1199 (citing *Hartford Roofing,* 17 O.S.H. Cas. (BNA) 1361).

The foregoing discussion plainly disposes of the Chamber's claim that the final rule imposes a sanction without an express authorization, in violation of § 558 of the APA. Nothing in the final rule imposes a sanction. Insofar as the rule addresses penalties, it does so only indirectly, by informing the public that the agency may exercise prosecutorial discretion to cite on a per-employee basis for violations of PPE and training standards. The Secretary's charging decision whether to issue a single citation or separate per-employee citations is not itself a penalty. *Chao* v. *OSHRC,* 480 F.3d at 325. Moreover, citations reflect only the Secretary's proposed penalty amounts—the Commission, not the Secretary, actually assesses penalties. *American Bus Ass'n* v. *Slater,* 231 F.3d 1 (DC Cir. 2000), cited by the Chamber, is obviously distinguishable in that the rule at issue there authorized the agency to levy fines in specific amounts directly against regulated entities for violations of bus accessibility requirements. In any event, section 9(a) of the OSH Act expressly authorizes the Secretary to issue a citation for violation of ''a requirement * * * of any standard,'' and section 17 states that a penalty may be assessed ''for each violation.'' Thus, the final rule clearly falls ''within jurisdiction delegated to the agency'' and does not violate section 558 of the APA.

b. The Chamber's criticisms of isolated statements in the proposal's preamble are irrelevant to the issue of the Secretary's legal authority to promulgate the final rule. (Ex. 28.1 at 4, 5). The Chamber chiefly challenges the proposal's statement that a separate violation occurs for each employee not provided required PPE or training, arguing that in some situations, the employer's failure to provide PPE or training to a class of employees can be considered a single violative condition or practice for which only a single citation could be issued. (Ex. 28.1 at 4, 5). However, the Secretary clearly has the authority to make specific changes

to the wording of her PPE and training standards, and to announce her interpretation of the amended rules, by following the procedures in section 6(b). At most, the Chamber's criticisms go to the legal effect of amendments in some specific circumstances. Whether the Secretary's interpretation will be accepted by the Commission or a court in these circumstances, if and when they arise, is a matter to be resolved in an enforcement proceeding.

In any event, the Chamber's arguments are wholly unpersuasive on their merits. The Chamber asserts that there might be only one training violation if the employer fails to cover a certain required element in training a group of employees and there might be only one respirator violation if the employer fails to provide the right cartridge for respirators used by a class of employees exposed to the same hazard. (Ex. 28.1 at 4, 5). In these cases, the Chamber suggests that the violation involves a single action by the employer affecting multiple employees alike. *Id.* The Secretary rejects this reasoning for the same reasons she rejects the Commission majority's analysis in *Ho*.

The hazardous ''condition'' or ''practice'' addressed by the PPE and training standards is the failure to protect each individual employee—through personal protective equipment or training—from the hazards of his or her or work environment. *Hartford Roofing,* 17 O.S.H. Cas. (BNA) at 1367. The hazardous condition addressed by the standards is always the same regardless of the actions taken by the employer to comply or not comply. It does not matter that a single action or decision by the employer results in several employees being exposed to hazardous working conditions without PPE or training—the unit of violation remains the individual unprotected employee. See *Chao* v. *OSHRC,* 380 F.3d. at 323 (although multiple recordkeeping violations may stem from a single company policy, each failure to record may represent a separate and distinct violation). *Secretary of Labor* v. *Caterpillar Inc.,* 15 O.S.H. Cas. (BNA) 2153, 2173 (Rev. Comm'n 1993). For the same reason, the availability of per-employee training violations does not depend upon whether the employer could have conducted a single group training session. *GM*, 2007 WL 4350896 at 36.

The Chamber's approach is also internally inconsistent. The Chamber appears to acknowledge that per-employee citations should have been available in the *Ho* case. (Ex. 28.1 at 1, 4). There is no logical distinction between the situation in *Ho*, where the employer failed to provide any respirators to employees, and a case where the employer provides noncomplying respirators to employees. (Ex. 28.1 at 4). In both cases, employees are not protected. The Chamber asserts that ''it all depends upon whether there are different violative conditions,'' but fails to explain how or why factual differences between *Ho* and its hypothetical case would support the availability of per-employee citations in one case but not the other.

c. Finally, the Chamber's proposed solution to the problem presented by the *Ho* case is no answer at all. The Chamber urges the Secretary to continue to litigate the issue by raising the arguments in the proposed rule directly to the Commission in the next appropriate case. Thus, the Chamber posits that while the Secretary lacks statutory authority to issue a rule clarifying her interpretation that the PPE and training standards are susceptible to per-employee citations, the Commission would accept this interpretation as a litigating position and change its doctrine. This appears wholly counterintuitive. The central tenet of the Secretary's position is that the statute supports her approach. To accept the Chamber's comments as a basis for not adopting a final rule would substantially weaken, if not destroy, the legal underpinning of the Secretary's position. For these reasons, the Secretary rejects both the Chamber's legal arguments and its recommendation for a non-regulatory course of action.

IV. Summary and Explanation of the Proposed Rule

In this final standard, OSHA is amending the standards in 29 CFR Parts 1910, 1915, 1917, 1918 and 1926 to provide additional clarity and consistency about the individualized nature of the employer's duty to provide training and personal protective equipment (including eye, hand, face, head, foot and hearing protection, respirators, and other forms of PPE) under standards in these parts. The final rule revises existing regulatory language and adds new sections to the introductory subparts to Parts 1910 through 1926. The following discussion addresses comments to the proposed language, OSHA's response to those comments, the actual final rule language, and how the final rule is to be interpreted.

A number of commenters offered broad support for the revisions (*see, e.g.*, Exs. 3, 5, 18.1, 21.1, 29.1, 32.1, 39.1, 44.1, 83.1, 84.1). ORC Worldwide remarked that the rulemaking is an appropriate action to eliminate confusion and ensure consistent and effective enforcement of OSHA's standards (Ex. 29.1). The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) added that the rule will remove any doubt that employers are obligated to provide required PPE and training to each worker and that employers who fail to do so for each individual employee are subject to per-instance citations for each employee left unprotected (Ex. 32.1). The American Industrial Hygiene Association (AIHA) urged OSHA to ''[m]ove forward with the completion of this proposed rule in as timely a manner as possible to avoid any potential delays in the protection of workers'' (Ex. 18.1).

A number of commenters also opposed the rulemaking (*see, e.g.*, Exs. 2, 19.1, 20.1, 22, 25.1, 26.1, 27.1, 28.1, 30, 38.1, 40.1, 41.1, 45.1, 48.1, 49.1, 51.1, 79 pp 35–46, 79 pp 73–77, 79 pp 87–92, 80.1, 81.1, 82.1). Several commenters expressed concern about OSHA's authority to promulgate the standards (*see, e.g.*, Exs. 28.1, 40.1, 80.1, 82.1). OSHA's response to these concerns is in the legal authorities section of this preamble. A number of commenters also expressed concerns about the cost impact of the standards on employers. These concerns are addressed in the economic analysis sections below. Remaining objections and recommendations are discussed in the following sections.

New Sections Added to Subpart A of Parts 1910 Through 1918, and Subpart C of Part 1926

OSHA has added a new section to Subpart A of Parts 1910, 1915, 1917 and 1918, and to Subpart C of Part 1926. These subparts contain general information about the scope and applicability of the standards in each part. The proposed new sections contain two paragraphs, which are identical for each new section. The first paragraph expressly states that, for standards in the part requiring employers to provide PPE, employers must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee imposes a separate compliance duty, and thus may be considered a separate violation. The new paragraph applies to all standards in the part that require provision of PPE, regardless of their wording. For example, § 1910.132 requires employers to provide PPE when needed, and also recognizes that an employer may allow an employee who voluntarily provides appropriate PPE he or she owns to use that PPE in place of the employer-provided equipment. See

§ 1910.132(h)(6). The underlying obligation to provide PPE to each employee is the employer's, and each employee who lacks required PPE may be considered a separate violation. The second paragraph expressly states that standards in the part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees or institute or implement a training program, impose a separate compliance duty to each employee covered by the requirement. Each failure to adequately train an employee may be considered a separate violation.

The new sections reflect the agency's intent, as discussed in the preceding sections of this preamble, that standards requiring the employer to protect employees by providing personal protective equipment or imparting hazard information through training impose a specific duty to protect each individual employee covered by the requirement. The new sections are placed in the introductory subparts of each part because the principle expressed in each section applies generally to all PPE and training standards in the part. OSHA intends the new sections to apply regardless of differences in wording between the PPE and training provisions in the various parts. The new sections provide unmistakable notice to employers that they are responsible for protecting each employee covered by the PPE and training standards, and consequently, that they may be subject to per-employee citations and proposed penalties for violations.

The AFL–CIO, supported by the Building and Construction Trades Department, proposed two changes to these general language sections (Ex. 32.1, 39.1, 70 pp. 82–83, 83.1, 84.1). As proposed, these sections read as follows:

(a) Personal protective equipment. Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators, because of hazards to employees impose a separate compliance duty to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) Training. Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty to each employee covered by the requirement.

The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

The AFL–CIO's first concern was that the first sentence of paragraph (a), by singling out respirators as an example of the PPE involved, ''[c]ould lead to the view that the requirement focuses more narrowly on respirators and not on the employer's more expansive duty to provide all forms of PPE to each worker'' (Ex. 32.1). It suggested that new text be inserted after the word ''including,'' which listed various specific types of PPE, such as foot, hand, and eye protection. Second, the AFL–CIO suggested inserting the words ''with respect'' after the word ''duty'' in the first sentence of paragraphs (a) and (b) to make clear that the employer's separate compliance duty was owed to each employee.

The Agency agrees with these recommendations in large part and has made corresponding changes in the final rule. It is not OSHA's intent to limit the PPE duties referenced in these sections to respirators only. But rather than include a list of types of PPE, which might itself be read as limiting, the final rule merely inserts the words ''and other types of PPE'' after the word ''respirators'' in the first sentence of paragraph (a). The final rule also includes the words ''with respect'' where suggested by the unions.

Alternative Approach

The Blueoceana Company (Ex. 77.) expressed a concern that OSHA's proposal to include these general language sections did not provide enough clarity in OSHA's regulations, and that the Agency should change the language of each training and PPE standard to make the requirement to provide PPE and training to each employee clear within each of those standards. Specifically, Blueoceana recommended that:

While we assume that all such PPE and Training regulations will be included within the embrace of any final rule, it would have been much ''cleaner'' to go directly to the source of any regulatory ambiguity and rectify such defects right where they exist. As proposed, the ''per employee rule'' will leave, unmolested, the dichotomies complained of in *Ho,* and will cause employers and employees to then look quizzically at the ''newly finalized'' sections while scratching their heads (Ex. 77).

OSHA does not believe that it is necessary to change each PPE and training standard to clarifiy the agency's interpretation. Most employers already understand that they must provide required PPE and training to each covered employee, so there is not widespread confusion on this matter. The final paragraphs make clear that they apply to all of the standards, and it will be quite clear that they apply throughout all the standards. This is also an approach used successfully in other rules. For example, in the PPE payment standard, the Agency requires employers to pay for PPE throughout each part by language stated in only one standard in the part (72 FR 64342, November 15, 2007). The Agency is unaware of any confusion caused by the approach used in PPE payment, and it does not expect any confusion for this clarification of the training and PPE standards. Nevertheless, in its future PPE and training standards, or when existing standards are modified, the Agency will attempt to make the requirement to protect each employee clear, so as to avoid additional confusion about the matter.

OSHA's Egregious Policy

A number of commenters expressed a concern about OSHA's instance-by-instance citation policy and the impact of the rulemaking on that policy (*see, e.g.*, Exs. 2, 14.1, 19.1, 22, 25.1, 27.1, 30, 36, 37.1, 38.1, 40.1, 41.1, 42.1, 45.1, 49.1, 51.1, 77, 79 pp 87–92, 80.1, 82.1). For example, the American Association of Homes and Services for the Aging (AAHSA) remarked that:

[t]he Occupational Safety and Health Administration (''OSHA'') states that the practice of ''grouping'' violations into a single citation is the more common method of dealing with multiple violations, whereas ''per instance'' violations are generally used to deter ''flagrant violators.'' This principle is documented in OSHA's CPL 2.80 Directive, entitled ''Handling of Cases to be Proposed for Violation-by-Violation Penalties,'' released on October 21, 1990 (the ''Directive''). Specifically, the Directive provides that only flagrant violations of the Occupational Safety and Health Act (the ''Act'') are appropriate bases for ''per instance'' violations. Despite the plain meaning of the Directive, the Clarification does not distinguish between flagrant violations for which ''per instance'' citations are appropriate and non-flagrant or unintentional violations for which ''grouping'' is appropriate. As a result, the standards should be revised to make this distinction (Ex. 36.1).

Con-Way Inc. remarked that ''The proposed rule effectively penalizes the employer multiple times for one infraction. There is no limitation within the language to make it apply to only egregious circumstances as OSHA has indicated. And that's a problem'' (Ex. 79, p 89). The American Society of Safety Engineers (ASSE) added that:

The failure to provide appropriate PPE or provide adequate training on how to use PPE

can be an egregious act by an employer with little or no regard for employee safety and health. In practicality and in most workplaces, however, violations of PPE standards are largely technical in nature and do not result in harm to an employee. Violations often can reflect unintended mistakes in its use by employees, a supervisor's mistaken understanding, or an individual's failure to follow an employer's or SH&E professional's best efforts to help that employee be protected. In such cases, where the overall intent of the employer is to meet or even exceed the OSHA standard and the overall approach in the workplace reflects a commitment to safety and health, a final rule should protect such employers against the application of the ''per employee'' penalty (Ex. 37.1).

The National Maritime Safety Association (NMSA) remarked: ''We note that nowhere in the proposed rule is there a reference to the OSHA Compliance Directive 'Handling of Cases to be Proposed for Violation by Violation Penalties' policy. If OSHA truly intends for this regulation to apply to flagrant or egregious violators then the proposed rules must state this in unequivocal language. Moreover, relevant Compliance Directives should be appropriately promulgated and implemented'' (Ex. 80.1). The Associated Builders and Contractors, Inc. (ABC) suggested OSHA incorporate its instance-by-instance policies directly into the rulemaking to ensure OSHA's egregious policies would not be changed in the future, stating that:

> The final rule's regulatory language, as opposed to the preamble, needs to be revised to make absolutely clear that the more expansive interpretation is not intended and cannot arise out of this rulemaking, i.e., that any (and every) PPE training violation will not be ''considered a separate violation.'' The codified regulatory language, not the preamble, should specify the particular circumstances under which an employer's failure to train will be considered as separate violations. This could be done, for example, by expressly incorporating the specific criteria set forth in CPL 02–00–080 (formerly CPL 2.80) that identifies the conditions under which the Commission would consider as a flagrant violation has occurred (Ex. 40.1).

A few commenters incorrectly believed that the final rule amendments would require OSHA inspectors to issue instance-by-instance citations and penalties (*see, e.g.*, Exs. 2, 14.1, 30, 38.1, 41.1, 49.1, 51.1). Michal L. Illes (Ex. 2) recommended that any instance-by-instance penalty system for training should be limited to employers with 50 or more employees. The Printing Industries of America/Graphic Arts Technical Foundation (PIA/GATF) stated that:

> While OSHA compliance inspectors may have the flexibility to group multiple violations under a single penalty or propose aggregate, per-instance violations, the proposed language does not provide inspectors with enough guidance at the time of an inspection regarding when to apply the per-instance penalties versus a single penalty. OSHA should reserve issuing per-instance violations for only the worst-case offenders that require strong deterrents to violating health and safety standards. The proposed language seems to direct an OSHA inspector to the per-instance approach regardless of the circumstances or the degree of violation. This potential practice could cause unnecessary economic and time constraints on small businesses that have not committed flagrant violations of the Administration's health and safety standards (Ex. 38.1).

OSHA wants to make it absolutely clear that this final rule simply clarifies that the PPE and training standards are legally susceptible to per-employee citations. Nothing in the final rule addresses the circumstances in which the Secretary will or will not issue per-employee citations in particular cases. The issuance of per-employee citations, like other types of per-instance citations, is a matter of prosecutorial discretion wholly outside the scope of this rulemaking.

At present, OSHA's policy on the issuance of per-instance citations and proposed penalties is outlined in Directive CPL 2.80, *Handling of Cases To Be Proposed for Violation-By-Violation Penalties*. The directive contains instructions to OSHA personnel on the criteria to be considered in determining whether to charge a separate violation and propose a separate penalty for each discrete instance of a violation of a standard or regulation. The directive covers the issuance of per-employee citations and proposed penalties for violation of PPE and training standards. The per-employee citations in the *Ho* and *GM* cases were issued pursuant to CPL 2.80.

OSHA does not believe that it is appropriate to refer in this final rule to Directive CPL 2.80, or to discuss the circumstances in which per-employee citations might be issued for PPE and training violations. As explained above, the agency's discretion to issue such citations is not a subject of this rulemaking. Furthermore, there is no ambiguity in the current directive as to its application to per-employee PPE and training violations. Thus, there is no need for further clarification on this point.

Several additional factors militate against including references to the directive in the final rule. The directive reflects the agency's current enforcement policy; it is not a standard or regulation and should not be construed as such. The Agency must have the flexibility to modify its enforcement and policies in order to deploy its enforcement resources efficiently, to meet its public policy goals, and to respond to changing conditions and unforeseen circumstances. To fix agency enforcement policies in a rulemaking such as this would limit that flexibility. Moreover, the directive applies to any number of OSHA standards, not just the PPE and training standards being modified in this rulemaking. For example, per-instance citations under OSHA's injury and illness recordkeeping regulation and machine guarding requirements are covered by the directive. There is no reason to affect the future enforcement of those rules in this action, which is limited to PPE and training requirements.

Revisions to Specific Respirator Paragraphs

OSHA proposed revisions to the initial respiratory protection paragraph in a number of standards in parts 1910, 1915 and 1926 to add language explicitly stating that the employer must provide an appropriate respirator to each employee required to use a respirator and implement a respiratory protection program for each such employee. The affected standards include the general respirator standard, § 1910.134, most general industry toxic-substance health standards in Subpart Z of part 1910, the shipyard employment asbestos standard, § 1915.1101, and the construction industry methylenedianiline, lead, asbestos, and cadmium standards, §§ 1926.60, 62, 1101, and 1127.

Section 1910.134 contains general respiratory protection requirements for General Industry (part 1910), Shipyards (part 1915), Marine Terminals (part 1917), Longshoring (part 1918), and Construction (part 1926). The existing section 1910.134(a)(2) states:

> [r]espirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purposes intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program which shall include the requirements outlined in paragraph (c) of this section.

OSHA proposed to revise the first and last sentences of paragraph (a)(2) of section § 1910.134. As proposed, the first sentence read, ''[r]espirators shall be provided by the employer *to each employee* when such equipment is necessary to protect the health of such employee'' (emphasis added). As

proposed, the last sentence read, ''[t]he employer shall be responsible for the establishment and maintenance of a respiratory protection program, which shall include the requirements outlined in paragraph (c) of this section, *for each employee required by this section to use a respirator*'' (emphasis added). This language has been carried through to the final rule, with one change discussed below. Section 1910.134, as revised in this rulemaking, will apply to construction under section 1926.103.

AAHSA noted that the proposed new language in the last sentence, when read literally, created an anomaly (Ex. 36.1). That is, the language requires employers to establish and maintain ''a respiratory protection program * * * for each employee. * * *'' It is not OSHA's intent that employers create separate programs for each of their employees; rather employers need have only one program covering all of their employees who wear respirators. OSHA has corrected this problem in the final rule by dividing the proposed sentence into two sentences, the last of which reads ''The program shall cover each employee required by this section to use a respirator.''

The National Paint and Coating Association was concerned that the proposed revision's requirement to provide respirators to each employee could be read to require that a separate respirator be assigned to each employee (Ex. 22). OSHA does not believe that this is a plausible construction of the language or that employers would be misled by this change. Rather, the plain language merely evinces the intent to ensure that appropriate respiratory protection is provided to each employee when needed on the worksite, and there is no requirement imposed by this language to assign particular respirators to particular employees.

OSHA proposed similar revisions to the initial respirator paragraphs of toxic substance standards in parts 1910, 1915 and 1926. The initial respiratory protection paragraph of the construction asbestos standard, which is virtually identical to all respirator sections revised in this rule, states that ''[f]or employees who use respirators required by this section, the employer must provide respirators that comply with the requirements of this paragraph.'' § 1926.1101(h)(1). The standard also states that, ''[t]he employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d), (except (d)(1)(iii)), and (f) through (m).'' § 1926.1101(h)(2).

OSHA proposed to revise the first sentence of paragraph (h)(1) of section 1926.1101 to state, ''[f]or employees who use respirators required by this section, the employer must provide *each employee an appropriate* respirator that complies with the requirements of this paragraph'' (emphasis added). The Agency proposed revising paragraph (h)(2)(i) to state, ''[t]he employer must implement a respiratory protection program in accordance with § 1910.134(b) though (d) (except (d)(1)(iii)), and (f) through (m) *for each employee required by this section to use a respirator*'' (emphasis added). Identical language revisions were proposed for the initial respirator paragraphs in other toxic-substance health standards; only the section and paragraph numbers were different. These revisions are carried through in the final rule with the change to ''which covers each employee'' to eliminate the potential ambiguity described above.

The National Association of Home Builders (NAHB) suggested that these amendments might create an ambiguity (Ex. 43.1, 59). Focusing on the requirement that employers select an ''appropriate'' respirator that ''complies with the requirements of this paragraph,'' NAHB suggested that the word ''appropriate'' might impose some requirement in addition to being in compliance with the requirements of the paragraph. However, OSHA intends no such additional requirement; a respirator is ''appropriate'' if it complies with the requirements of the paragraph. The word ''appropriate'' is included to emphasize the employer's duty to provide an adequately protective respirator as delineated by the standard.

OSHA believes that all of these revisions are appropriate in light of the *Ho* majority's narrow interpretation of the asbestos respirator provision. OSHA is adding explicit ''each employee'' language to section 1910.134 and to the initial respirator paragraphs of toxic-substance health standards to address the Commission's concern that this language is necessary to inform employers of their specific duty to provide a respirator to each individual employee required to use a respirator. The revisions will improve these standards by conforming them to each other and to the revised section 1910.134, and contribute to a greater awareness of the importance of full compliance with these important requirements.

Revisions to Specific Training Paragraphs

The final rule carries through the proposed revisions to those training provisions in safety and health standards that require the employer to institute or provide a training program for employees exposed to hazards. The Commission had indicated that the requirement in section 1926.1101(k)(9)(i) to ''institute a training program for all employees who are likely to be exposed in excess of a PEL and for all employees who perform Class I through IV asbestos operations, and shall ensure their participation in the program'' is not sufficiently explicit as to the employer's duty to ensure that each employee is trained. A number of other standards include similarly worded training provisions. Accordingly, the final rule revises section 1926.1101(k)(9)(i) to state, in relevant part, ''[t]he employer shall train *each employee* who is likely to be exposed in excess of a PEL, and *each employee* who performs Class I through IV asbestos operations, in accordance with the requirements of this section'' (emphasis added). Similar revised language is adopted for training sections in other standards that contain similar wording to section 1926.1101(k)(9)(i). The amended training provisions will conform to the training provision that the Commission in *GM* interpreted to permit per-employee citations.

The Association of Environmental Contractors (AEC) objected to this language (Ex. 34.1). Its members are asbestos abatement contractors who have negotiated a collective bargaining agreement with a local union under which the union provides the training required. Its concern is that training provided by the union, which is otherwise compliant with the standard, might not be acceptable because it was not provided by the employer. This concern is unfounded. The intent of the new language is to impose a duty on employers to ensure each employee is properly trained, not to require each employer to actually conduct the training. The employer's duty to train each employee may be discharged by ensuring employees have received adequate training provided by a union or other third party, and indeed OSHA has long taken this position in interpreting similar language under the Hazard Communication Standard (Letter to Frank Pelligrini, May 11, 1988). There is no need to change the proposed language to accommodate AEC's comment.

Stericycle argued that this language ''[i]mplies individual customized training rather than attending group training sessions.'' (Ex. 35.1.) OSHA disagrees, and does not believe that the new language can reasonably be read to exclude group training. Notably, no other participant in this rulemaking has suggested this interpretation of the

provision. Regardless, it is OSHA's intent that employers may satisfy this requirement through group training, provided that each employee in the group receives and understands the training.

State Plan Issue

The Public Risk Management Association (PRIMA), an organization of risk management professionals for public entities and local governments, argued against the proposal on the grounds that it would discourage states from pursuing authorization to administer a state plan under section 18 of the OSH Act. States would be discouraged, PRIMA argues, because ''[t]hey may be subjecting themselves and their political subdivisions to prohibitive substantial financial penalties for a good faith effort toward compliance.'' (Ex. 26.1; see also Exs. 66.1, Ex. 79 p. 97.)

OSHA disagrees for a number of reasons. Initially, as explained in detail elsewhere in the preamble, the standard does nothing to change regulated entities' compliance obligations. The standard places no new duties on public entities covered under a state plan, and leaves both federal and state plan enforcement policy unaffected. Thus, the standard should not affect states' decisions on participation one way or the other. Moreover, while PRIMA is concerned with the potential that public employers would be subjected to large penalties for citations made on a per-employee basis, CPL 2.80 provides that state-plan states need not extend the egregious policy to public sector programs (Ex. 70). Indeed, OSHA does not require state plans to impose monetary sanctions on public employers if other adequate remedies are available. 29 CFR 1956.11(c)(2)(x). Finally, there is no evidence that any states have been discouraged from seeking or maintaining state-plan status. To the contrary, PRIMA conceded at the hearing that it was not aware of any state-plan states that were reconsidering their status as a result of this rulemaking, (Ex. 79 p. 99), and the Kentucky OSH Program submitted a comment in support of the proposal (Ex. 21.1).

Multi-Employer Worksites

Two comments were received regarding application of per-instance (or per-employee) citations to an employer under the multi-employer citation policy. The Associated General Contractors of America (AGC) noted that this rule ''could extend citations to the general contractor'' (Ex. 42.1). The American Society of Safety Engineers (ASSE) commented that the impact of the rulemaking is ''ambiguous'' with respect to a worksite where either the ''general contractor, or a subcontractor is overseeing provision of PPE or training'' (Ex. 37.1).

As explained above, this rulemaking does not address the circumstances in which per-employee citations might be issued. The final rule does not broaden or narrow the application of the Agency's current multi-employer citation policy. For more discussion on this issue, see the final rule for ''Employer Payment for Personal Protective Equipment'' (72 FR 64342, 64363).

This rulemaking does not impose any new substantive requirements for employers and serves only to clarify the duty to provide personal protective equipment and training to each employee. Therefore, the application of OSHA's multi-employer citation policy (CPL 02–00–124) is not affected.

Employer Liability for Employee Misconduct

Several rulemaking participants expressed concern that the proposed rule would increase employers' liabilities for citations when employees failed to adhere to work rules requiring the proper use of PPE, even when such employees were provided appropriate PPE and properly trained in its use (Exs. 16, 20.1, 25.1, 42.1, 48.1, 80.1). Representative of these is a submission by the American Health Care Association, which stated that:

> It is difficult to determine whether, when employees are not using PPE or are using it incorrectly, that it is due to insufficient training on the part of the employer or if it is the fault of the employee(s) involved. * * * [D]ocumentation that training has occurred, that PPE is supplied, and that employees stated that they understood the training upon its completion should be adequate evidence to OSHA that the employer is in compliance (Ex. 25.1).

Similarly, the National Maritime Safety Association (NMSA) stated that, during OSHA investigations, it is possible that a ''[c]ompliance officer can casually observe employees in an otherwise compliance workplace * * * improperly using or not using PPE at all.'' NMSA argued that, under the new standard, employers could be cited for each of these employees who ''[s]imply were lax and for a brief period in time failed to catch the attention of a supervisor who normally would have corrected their lapse.'' (Ex. 80.1) Finally, in their pre-hearing submission, ASSE stated that ''* * * [v]iolations often can reflect unintended mistakes in its use by employees, a supervisor's mistaken understanding, or an individual's failure to follow an employer's or * * * [safety and health] professional's best efforts to help that employee be protected.'' (Ex. 37.1)

These comments appear to address situations in which an individual employee's failure to use required PPE may result from unpreventable employee misconduct; that is, misconduct that occurs despite the existence of an adequately communicated and enforced work rule that would have prevented the violation. Unpreventable employee misconduct is an affirmative defense to a violation of a standard. Thus, if the employer proves that the elements of the defense are satisfied with respect to a citation alleging a violation for an individual employee's failure to use required PPE, the employer is not liable. Nothing in the final rule affects the applicability of the affirmative defense of unpreventable employee misconduct to a citation issued on a per-employee basis. Therefore, OSHA does not agree with these commenters that the final rule will increase employers' liabilities for citations in situations involving employee misconduct in following an employer's established work rules.

PPE and Training for Short-Term Employees

In its submission to the record, the Finishing Contractors Association raised a concern with respect to providing PPE and training of short-term employees, stating that:

> As union contractors who hire temporary employees off the bench to supplement their regular crew, should the contractors be required to provide PPE and training for these employees who may be with the company a couple of weeks? Such a requirement provides an economic burden, particularly on the smaller contractors. These temporary employees, perhaps, should use their own safety equipment from their previous job, unless this is their first assignment. * * * It is also difficult for these contractors to honor their commitment to provide updated training for these temporary workers on fast-paced, contracted jobs, since time is of the essence. (Ex. 48.1)

This comment appears both to question the nature of a short-term employer's duty to comply with PPE and training standards and to suggest that the final rule could impose additional costs on these employers. Insofar as the comment relates to the cost of the rule, it is addressed in section VI below. The following discussion addresses the commenter's question about the applicability of the amendments to short-term employers.

OSHA's PPE and training standards require employers to ensure that their

employees are provided appropriate PPE and are adequately trained in its use. The final rule clarifies that employers have this obligation for each employee who is required to use PPE, but does not otherwise fundamentally alter the obligation to provide PPE and ensure that employees are properly trained. OSHA's PPE and training requirements apply to all employers covered under the Act, including those with short-term employees, whether referred to as temporary employees, piece workers, seasonal employees, hiring hall employees, labor pool employees, or transient employees. If an employer-employee relationship is established, then the employer must ensure that PPE is provided, used, and maintained in a sanitary and reliable condition, as required by 29 CFR 1910.132(a) (for general industry) and 29 CFR 1926.95(a) (for construction). However, as does commonly occur with short-term employees, both the general industry and construction standards permit employers to allow employees to use their own PPE provided that the PPE is appropriate for the hazards present at the worksite and is effectively maintained (see 1910.132(b) and 1926.95(b)). Where employers hire short-term employees, this final rule does not affect the employer's obligations to ensure that PPE is provided to each employee and that each employee is trained in its use.

Implied Ownership of PPE

One rulemaking participant, Stericycle, believed that the proposed language clarifying that PPE is to be provided to each employee implied that employees would own the PPE (Ex. 35.1). They suggested language be added to make clear that employers may ''maintain custody'' of PPE to ensure its availability. OSHA does not believe such clarification is necessary in the final rule since the Agency is simply clarifying its intent that PPE and training requirements apply to each employee covered by the requirements. The final rule does not affect ownership of PPE and employers are free to maintain ownership of PPE that they provide and pay for. For a further discussion of the ownership issue, employers may consult the preamble to the PPE payment final rule (72 FR 64359).

V. Final Economic Analysis

OSHA has determined that the final standard is not an economically significant regulatory action under Executive Order (E.O.) 12866. E.O. 12866 requires regulatory agencies to conduct an economic analysis for rules that meet certain criteria. The most frequently used criterion under E.O. 12866 is that the rule will impose annual costs to the economy of $100 million or more. Neither the benefits nor the costs of this rule exceed $100 million. OSHA has also determined that the final standard is not a major rule under the Congressional Review provisions of the Small Business Regulatory Enforcement Fairness Act.

The Regulatory Flexibility Act of 1980 (RFA), as amended in 1996, requires OSHA to determine whether the Agency's regulatory actions will have a significant impact on a substantial number of small entities. OSHA's analysis, based on the analysis in this section of the Preamble as well as in the later section ''OMB Review Under the Paperwork Reduction Act'' below, indicates that the final rule will not have a significant impact on a substantial number of small entities.

The final rule inserts two new paragraphs in the general industry health and safety standards (Part 1910), the shipyard employment standards (Part 1915), the marine terminal standards (Part 1917), the longshoring standards (Part 1918), and the construction standards (Part 1926). The new provisions, indentical in each part, clarify OSHA's position that personal protective equipment and training standards impose a separate compliance duty with respect to each employee covered by the PPE or training requirement, and each failure to provide necessary PPE or training may be considered a separate violation.

In addition, the Agency has also editorially revised provisions for respiratory protection, respiratory programs, and employee training across many existing standards. These editorial revisions emphasize the employer's responsibility to provide protection to each employee. For example, the existing language of Sec. 1910.134 (a) (2) ''Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee'' is replaced in the final rule by: ''A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee.''

There have been no changes in the final rule from the proposed rule that would have any new effect on costs. In the proposed rule, OSHA tentatively found that the proposed additions and changes to the affected rules would have no costs for two reasons. First, OSHA preliminarily concluded that the proposal would not represent any change in OSHA policy but instead, as explained in detail in the Summary and Explanation, would simply ''make explicit the Agency's policy and warn employers of the potential cost and penalties of violations.'' Where there exists no change, there can be no costs. Second, OSHA pointed out that ''These changes again do not impose any additional employer responsibility for providing respiratory protection, respiratory programs, or training for employees.'' OSHA also pointed out that the Agency examines the economic feasibility of its standards assuming full compliance, and therefore the costs of compliance with existing PPE and training standards have already been considered. Therefore, OSHA reasoned, though the proposed rule ''may change the frequency or number of violations and amount of fines assessed, these are not material for estimating new costs to comply with a standard'' (73 FR 48343).

After careful consideration of the rulemaking comments, OSHA finds no basis to depart from these preliminary conclusions. Many commenters objected that the rule would have substantial costs (*see, e.g.*, Exs. 1.1, 7.1. 13.1, 26.1, 30.1, 40.1, 51.1, 66.1, and 81.1) or expressed a special concern that the proposed rule could have significant costs for small entities, perhaps sufficient to require a regulatory flexibility analysis (*see, e.g.*, Exs. 5, 38.1, 41.1. 42.1, 43.1, and 74). Some of these commenters simply provided a generic statement that the proposed rule would have costs or economic impacts with no details as to why they thought this would be the case, or why they objected to OSHA's arguments concerning costs and impacts (*see, e.g.*, Exs. 7.1, 11.1, 13.1, 38.1, 40.1, 51.1, and 66.1). However some commenters also offered specific reasons for holding that the proposed regulation would have costs or significant impacts.

Some commenters expressed concerns that actually represent objections to the costs of the underlying rules—specifically, that assuring all employees are trained represents a substantial cost and undue burden on firms in industries with high turnover (Exs. 33, 48.1, and 81.1). For example, as noted above, one commenter argued ''As union contractors who hire temporary employees off the bench to supplement their regular crew, should the contractors be required to provide PPE and training for employees who may be with their company for only a couple of weeks? Such a requirement provides an economic burden, particularly on the smaller contractors.'' Such comments represent objections to the costs and economic impacts of the underlying rules, which have already been analyzed and found technologically and

economically feasible based on full compliance. This rule does not change any obligation of employers, or add compliance costs not already accounted for in the underlying rules.

Some commenters were concerned with costs of penalties, or the economic impact or significance of such penalties (*see, e.g.*, Exs. 5, 26, 41.1, 43.1, and 48.1). None of these commenters addressed OSHA's point concerning penalty costs mentioned in the proposed rule. First, the changes to these rules are a clarification and not a change to existing policies. Second, penalty costs are totally avoidable—simply comply with the rule as OSHA has assumed employers will in all of its analyses, and there are no additional costs for penalties. In addition, it should be noted that penalty costs, while costs to employers, do not, by and large represent true costs to the economy, but only represent transfer from firms that choose not to comply with OSHA regulations to the government. However, even ignoring these points, the actual penalty costs of noncompliance and the number of firms directly affected are likely to be minimal. An average of seven firms a year have been subject to penalties based on a per-employee fine. Further, many of these firms have not been small firms. Thus even if one disagrees with OSHA's view that the amendments are only a clarification, that compliance costs have already been accounted for, and that penalties need not be incurred, the costs are minimal and the number of firms affected cannot rise to the level of a substantial number of small firms that would be needed for a regulatory flexibility analysis to be required.

Some commenters concerned with penalty costs also pointed out that affected firms would have both higher penalties and higher legal costs, since firms would be more likely to incur legal costs to fight higher penalties (Exs. 42.1 and 43.1). OSHA views this argument as irrelevant because there are no new costs for a rule that simply clarifies existing policy. Further, even if this point is ignored, the legal costs of fighting penalties are no more relevant than the penalties themselves for purposes of feasibility analysis. They are not compliance costs, are totally avoidable, and do not rise to the level of affecting a substantial number of firms.

One commenter (Ex. 42.1) was concerned that this regulation would cause some employers to incur significant new recordkeeping costs. Since the rule imposes no new obligations and simply clarifies existing policy in a regulatory framework, OSHA considers this argument to be of dubious merit. In most cases, the underlying PPE and training standards require no recordkeeping. To the extent that recordkeeping for training or PPE is normal and customary in these industries, OSHA sees no difference between the records appropriate for showing that every employee has received adequate PPE or training, and records appropriate for showing that each employee has received adequate PPE or training. The same exact records will suffice for either, if an employer chooses to keep such records.

Finally, one commenter (Ex. 43.1), expanding on the possibility of new costs, more generally argued that employers would incur costs because, in order to avoid higher penalties, they would ''overprotect'' their employees, providing unnecessary PPE or training. However, ''overprotection'' if it exists, is, by definition, not a requirement of any standard, and is therefore not properly considered a cost of compliance for the purposes of determining economic feasibility. Furthermore, commenters have not provided any evidence that could be used as a basis for estimating such costs or determining how many firms might ''overprotect'' their employees as a result of this final rule.

Having considered the comments arguing that this regulation imposes new costs, or has significant economic impacts on a substantial number of firms, OSHA finally concludes that this set of changes to existing rules represents no new requirements, imposes no new costs, and raises no new analytic issues not already considered in the development of the rules being modified.

VI. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (as amended), OSHA examined the regulatory requirements of the final rule to determine if they will have a significant economic impact on a substantial number of small entities. As indicated in section V. (''Final Economic Analysis'') of this preamble, the final rule is expected to have no effect on compliance costs and regulatory burden for any employer, large or small. Accordingly, the Agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

VII. Environmental Impact Assessment

OSHA has reviewed the final rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 U.S.C. part 1500), and the Department of Labor's NEPA procedures (29 CFR part 11). The Agency finds that the final rule will have no major negative impact on air, water or soil quality, plant or animal life, the use of land, or other aspects of the environment.

VIII. Federalism

OSHA has reviewed this final rule in accordance with the Executive Order on Federalism (Executive Order 13132, 64 FR 43255, August 10, 1999), which requires that agencies, to the extent possible, refrain from limiting state policy options, consult with states prior to taking any actions that would restrict state policy options, and take such actions only when there is clear constitutional authority and the presence of a problem of national scope. Executive Order 13132 provides for preemption of state law only if there is a clear congressional intent for the Agency to do so. Any such preemption is to be limited to the extent possible.

Section 18 of the OSH Act (29 U.S.C. 651 *et seq.*) expresses Congress' intent to preempt state laws where OSHA has promulgated occupational safety and health standards. Under the OSH Act, a state can avoid preemption on issues covered by federal standards only if it submits, and obtains federal approval of, a plan for the development of such standards and their enforcement (State Plan state). 29 U.S.C. 667. Occupational safety and health standards developed by such State Plan states must, among other things, be at least as effective in providing safe and healthful employment and places of employment as the federal standards. Subject to these requirements, State Plan states are free to develop and enforce under state law their own requirements for safety and health standards.

This final rule complies with Executive Order 13132. As Congress has expressed a clear intent for Federal preemption on issues addressed by OSHA standards in states without OSHA-approved State Plans, this rule preempts state law in the same manner as any OSHA standard. States with OSHA-approved State Plans are free to develop policy options on issues addressed herein, provided their standards are at least as protective as this final rule.

IX. Unfunded Mandates

For the purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, *et seq.*, as well as E.O. 12875, this final rule does not include any Federal mandate that may result in increased

expenditures by State, local, and tribal governments, or increased expenditures by the private sector of more than $100 million.

X. OMB Review Under the Paperwork Reduction Act of 1995

This final rule does not contain any new collection of information requirements that are subject to review by OMB under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* and OMB regulations at 5 CFR part 1320.

Several commenters suggested that the rule could increase paperwork burdens on employers (*See, e.g.*, Exs. 40.1, 42.1, 80.1, 81.1). The Associated General Contractors of America (AGC) remarked that ''This proposal has substantial economic impact on small business owners within the construction industry. Requiring a contractor to prove that he or she provided appropriate PPE and training for each employee would result in a considerable amount of recordkeeping, which would overly burden small employers'' (Ex. 42.1). Associated Builders and Contractors, Inc. (ABC) recommended that OSHA ''[i]nclude specific guidance on what evidence OSHA will require (or otherwise expect) employers to provide in order to document that the requisite training has in fact been provided'' (Ex. 40.1).

As OSHA has stated numerous times throughout this preamble, these standards do not make any changes to the substantive requirements of the standards and thus do not impose any new duties on employers, including the duty to keep training and PPE records. The recordkeeping requirements of individual PPE and training requirements located in many of OSHA's standards vary on this matter: Some require training records, some require training certifications, and some do not require records at all. These requirements continue unchanged and OSHA therefore reiterates its finding that the rulemaking imposes no new paperwork burdens.

XI. State Plan States

When federal OSHA promulgates a new standard or more stringent amendment to an existing standard, the 26 states or U.S. territories with their own OSHA-approved occupational safety and health plans must revise their standards to reflect the new standard or amendment, or show OSHA why there is no need for action, e.g., because an existing state standard covering this area is already ''at least as effective'' as the new federal standard or amendment. 29 CFR 1953.5(a). The state standard must be at least as effective as the final federal rule, must be applicable to both the private and public (state and local government employees) sectors, and must be completed within six months of the publication date of the final federal rule. When OSHA promulgates a new standard or a standards amendment which does not impose additional or more stringent requirements than an existing standard, states are not required to revise their standards, although OSHA may encourage them to do so. The 26 states and territories with OSHA-approved State Plans are: Alaska, Arizona, California, Connecticut (plan covers only State and local government employees), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New Jersey (plan covers only State and local government employees), New York (plan covers only State and local government employees), North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands (plan covers only State and local government employees), Washington, and Wyoming.

With regard to this final rule, while it does not impose any additional or more stringent requirements, it adds language clarifying that the personal protective equipment and training requirements of OSHA's standards impose a compliance duty with respect to each employee covered by the requirements. State Plan states must ensure that their PPE and training standards are at least as effective as the federal standards as amended by this final rule. States must adopt revisions, if necessary, within six months of the publication of this rule.

XII. Authority and Signature

This document was prepared under the direction of Thomas M. Stohler, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. It is issued under sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), section 941 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*), section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 *et seq.*), Secretary of Labor's Order No. 5–2007, and 29 CFR part 1911.

Signed at Washington, DC, this 4th day of December, 2008.

Thomas M. Stohler,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

List of Subjects

29 CFR Part 1910

Chemicals, Gases, Hazardous substances, Occupational safety and health, Protective equipment.

29 CFR Part 1915

Chemicals, Gases, Hazardous substances, Longshore and harbor workers, Occupational safety and health, Protective equipment.

29 CFR Part 1917

Chemicals, Gases, Hazardous substances, Longshore and harbor workers, Occupational safety and health, Protective equipment.

29 CFR Part 1918

Chemicals, Gases, Hazardous substances, Longshore and harbor workers, Occupational safety and health, Protective equipment.

29 CFR Part 1926

Chemicals, Construction industry, Gases, Hazardous substances, Occupational safety and health, Protective equipment.

The Final Standard

■ Parts 1910, 1915, 1917, 1918 and 1926 of Title 29 of the Code of Federal Regulations are hereby amended as follows:

PART 1910—[AMENDED]

Subpart A—[Amended]

■ 1. The authority citation for subpart A of 29 CFR part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), and 5–2007 (72 FR 31159), as applicable.

Sections 1910.7, 1910.8, and 1910.9 also issued under 29 CFR Part 1911. Section 1910.7(f) also issued under 31 U.S.C. 9701, 29 U.S.C. 9a, 5 U.S.C. 553; Pub. L. 106–113 (113 Stat. 1501A–222); and OMB Circular A–25 (dated July 8, 1993) (58 FR 38142, July 15, 1993).

■ 2. A new section 1910.9 is added, to read as follows:

§ 1910.9 Compliance duties owed to each employee.

(a) *Personal protective equipment.* Standards in this part requiring the

employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

Subpart G—[Amended]

■ 3. The authority citation for subpart G of 29 CFR part 1910 is revised to read as follows:

Authority: Secs. 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 50017), or 5–2007 (72 FR 31159) as applicable; and 29 CFR part 1911.

■ 4. In section 1910.95, paragraph (k)(1) is revised to read as follows:

§ 1910.95 Occupational noise exposure.

* * * * *

(k) * * *

(1) The employer shall train each employee who is exposed to noise at or above an 8-hour time weighted average of 85 decibels in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

Subpart I—[Amended]

■ 5. The authority citation for subpart I of 29 CFR part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160), as applicable, and 29 CFR Part 1911.

■ 6. In section 1910.134, paragraph (a)(2) is revised to read as follows:

§ 1910.134 Respiratory protection.

* * * * *

(a) * * *

(2) A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program, which shall include the requirements outlined in paragraph (c) of this section. The program shall cover each employee required by this section to use a respirator.

* * * * *

Subpart L—[Amended]

■ 7. The authority citation for subpart L of 29 CFR part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160), as applicable, and 29 CFR Part 1911.

■ 8. In section 1910.156, paragraph (f)(1)(i) is revised to read as follows:

§ 1910.156 Fire brigades.

* * * * *

(f)* * *

(1)* * *

(i) The employer must ensure that respirators are provided to, and used by, each fire brigade member, and that the respirators meet the requirements of 29 CFR 1910.134 for each employee required by this section to use a respirator.

* * * * *

Subpart Z—[Amended]

■ 9. The authority citation for subpart Z of 29 CFR part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160), as applicable.

All of subpart Z issued under section 6(b) of the Occupational Safety and Health Act, except those substances that have exposure limits listed in Tables Z–1, Z–2, and Z–3 of 29 CFR 1910.1000. The latter were issued under section 6(a) (29 U.S.C. 655(a)).

Section 1910.1000, Tables Z–1, Z–2, and Z–3 also issued under 5 U.S.C. 553, Section 1910.1000 Tables Z–1, Z–2, and Z–3 but not under 29 CFR part 1911 except for the arsenic (organic compounds), benzene, cotton dust, and chromium (VI) listings.

Section 1910.1001 also issued under section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704) and 5 U.S.C. 553.

Section 1910.1002 also issued under 5 U.S.C. 553 but not under 29 U.S.C. 655 or 29 CFR part 1911.

Sections 1910.1018, 1910.1029 and 1910.1200 also issued under 29 U.S.C. 653.

Section 1910.1030 also issued under Pub. L. 106–430, 114 Stat. 1901.

■ 10. In section 1910.1001, paragraphs (g)(1) introductory text, (g)(2)(i), and (j)(7)(i) are revised to read as follows:

§ 1910.1001 Asbestos.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with 29 CFR 134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(j) * * *

(7) * * *

(i) The employer shall train each employee who is exposed to airborne concentrations of asbestos at or above the PEL and/or excursion limit in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 11. In section 1910.1003, paragraphs (c)(4)(iv) and (d)(1) are revised to read as follows:

§ 1910.1003 13 Carcinogens (4-Nitrobiphenyl, etc.).

* * * * *

(c) * * *

(4) * * *

(iv) Each employee engaged in handling operations involving the carcinogens addressed by this section must be provided with, and required to wear and use, a half-face filter type respirator for dusts, mists, and fumes. A

respirator affording higher levels of protection than this respirator may be substituted.

* * * * *

(d) * * *

(1) *Respiratory program.* The employer must implement a respiratory protection program in accordance with § 1910.134 (b), (c), (d) (except (d)(1)(iii) and (iv), and (d)(3)), and (e) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 12. In section 1910.1017, paragraphs (g)(1) and (g)(2) are revised to read as follows:

§ 1910.1017 Vinyl chloride.

* * * * *

(g) *Respiratory protection.* (1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph.

(2) *Respirator program.* The employer must implement a respiratory protection program in accordance § 1910.134 (b) through (d) (except (d)(1)(iii), and (d)(3)(iii)(B)(1) and (2)), and (f) through (m) which covers each employee required by this section to use a respirator.

* * * * *

■ 13. In section 1910.1018, paragraphs (h)(1) introductory text, and (h)(2)(i), and (o)(1)(i) are revised to read as follows:

§ 1910.1018 Inorganic arsenic.

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(o) * * *

(l) * * *

(i) The employer shall train each employee who is subject to exposure to inorganic arsenic above the action level without regard to respirator use, or for whom there is the possibility of skin or eye irritation from inorganic arsenic, in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 14. In section 1910.1025, paragraphs (f)(1) introductory text, (f)(2)(i), and (l)(1)(ii) are revised to read as follows:

§ 1910.1025 Lead.

* * * * *

(f) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(l) * * *

(1) * * *

(ii) The employer shall train each employee who is subject to exposure to lead at or above the action level, or for whom the possibility of skin or eye irritation exists, in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 15. In section 1910.1026, paragraphs (g)(1) introductory text and (g)(2) are revised to read as follows:

§ 1910.1026 Chromium (VI).

* * * * *

(g) * * *

(1) *General.* Where respiratory protection is required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respiratory protection is required during:

* * * * *

(2) *Respiratory protection program.* Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134, which covers each employee required to use a respirator.

* * * * *

■ 16. In section 1910.1027, paragraphs (g)(1) introductory text, (g)(2)(i), and (m)(4)(i) are revised to read as follows:

§ 1910.1027 Cadmium.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(m) * * *

(4) * * *

(i) The employer shall train each employee who is potentially exposed to cadmium in accordance with the requirements of this section. The employer shall institute a training program, ensure employee participation in the program, and maintain a record of the contents of such program.

* * * * *

■ 17. In section 1910.1028, paragraph (g)(1) introductory text and (g)(2)(i) are revised to read as follows:

§ 1910.1028 Benzene.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(b)(1) and (2)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 18. In section 1910.1029, paragraphs (g)(1) introductory text, (g)(2) and (k)(1)(i) are revised to read as follows:

§ 1910.1029 Coke oven emissions.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator program.* The employer must implement a respiratory protection

program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(k) * * *

(1) * * *

(i) The employer shall train each employee who is employed in a regulated area in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 19. In section 1910.1030, paragraph (g)(2)(i) is revised to read as follows:

§ 1910.1030 Bloodborne pathogens.

* * * * *

(g) * * *

(2) * * *

(i) The employer shall train each employee with occupational exposure in accordance with the requirements of this section. Such training must be provided at no cost to the employee and during working hours. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 20. In section 1910.1043, paragraphs (f)(1) introductory text, (f)(2)(i), and (i)(1)(i) are revised to read as follows:

§ 1910.1043 Cotton dust.

* * * * *

(f) * * *

(1) *General.* For employees who are required to use respirators by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(i) * * *

(1) * * *

(i) The employer shall train each employee exposed to cotton dust in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 21. In section 1910.1044, paragraphs (h)(1) introductory text, (h)(2), and (n)(1)(i) are revised to read as follows:

§ 1910.1044 1,2-dibromo-3-chloropropane.

* * * * *

(h) * * *

(1) *General.* For employees who are required to use respirators by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator Program.* The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(n) * * *

(1) * * *

(i) The employer shall train each employee who may be exposed to DBCP in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 22. In section 1910.1045, paragraphs (h)(1) introductory text, (h)(2)(i), and (o)(1)(i) are revised to read as follows:

§ 1910.1045 Acrylonitrile.

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(b)(1), and (2)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(o) * * *

(1) * * *

(i) The employer shall train each employee exposed to AN above the action level, each employee whose exposures are maintained below the action level by engineering and work practice controls, and each employee subject to potential skin or eye contact with liquid AN in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 23. In section 1910.1047, paragraph (g)(1) introductory text and (g)(2) are revised to read as follows:

§ 1910.1047 Ethylene oxide.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator program.* The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(i)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 24. In section 1910.1048, paragraphs (g)(1) introductory text and (g)(2)(i) are revised to read as follows:

§ 1910.1048 Formaldehyde.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(b)(1), and (2)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 25. In section 1910.1050, paragraphs (h)(1) introductory text and (h)(2) are revised to read as follows:

§ 1910.1050 Methylenedianiline.

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator program.* The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each

employee required by this section to use a respirator.

* * * * *

■ 26. In section 1910.1051, paragraphs (h)(1) introductory text, (h)(2)(i), and (l)(2)(ii) are revised to read as follows:

§ 1910.1051 Butadiene.

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(B)(1), and (2)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(l) * * *

(2) * * *

(i) * * *

(ii) The employer shall train each employee who is potentially exposed to BD at or above the action level or the STEL in accordance with the requirements of this section. The employer shall institute a training program, ensure employee participation in the program, and maintain a record of the contents of such program.

* * * * *

■ 27. In section 1910.1052, paragraphs (g)(1) introductory text and (g)(2)(i) are revised to read as follows:

§ 1910.1052 Methylene chloride.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.13(b) through (m) (except (d)(1)(iii)), which covers each employee required by this section to use a respirator.

* * * * *

PART 1915—[AMENDED]

■ 28. The authority citation for part 1915 is revised to read as follows:

Authority: Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Sections. 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160) as applicable; 29 CFR Part 1911.

Subpart A—[Amended]

■ 29. A new section 1915.9 is added, to read as follows:

§ 1915.9 Compliance duties owed to each employee.

(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

Subpart Z—[Amended]

■ 30. In section 1915.1001, paragraphs (h)(1) introductory text, (h)(3)(i), and (k)(9)(i), are revised to read as follows:

§ 1915.1001 Asbestos.

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used in the following circumstances:

* * * * *

(3) * * *

(i) Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134(b), (d), (e), and (f), which covers each employee required by this section to use a respirator.

* * * * *

(k) * * *

(9) * * *

(i) The employer shall train each employee who is likely to be exposed in excess of a PEL and each employee who performs Class I through IV asbestos operations in accordance with the requirements of this section. Training shall be provided at no cost to the employee. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 31. In section 1915.1026, paragraphs (f)(1) introductory text and (f)(2) are revised to read as follows:

§ 1915.1026 Chromium (IV).

* * * * *

(f) * * *

(1) *General.* Where respiratory protection is required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respiratory protection is required during:

* * * * *

(2) *Respiratory Protection Program.* Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134, which covers each employee required to use a respirator.

* * * * *

PART 1917—[AMENDED]

■ 32. The authority citation for part 1917 is revised to read as follows:

Authority: Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160) as applicable; 29 CFR Part 1911.

Subpart A—[Amended]

■ 33. A new section 1917.5 is added, to read as follows:

§ 1917.5 Compliance duties owed to each employee.

(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an

employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

PART 1918—[AMENDED]

■ 34. The authority citation for part 1918 is revised to read as follows:

Authority: Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (72 FR 31160) as applicable; 29 CFR Part 1911.

Subpart A—[Amended]

■ 35. A new section 1918.5 is added, to read as follows:

§ 1918.5 Compliance duties owed to each employee.

(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

PART 1926—[AMENDED]

Subpart C—[Amended]

■ 36. The authority citation for subpart C of 29 CFR part 1926 is revised to read as follows:

Authority: Sec. 3704, Contract Work Hours and Safety Standards Act (40 U.S.C. 333); secs. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 6–96 (62 FR 111), or 5–2007 (72 FR 31160) as applicable; and 29 CFR part 1911.

■ 37. In section 1926.20, a new paragraph (f) is added to read as follows:

§ 1926.20 General safety and health provisions.

* * * * *

(f) *Compliance duties owed to each employee.* (1) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(2) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty with respect to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

Subpart D—[Amended]

■ 38. The authority citation for subpart D of 29 CFR part 1926 is revised to read as follows:

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 *et seq.*); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Orders 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (62 FR 50017), 5–2002 (67 FR 65008); or 5–2007 (72 FR 31160) as applicable; and 29 CFR part 1911.

Sections 1926.58, 1926.59, 1926.60, and 1926.65 also issued under 5 U.S.C. 553 and 29 CFR part 1911.

Section 1926.62 of 29 CFR also issued under section 1031 of the Housing and Community Development Act of 1992 (42 U.S.C. 4853).

Section 1926.65 of 29 CFR also issued under section 126 of the Superfund Amendments and Reauthorization Act of 1986, as amended (29 U.S.C. 655 note), and 5 U.S.C. 553.

■ 39. In section 1926.60, paragraph (i)(1) introductory text, and (i)(2) are revised to read as follows:

§ 1926.60 Methylenedianiline.

* * * * *

(i) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator program.* The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

■ 40. In section 1926.62, paragraphs (f)(1) introductory text, (f)(2)(i), and (l)(1)(ii) are revised to read as follows:

§ 1926.62 Lead.

* * * * *

(f) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(l) * * *

(ii) The employer shall train each employee who is subject to exposure to lead at or above the action level on any day, or who is subject to exposure to lead compounds which may cause skin or eye irritation (*e.g.*, lead arsenate, lead azide), in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

Subpart R—[Amended]

■ 41. The authority citation for subpart R of 29 CFR part 1926 is revised to read as follows:

Authority: Sec. 3704, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); Sec. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 3–2000 (65 FR 50017), No. 5–2002 (67 FR 65008), or No. 5–2007 (72 FR 31160) as applicable; and 29 CFR part 1911.

■ 42. In section 1926.761, paragraph (b) is revised to read as follows:

§ 1926.761 Training.

* * * * *

(b) *Fall hazard training.* The employer shall train each employee exposed to a fall hazard in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

Subpart Z—[Amended]

■ 43. The authority citation for subpart Z of 29 CFR part 1926 is revised to read as follows:

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 et seq.); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Orders 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (62 FR 50017), 5–2002 (67 FR 65008), or 5–2007 (71 FR 31160), as applicable; and 29 CFR part 11.

Section 1926.1102 of 29 CFR not issued under 29 U.S.C. 655 or 29 CFR part 1911; also issued under 5 U.S.C. 553.

■ 44. In section 1926.1101, paragraphs (h)(1) introductory text, (h)(2), and (k)(9)(i) are revised to read as follows:

§ 1926.1101 Asbestos.

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(k) * * *

(9) * * *

(i) The employer shall train each employee who is likely to be exposed in excess of a PEL, and each employee who performs Class I through IV asbestos operations, in accordance with the requirements of this section. Such training shall be conducted at no cost to the employee. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

■ 45. In section 1926.1126, paragraphs (f)(1) introductory text and (f)(2) are revised to read as follows:

§ 1926.1126 Chromium (IV).

* * * * *

(f) * * *

(1) *General.* Where respiratory protection is required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respiratory protection is required during:

* * * * *

(2) *Respiratory protection program.* Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134, which covers each employee required to use a respirator.

* * * * *

■ 46. In section 1926.1127, paragraphs (g)(1) introductory text, (g)(2)(i), and (m)(4)(i) are revised to read as follows:

§ 1926.1127 Cadmium.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m), which covers each employee required by this section to use a respirator.

* * * * *

(m) * * *

* * * * *

(4) * * *

(i) The employer shall train each employee who is potentially exposed to cadmium in accordance with the requirements of this section. The employer shall institute a training program, ensure employee participation in the program, and maintain a record of the contents of the training program.

* * * * *

[FR Doc. E8–29122 Filed 12–9–08; 4:15 pm]

BILLING CODE 4510–26–P

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 380

[Docket No. BPD GSRS 08–02]

Collateral Acceptability and Valuation

AGENCY: Bureau of the Public Debt, Fiscal Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury is amending regulations that govern the acceptability and valuation of collateral pledged to secure deposits of public monies and other financial interests of the government under Treasury's three Fiscal Service collateral programs. This final rule is a nonsubstantive, technical amendment that updates a Web site and a postal mailing address referenced in those regulations.

DATES: *Effective date:* December 12, 2008.

ADDRESSES: You may download this final rule from the Bureau of the Public Debt's Web site at *www.treasurydirect.gov* or from the Electronic Code of Federal Regulations (e–CFR) Web site at *www.gpoaccess.gov/ecfr.* It is also available for public inspection and copying at the Treasury Department Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. To visit the library, call (202) 622–0990 for an appointment.

FOR FURTHER INFORMATION CONTACT: Lori Santamorena (Executive Director) or Kurt Eidemiller (Associate Director), Department of the Treasury, Bureau of the Public Debt, Office of the Commissioner, Government Securities Regulations Staff, at (202) 504–3632 or e-mail us at *govsecreg@bpd.treas.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Department of the Treasury (''Treasury'') is amending 31 CFR part 380, which governs the acceptable types of collateral and their assigned values that may be pledged to secure deposits of public monies and other financial interests of the government under Treasury's Fiscal Service collateral programs.

Treasury's Fiscal Service administers several financial programs that involve the pledging of specific collateral. These programs are described in, and governed by, the regulations at 31 CFR part 202 (Depositaries and Financial Agents of the Government), 31 CFR part 203 (Payment of Federal Taxes and the Treasury Tax and Loan Program), and 31 CFR part 225 (Acceptance of Bonds Secured by Government Obligations in Lieu of Bonds with Sureties). The Financial Management Service (''FMS''), a bureau within Treasury's Fiscal Service, administers these programs, which are handled operationally by the Federal Reserve System, acting as fiscal agent for Treasury. The Bureau of the Public Debt (''Public Debt''), another bureau within Treasury's Fiscal Service, administers 31 CFR part 380, which governs the acceptability and valuation of the collateral in these programs. The Government Securities Regulations Staff at Public Debt is responsible for guidance and interpretations of those regulations.

All information about the acceptability and valuation of collateral for these programs can be found on Public Debt's Web site. The Web site has changed and it can now be accessed at *http://www.treasurydirect.gov* instead of its previous address, *http://www.publicdebt.treas.gov.* Also, this amendment updates Public Debt's postal mailing address.

II. Procedural Requirements

Executive Order 12866

This final rule is not subject to Executive Order 12866 because it relates only to Treasury's organization, specifically, the mailing address and Web site URL for one of its bureaus.

Administrative Procedure Act, 5 U.S.C. 551 et seq.

The procedures for public notice and comment under 5 U.S.C. 553(b), and the delayed effective date requirement of 5 U.S.C. 553(d), do not apply when an agency for good cause finds that the procedures are unnecessary. This rule does not promulgate any substantive changes to the regulations being amended. Rather, this rule merely makes minor, technical changes, specifically, updating the mailing address and Web site address listed in the regulations, that do not involve the exercise of agency discretion and which are unlikely to generate public comment. Accordingly, Treasury finds that good cause exists to dispense with notice and comment procedures for this rule, and to have the rule take immediate effect, under 5 U.S.C. 553(b)(B) and 553(d)(3).

Regulatory Flexibility Act, 5 U.S.C. 601 et seq.

Because a notice of proposed rulemaking is not required under 5 U.S.C. 553 for this rule, the Regulatory Flexibility Act does not apply to this rule.

List of Subjects in 31 CFR Part 380

Collateral, Depositaries, Government obligations, Government securities, Securities, Surety bonds.

■ For the reasons set forth in the preamble, we amend Subchapter B of Chapter II of Title 31 of the Code of Federal Regulations by revising part 380 to read as follows:

PART 380—COLLATERAL ACCEPTABILITY AND VALUATION

Subpart A—General Information

Sec.

380.0 What do these regulations govern?
380.1 What special definitions apply to this part?

Subpart B—Acceptable Collateral and Its Valuation

380.2 What collateral may I pledge if I am a depositary or a financial agent of the Government under 31 CFR part 202, and what value will you assign to it?
380.3 What collateral may I pledge if I am a Treasury Tax and Loan depositary under 31 CFR part 203, and what value will you assign to it?
380.4 What collateral may I pledge instead of a surety bond under 31 CFR part 225, and what value will you assign to it?

Subpart C—Miscellaneous Provisions

380.5 Where can I find current information, and who can I contact for additional guidance and interpretation?

Authority: 12 U.S.C. 90, 265–266, 332, 391, 1452(d), 1464(k), 1767, 1789a, 2013, 2122, 3101–3102; 26 U.S.C. 6302; 31 U.S.C. 321, 323, 3301–3304, 3336, 9301, 9303.

Subpart A—General Information

§ 380.0 What do these regulations govern?

The regulations in this part govern the types of acceptable collateral that you may pledge to secure deposits of public monies and other financial interests of the Federal Government, as well as the valuation of that collateral. Specifically, the regulations in this part apply to the programs governed by the Department of the Treasury's regulations at 31 CFR part 202 (Depositaries and Financial Agents of the Government), 31 CFR part 203 (Payment of Federal Taxes and the Treasury Tax and Loan Program), and 31 CFR part 225 (Acceptance of Bonds Secured by Government Obligations in Lieu of Bonds with Sureties). The regulations in this part apply only to the acceptability and valuation of collateral that may be pledged under these programs. 31 CFR parts 202, 203, and 225 continue to govern the respective programs themselves.

§ 380.1 What special definitions apply to this part?

Special definitions that may apply to this part are contained in 31 CFR parts 202, 203 and 225.

Subpart B—Acceptable Collateral and Its Valuation

§ 380.2 What collateral may I pledge if I am a depositary or a financial agent of the Government under 31 CFR part 202, and what value will you assign to it?

Unless we specify otherwise, we will list the types and valuation of acceptable collateral in Treasury procedural instructions. We will also post updated information and guidance on Treasury's Bureau of the Public Debt Web site at *http://www.treasurydirect.gov*.

§ 380.3 What collateral may I pledge if I am a Treasury Tax and Loan depositary under 31 CFR part 203, and what value will you assign to it?

Unless we specify otherwise, we will list the types and valuation of acceptable collateral in Treasury procedural instructions. We will also post updated information and guidance on Treasury's Bureau of the Public Debt Web site at *http://www.treasurydirect.gov*.

§ 380.4 What collateral may I pledge instead of a surety bond under 31 CFR part 225, and what value will you assign to it?

Unless we specify otherwise, we will list the types and valuation of acceptable collateral in Treasury procedural instructions. We will also post updated information and guidance on Treasury's Bureau of the Public Debt Web site at *http://www.treasurydirect.gov*.

Subpart C—Miscellaneous Provisions

§ 380.5 Where can I find current information, and who can I contact for additional guidance and interpretation?

You can find a current list of acceptable classes of securities, instruments and respective valuations on Treasury's Bureau of the Public Debt Web site at *http://www.treasurydirect.gov*. You may also contact the Office of the Commissioner. We can be reached by postal mail at: Department of the Treasury, Bureau of the Public Debt, Office of the Commissioner, Government Securities

Regulations Staff, 799 9th Street, NW., 8th Floor, Washington, DC 20239–0001, or by e-mail at *govsecreg@bpd.treas.gov*.

Kenneth E. Carfine,

Fiscal Assistant Secretary.

[FR Doc. E8–29440 Filed 12–11–08; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 706

Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972

AGENCY: Department of the Navy, DoD.

ACTION: Final rule.

SUMMARY: The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) of the Navy has determined that USS SAN FRANCISCO (SSN 711) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with certain provisions of the 72 COLREGS without interfering with its special function as a naval ship. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

DATES: This rule is effective December 12, 2008 and is applicable beginning 20 November 2008.

FOR FURTHER INFORMATION CONTACT: Commander M. Robb Hyde, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law), Office of the Judge Advocate General, Department of the Navy, 1322 Patterson Ave., SE., Suite 3000, Washington Navy Yard, DC 20374–5066, telephone number: 202–685–5040.

SUPPLEMENTARY INFORMATION: Pursuant to the authority granted in 33 U.S.C. 1605, the Department of the Navy amends 32 CFR Part 706.

This amendment provides notice that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) of the Navy, under authority delegated by the Secretary of the Navy, has certified that USS SAN FRANCISCO (SSN 711) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with the following specific provisions of 72 COLREGS without interfering with its special function as a naval ship: Rule 21(a) pertaining to the location of the masthead lights over the fore and aft centerline of the ship. The Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

List of Subjects in 32 CFR Part 706

Marine safety, Navigation (Water), and Vessels.

■ For the reasons set forth in the preamble, amend part 706 of title 32 of the Code of Federal Regulations as follows:

PART 706—CERTIFICATIONS AND EXEMPTIONS UNDER THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972

■ 1. The authority citation for 32 CFR Part 706 continues to read as follows:

Authority: 33 U.S.C. 1605.

■ 2. Section 706.2 is amended as follows:

■ A. In Table Two by adding, in numerical order, the following entry for USS SAN FRANCISCO (SSN 711):

§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.

* * * * *

TABLE TWO

* * * * * * *

Vessel	Number	Masthead lights, distance to stbd of keel in meters; Rule 21(a)	Forward anchor light, distance below flight dk in meters; § 2(K), Annex I	Forward anchor light, number of; Rule 30(a)(i)	AFT anchor light, distance below flight dk in meters; Rule 21(e), Rule 30(a)(ii)	AFT anchor light, number of; Rule 30(a)(ii)	Side lights, distance below flight dk in meters; § 2(g), Annex I	Side lights, distance forward of forward masthead light in meters; § 3(b), Annex I	Side lights, distance inboard of ship's sides in meters; § 3(b), Annex I
*	*	*	*	*	*	*	*	*	*
USS SAN FRANCISCO	SSN 711	0.41							
*	*	*	*	*	*	*	*	*	*

* * * * *

Approved: November 20, 2008.

M. Robb Hyde,

Commander, JAGC, U.S. Navy, Deputy Assistant Judge Advocate, General (Admiralty and Maritime Law).

[FR Doc. E8–29435 Filed 12–11–08; 8:45 am]

BILLING CODE 3810–FF–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Chapter I

[EPA–HQ–OPP–2008–0247; FRL–8146–6]

Pesticide Regulations; Technical Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA has reviewed its pesticide regulations contained in 40 CFR Parts 150–180, and is making technical changes in a number of areas. These technical changes will correct errors and cross-references, improve presentation and format, and conform the regulations to current CFR practice. These changes have no substantive impact on any requirements. As such, notice and public comment procedures are unnecesary, and EPA finds that this constitutes good cause under the Administrative Procedure Act.

DATES: This final rule is effective February 10, 2009.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0247. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Kathryn Boyle, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6304; fax number: (703) 305–5884; e-mail address: *boyle.kathryn@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Does this Action Apply to Me?

You may be potentially affected by this action if you produce or register pesticide products, or petition the Agency to establish or modify a pesticide tolerance. Potentially affected entities may include, but are not limited to Pesticide Producers (NAICS 32532), e.g., pesticide manufacturers or formulators of pesticide products or importers of pesticide products.

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

II. Background

Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and the Federal Food, Drug and Cosmetic Act (FFDCA), the Agency regulates the sale, distribution and use of pesticides. EPA regulations covering activities under these statutes are contained in 40 CFR parts 150 – 180. Many of these regulations were promulgated or last revised in the 1970s and 1980s and have not been significantly updated.

Over the past year, EPA has conducted a detailed review of its pesticide regulations, contained in 40 CFR parts 150 – 180. EPA believes that improvements in these regulations are warranted. Today's final rule makes ''housekeeping'' or non-substantive technical changes to a series of regulations. Future rulemakings implementing substantive changes will be issued as proposed rules with opportunity for comment. The types of changes being made today involve error correction, conforming changes, and general non-substantive improvements in presentation and format.

III. Today's final rule

In today's final rule EPA is making the following key types ofchanges to the regulations in 40 CFR parts 150 – 180.

1. EPA is removing compliance and effective dates that have passed.These involve certain provisions concerning:

a. Data compensation (part 152, subpart E);

b. Worker protection interim provisions and exceptions (part 170).

2. EPA is removing unnecessary or obsolete references, including:

a. References to the Pesticide Assessment Guidelines that are notneeded in regulatory text (part 172);

b. Definitions related solely to plant-incorporated protectants that are not used in the regulatory text of part 152. These definitions are duplicative of definitions in part 174.

c. Reference in § 180.34 to the certification of usefulness, a provision eliminated by the Food Quality Protection Act (FQPA) in 1996.

3. EPA is removing most references to section 409 of the FFDCA. Prior to 1996, EPA established tolerances for raw agricultural commodities under section 408 and food additive regulations for certain pesticide residues in processed foods under section 409, which pertains to food additives. As part of the FQPA, Congress combined EPA's authority to regulate all pesticide chemical residues in food under section 408 of the FFDCA (leaving the Food and Drug Administration the sole authority under section 409 to regulate food additives). As it no longer has any regulatory authority under section 409, EPA is eliminating most references to FFDCA section 409 from its regulations. Those retained are needed for continued enforcement of pre-FQPA provisions.

4. EPA is correcting other statutory and regulatory cross-references.

a. EPA is correcting the references to data compensation provisions in FIFRA sec. 3(c)(1)(D), which is now 3(c)(1)(F).

b. EPA is correcting the references to FIFRA sec. 4, which is now FIFRA sec. 11.

c. EPA is correcting the regulatory cross-references from § 156.10(h) to § 156.62 and § 162.11 to part 154. These regulations were restructured a number of years ago, but the cross-references were not.

5. EPA is correcting part 155, subpart C, Registration Review Procedures, to include the mandatory 15-year

registration review and minor changes to docket procedures required under the Pesticide Regulatory Improvement Renewal Act.

6. EPA is updating organizational and docket references in the regulations. For example, EPA is revising a reference to the U.S. Bureau of Mines to refer to the National Institute for Occupational Safety and Health. EPA is revising the URL for the location of EPA's electronic dockets to *www.regulations.gov*.

7. EPA is revising the regulations to conform with current CFR practice.

a. EPA is revising the structure used to present definitions. Current CFR practice is to list definitions alphabetically without numeric or alpha paragraph designations. EPA is revising various definitions sections to provide for greater consistency in presentation by removing numeric and alpha paragraph designations from parts 154, 157, 162, 166, and 172. In addition, EPA is standardizing the introductory material and, in a few cases, revising a definition from ''term includes'' or ''term refers to'' to ''term means.'' In each instance where EPA is making this revision the existing definition contains language that makes the definition all-inclusive, so that the term ''includes'' in actuality means ''means.''

b. EPA is removing the topic headings in part 180, which are no longerused in regulations.

8. EPA is reformatting certain material without substantive change for greater clarity and understanding.

a. EPA is restructuring the opening paragraphs of § 152.1 and § 160.1

b. EPA is revising certain table titles in part 158 to clearly identify experimental use permit versus registration data requirements.

9. EPA is revising section titles to reflect statutory language.Specifically, EPA is revising the titles of § 152.10 and § 152.20 to accurately reflect the underlying statutory language.

IV. Good Cause Exemption

Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a final rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for issuing today's rule final without prior proposal and opportunity for comment because notice and public comment are unnecessary. EPA is making only technical changes that have no substantive effect on any requirement, while improving the clarity and usefulness of its regulations. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

V. FIFRA Review Requirements

In accordance with FIFRA sec. 25(a), a draft of this final rule was submitted to the Secretary of Agriculture, the FIFRA SAP, and appropriate Congressional Committees. The FIFRA SAP and the Secretary of Agriculture waived review of the final rule.

VI. Statutory and Executive Order Reviews

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' subject to review by the Office of Management and Budget (OMB) under Executive Order 12866, nor does this rule contain any information collections subject to OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

Because the Agency has made a ''good cause'' finding that this action is not subject to notice-and-comment requirements under the APA or any other statute (see Unit IV.), it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does this action significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999), nor will this rule have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000).

This rule does not require any special considerations, OMB review or any Agency action under Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997). Nor will this rule have any affect on energy supply, distribution or use as described in Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995, Public Law 104–113, section 12(d) (15 U.S.C. 272 note). The rule also does not involve special consideration of environmental justice related issues under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (55 FR 7629, February 16, 1994).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report to each House of the Congress and 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**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Parts 152 and 154

Environmental protection, Administrative practice and procedure, Pesticides and pest, Reporting and recordkeeping requirements.

40 CFR Part 155

Environmental protection, Administrative practice and procedure, Confidential business information, Pesticides and pest, Reporting and recordkeeping requirements.

40 CFR Part 156

Environmental protection, Administrative practice and procedure, labeling, Pesticides and pest, Reporting and recordkeeping requirements.

40 CFR Part 157

Environmental protection, Administrative practice and procedure, Infants and children, Packaging and containers, Pesticides and pest, Reporting and recordkeeping requirements.

40 CFR Parts 158 and 159

Environmental protection, Confidential business information, Pesticides and pest, Reporting and recordkeeping requirements.

40 CFR Part 160

Environmental protection, Laboratories, Pesticides and pest, Reporting and recordkeeping requirements.

40 CFR Part 162

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Laboratories, Pesticides and pest.

40 CFR Part 164

Environmental protection, Administrative practice and procedure, Pesticides and pest.

40 CFR Part 166

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Laboratories, Pesticides and pest.

40 CFR Part 168

Environmental protection, Administrative practice and procedure, Advertising, Pesticides and pest.

40 CFR Part 170

Environmental protection, Intergovernmental relations, Labeling, Occupational safety and health, Pesticides and pest.

40 CFR Part 171

Environmental protection, Indian lands, Intergovernmental relations, Laboratories, Pesticides and pest, Reporting and recordkeeping requirements.

40 CFR Part 172

Environmental protection, Intergovernmental relations, Labeling, Pesticides and pest, Reporting and recordkeeping requirements, Research.

40 CFR Part 180

Environmental protection, Administrative practice and procedure, Pesticides and pest, Reporting and recordkeeping requirements.

Dated: December 2, 2008.

James B. Gulliford,

Assistant Administrator for Prevention, Pesticides, and Toxic Substances.

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

PART 152—[AMENDED]

■ 1. The authority citation for part 152 continues to read as follows:

Authority: 7 U.S.C. 136 - 136y; Subpart U is also issued under 31 U.S.C. 9701.

■ 2. By revising § 152.1 to read as follows:

§ 152.1 Scope.

(a) Part 152 sets forth procedures, requirements and criteria concerning the registration of pesticide products under FIFRA section 3, including plant-incorporated protectants (PIPs). Unless specifically superseded by part 174, the regulations in part 152 apply to PIPs.

(b) Part 152 also describes associated regulatory activities affecting registration, as described in this paragraph.

(1) *Data compensation and exclusive use of data in support of registration*. Refer to subpart E of this part.

(2) *Rights and obligations of registrants*. Refer to subpart G of this part.

(3) *Classification of pesticide uses*. Refer to subpart I of this part.

(4) *Fees*. Refer to subpart U of this part.

(5) *Requirements pertaining to pesticide devices*. Refer to subpart Z of this part.

■ 3. In § 152.3 by removing the definitions of ''Genetic material necessary for the production,'' ''In a living plant,'' ''Noncoding, nonexpressed nucleotide sequences,'' ''Pesticidal substance,'' ''Produce thereof,'' and ''Regulatory region'', and by revising the definitions of ''Applicant,'' and subparagraph (1) under the definition for ''New use'' to read as follows:

§ 152.3 Definitions.

* * * * *

Applicant means a person who applies for a registration or amended registration under FIFRA sec. 3.

* * * * *

New use * * *

(1) Any proposed use pattern that would require the establishment of, the increase in, or the exemption from the requirement of a tolerance or food additive regulation under section 408 of the Federal Food, Drug and Cosmetic Act;

* * * * *

■ 4. In § 152.6 by revising paragraph (a)(2) to read as follows:

§ 152.6 Substances excluded from regulation by FIFRA.

* * * * *

(a) * * *

(2) *Claims*. The product must bear a sterilant claim, or a sterilant plus subordinate level disinfection claim. Products that bear antimicrobial claims solely at a level less than ''sterilant'' are not excluded and are jointly regulated by EPA and FDA.

* * * * *

■ 5. By revising the section heading of § 152.10 to readas follows:

§ 152.10 Products that are not pesticides because they are not intended for a pesticidal purpose.

* * * * *

■ 6. By revising the section heading of § 152.20 to readas follows:

§ 152.20 Exemptions for pesticides adequately regulated by another Federal agency.

* * * * *

■ 7. Section 152.50 is amended by revising paragraph (i), and by adding paragraph (j) to read as follows:

§ 152.50 Contents of application.

* * * * *

(i) *Statement concerning tolerances*. (1) If the proposed labeling bears instructions for use of the pesticide on food or feed crops, or if the intended use of the pesticide results or may be expected to result, directly or indirectly, in pesticide chemical residues in or on food or feed (including residues of any active ingredient, inert ingredient, metabolite, or degradation product), the applicant must submit a statement indicating whether such residues are authorized by a tolerance or exemption from the requirement of a tolerance issued under section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA).

(2) If such residues have not been authorized, the application must be accompanied by a petition for establishment of appropriate tolerances or exemptions from the requirement of a tolerance, in accordance with part 180 of this chapter.

(j) *Fees*. (1) The applicant shall identify the appropriate fee category in the schedule provided for by FIFRA sec. 33, and shall submit the fee for that category as prescribed by the latest EPA notice of section 33 fees.

(2) If FIFRA sec. 33 is not in effect, the applicant shall submit any fees required by subpart U of this part, if applicable.

■ 8. By revising § 152.80 to read as follows:

§ 152.80 General.

This subpart E describes the information that an applicant must submit with his application for registration or amended registration to comply (and for the Agency to determine compliance) with the provisions of FIFRA sec. 3(c)(1)(F). This subpart also describes the procedures by which data submitters may challenge registration actions which allegedly failed to comply with these procedures. If the Agency determines that an applicant has failed to comply with the requirements and procedures in this subpart, the application may be denied. If the Agency determines, after

registration has been issued, that an applicant failed to comply with these procedures and requirements, the Agency may issue a notice of intent to cancel the product's registration.

§ 152.83 [Amended]

■ 9. Section 152.83 is amended by removing the alpha paragraph designations from the definitions, and revising the reference to ''FIFRA section 3(c)(1)(D)'' to read ''FIFRA section 3(c)(1)(F)'', wherever it appears.

§ 152.86 [Amended]

■ 10. Section 152.86 is amended by revising the reference ''FIFRA section 3(c)(1)(D)'' to read ''FIFRA section 3(c)(1)(F)'' wherever it appears.

■ 11. Section 152.93 is amended by revising the introductory text of paragraph (b)(2), paragraphs (b)(2)(iii) and (b)(3) to read as follows:

§ 152.93 Citation of a previously submitted valid study.

* * * * *

(b) * * *

(2) *Citation with offer to pay compensation to the original data submitter.* The applicant may cite any valid study that is not subject to the exclusive use provisions of FIFRA section 3(c)(1)(F)(i) without written authorization from the original data submitter if the applicant certifies to the Agency that he has furnished to the original data submitter:

* * * * *

(iii) An offer to pay the person compensation to the extent required by FIFRA section 3(c)(1)(F);

* * * * *

(3) *Citation without authorization or offer to pay.* The applicant may cite any valid study without written authorization from, or offer to pay to, the original data submitter if the study was originally submitted to the Agency on or before the date that is 15 years before the date of the application for which it is cited, and the study is not an exclusive use study, as defined in § 152.83(c).

§§ 152.94, 152.95, 152.98, and 152.99 [Amended]

■ 12. Sections 152.94, 152.95, 152.98, are amended by revising the reference ''FIFRA section 3(c)(1)(D)'' to read ''FIFRA section 3(c)(1)(F)'' and § 152.99 is amended by revising the reference ''FIFRA section 3(c)(1)(D)(ii)'' to read ''FIFRA section 3(c)(1)(F)(ii)'' whichever occurs and wherever it occurs.

■ 13. By revising § 152.110 to read as follows:

§ 152.110 Time for agency review.

The Agency will complete its review of applications as expeditiously as possible. Applications subject to specific timeframes under the fee schedule established by FIFRA section 33 will be reviewed within the timeframes established for the application or action type.

■ 14. In § 152.112 by revising paragraph (d) to read as follows, and in paragraph (g), by revising the phrase ''under FFDCA sec. 408, sec. 409 or both; and'' to read ''under FFDCA sec. 408, and''.

§ 152.112 Approval of registration under FIFRA sec. 3(c)(5)

* * * * *

(d) The Agency has determined that the composition of the product is such as to warrant the proposed efficacy claims for it, if efficacy data are required to be submitted for the product by part 158 or part 161 of this chapter, as applicable.

* * * * *

§ 152.116 and § 152.135 [Amended]

■ 15. Section 152.116 and 152.135 are amended by revising the reference ''FIFRA sec. 3(c)(1)(D)(i)'' to read ''FIFRA sec. 3(c)(1)(F)(i)'' or by revising the reference ''FIFRA sec. 3(c)(1)(D)'' to read ''FIFRA section 3(c)(1)(F)'', whichever occurs and wherever it occurs.

■ 16. Section 152.125 is revised to read as follows:

§ 152.125 Submission of information pertaining to adverse effects.

If at any time the registrant receives or becomes aware of any factual information regarding unreasonable adverse effects of the pesticide on the environment that has not previously been submitted to the Agency, the registrant shall, in accordance with FIFRA section 6(a)(2) and the requirements of part 159, subpart D of this chapter, provide such information to the Agency, clearly identified as FIFRA 6(a)(2) data.

PART 154—[AMENDED]

■ 17. The authority citation for part 154 is revised to read as follows:

Authority: 7 U.S.C. 136a, d, and w.

■ 18. Section 154.3 is revised to read as follows:

§ 154.3 Definitions.

Terms used in this part have the same meaning as in the Act. In addition, as used in this part, the following terms shall apply:

Act or FIFRA means the Federal Insecticide, Fungicide, and Rodenticide Act, as amended.

Administrator means the Administrator of the Environmental Protection Agency or any officer or employee thereof to whom authority has been delegated to act for the Administrator.

Confidential business information means trade secrets or confidential commercial or financial information under FIFRA section 10(b) or 5 U.S.C. 552(b)(3) or (4).

Other significant evidence means factually significant information that relates to the uses of the pesticide and its adverse risk to man or to the environment but does not include evidence based only on misuse of the pesticide unless such misuse is widespread and commonly recognized practice.

Person means an applicant, registrant, manufacturer, pesticide user, environmental group, labor union, or other individual or group of individuals interested in pesticide regulation.

Pesticide use means a use of a pesticide (described in terms of the application site and other applicable identifying factors) that is included in the labeling of a pesticide product which is registered, or for which an application for registration is pending, and the terms and conditions (or proposed terms and conditions) of registration for the use.

Terms and conditions of registration means the terms and conditions governing lawful sale, distribution, and use approved in conjunction with registration, including labeling, use classification, composition, and packaging.

Validated test means a test determined by the Agency to have been conducted and evaluated in a manner consistent with accepted scientific procedures.

PART 155—[AMENDED]

■ 19. The authority citation for part 155 is revised to read as follows:

Authority: 7 U.S.C. 136a and 136w.

■ 20. By revising § 155.40(a) to read as follows:

§ 155.40 General.

(a) *Purpose.* These regulations establish procedures for the registration review program required in FIFRA section 3(g). Registration review is the periodic review of a pesticide's registration to ensure that each pesticide registration continues to satisfy the FIFRA standard for registration. Under

FIFRA section 3(g), each pesticide is required to be reviewed every 15 years.

* * * * *

■ 21. By revising § 155.52(a) and (c), to read as follows:

155.52 Stakeholder engagement.

* * * * *

(a) *Minutes of meetings with persons outside of government.* Subject to paragraph (c) of this section, if the Agency meets with one or more individuals that are not government employees to discuss matters relating to a registration review, the Agency will place in the docket a list of meeting attendees, minutes of the meeting, and any documents exchanged at the meeting, not later than the earlier of:

(1) 45 days after the meeting; or

(2) The date of issuance of the registration review decision.

* * * * *

(c) *Confidential business information.* The Agency will identify, but not include in the docket, any confidential business information whose disclosure is prohibited by FIFRA section 10.

PART 156—[AMENDED]

■ 22. The authority citation for part 156 continues to read as follows:

Authority: 7 U.S.C. 136 - 136y.

■ 23. Section 156.10 is amended by revising paragraphs (i)(2)(ix), and (i)(2)(x)(D), and the introductory text of paragraph (j) to read as follows:

§ 156.10 Labeling requirements.

* * * * *

(i) * * *

(2) * * *

(ix) Specific directions concerning the storage, residue removal and disposal of the pesticide and its container, in accordance with subpart H of this part. These instructions must be grouped and appear under the heading,''Storage and Disposal.'' This heading must be set in type of the same minimum sizes as required for the child hazard warning. (See table in § 156.60(b))

(x) * * *

(D) For total release foggers as defined in § 156.78(d)(1), the following statements must be included in the ''Directions for Use.''

* * * * *

(j) *Statement of use classification.* Any pesticide product for which some uses are classified for general use and others for restricted use shall be separately labeled according to the labeling standards set forth in this subsection, and shall be marketed as separate products with different registration numbers, one bearing directions only for general use(s) and the other bearing directions for restricted use(s) except that, if a product has both restricted use(s) and general use(s), both of these uses may appear on a product labeled for restricted use. Such products shall be subject to the provisions of paragraph (j)(2) of this section.

* * * * *

■ 24. Section 156.200 is amended by revising paragraph (c) to read as follows:

§ 156.200 Scope and applicability.

* * * * *

(c) *Effective dates.* No product to which this subpart applies shall be distributed or sold without amended labeling by any registrant after April 21, 1994, or by any person after October 23, 1995.

■ 25. Section 156.203 is amended by revising the definition of ''Restricted-entry interval'' to read as follows:

§ 156.203 Definitions.

* * * * *

Restricted-entry interval or REI means the time after the end of a pesticide application during which entry to the treated area is restricted.

■ 26. Section 156.204 is amended by revising paragraph (b) to read as follows:

§ 156.204 Modification and waiver of requirements.

* * * * *

(b) *Other modifications.* The Agency, pursuant to this subpart and authorities granted in FIFRA sections 3, 6, and 12, may, on its initiative or based on data submitted by any person, modify or waive the requirements of this subpart, or permit or require alternative labeling statements. Supporting data may be either data conducted according to Subdivisions U or K of the Pesticide Assessments guidelines or data from medical, epidemiological, or health effects studies. A registrant who wishes to modify any of the statements required in §§ 156.206, 156.208, 156.210, or 156.212 must submit an application for amended registration unless specifically directed otherwise by the Agency.

§§ 156.206, 156.208, 156.210, and 156.212 [Amended]

■ 27. Sections 156.206(e), 156.208(c)(1), 156.210(b)(1), and 156.212(d)(2) are amended by revising the reference ''§ 156.10(h)(l)'' to read ''§ 156.62'', wherever it occurs.

PART 157—[AMENDED]

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

Authority: 7 U.S.C. 136w.

§ 157.21 [Amended]

■ 29. Section 157.21 is amended by removing the alpha paragraph designations from the definitions.

PART 158—[AMENDED]

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

Authority: 7 U.S.C. 136-136y; 21 U.S.C. 346a.

§ 158.220 [Amended]

■ 31. In § 158.220, the title of the table in paragraph (c) is revised to read ''Table—Experimental Use Permit Data Requirements for Product Performance''.

§ 158.230 [Amended]

■ 32. In § 158.230, the title of the table in paragraph (c) is revised to read ''Table—Experimental Use Permit Toxicity Data Requirements.''

§ 158.243 [Amended]

■ 33. In § 158.243, the title of the table in paragraph (c) is revised to read ''Table—Experimental Use Permit Terrestrial and Aquatic Nontarget Organism Data Requirements.''

§ 158.260 [Amended]

■ 34. In § 158.260, the title of the table in paragraph (c) is revised to read ''Table—Experimental Use Permit Environmental Fate Data Requirements.''

PART 159—[AMENDED]

■ 35. The authority citation for part 159 continues to read as follows:

Authority: 7 U.S.C. 136 - 136y.

■ 36. Section 159.153 is amended by revising the introductory text of paragraph (b) to read as follows:

§ 159.153 Definitions.

* * * * *

(b) For purposes of reporting information pursuant to FIFRAsection 6(a)(2), the following definitions apply only to this subpart:

* * * * *

■ 37. Section 159.160 is amended by revising paragraph (b)(4) to read as follows:

§ 159.160 Obligations of former registrants.

* * * * *

(b) * * *

(4) The information pertains solely to a formerly registered product that no longer meets the definition of ''pesticide'' in section 2(u) of FIFRA.

* * * * *

§ 159.165 [Amended]

■ 38. Section 159.165 is amended in paragraph (a)(2) by revising the reference ''40 CFR 156.10(h)'' to read ''40 CFR 156.62'' and in the introductory text of paragraph (d)(2) by revising the phrase ''90 calendar days or less,'' to read ''more than 90 calendar days.''

PART 160—[AMENDED]

■ 39. The authority citation for part 160 is revised to read as follows:

Authority: 7 U.S.C. 136a, 136c, 136d, 136f, 136j, 136t, 136v, 136w; 21 U.S.C. 346a, 371, Reorganization Plan No. 3 of 1970.

■ 40. Section 160.1 is revised to read as follows:

§ 160.1 Scope and applicability.

(a) This part prescribes good laboratory practices for conducting studies that support or are intended to support applications for research or marketing permits for pesticide products regulated by the EPA. This part is intended to assure the quality and integrity of data submitted pursuant to sections 3, 4, 5, 8, 18 and 24(c) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, and section 408 or 409 of the Federal Food, Drug and Cosmetic Act.

(b) This part applies to any study described by paragraph (a) of this section which any person conducts, initiates, or supports on or after October 16, 1989.

■ 41. In § 160.3 revise the introductory text of the definition for *Application for research or marketing permit*, and in the same definition, revise paragraph (5), and revise the definition for ''person'' to read as follows:

§ 160.3 Definitions.

* * * * *

Application for research or marketing permit means any of the following:

* * * * *

(5) A petition or other request for establishment or modification of a food additive regulation or other clearance by EPA under FFDCA section 409 that was submitted prior to August 3, 1996.

* * * * *

Person means an individual, partnership, corporation, association, scientific or academic establishment, government agency or organizational unit thereof, or any other legal entity.

* * * * *

PART 162—[AMENDED]

■ 42. The authority citation for part 162 continues to read as follows:

Authority: 7 U.S.C. l36v, 136w.

■ 43. Section 162.151 is revised to read as follows:

§ 162.151 Definitions.

Terms used in this part have the same meaning as in the Act and part 152 of this chapter. In addition, as used in this subpart, the following terms shall apply:

Federally registered means currently registered under section 3 of the Act, after having been initially registered under the Federal Insecticide, Fungicide, and Rodenticide Act of 1947 by the Secretary of Agriculture or under FIFRA by the Administrator.

Manufacturing-use product means any pesticide product other than a product to be labeled with directions for end use. This term includes any product intended for use as a pesticide after reformulation or repackaging.

New product means a pesticide product which is not a federally registered product.

Pest problem means:

(1) A pest infestation and its consequences, or

(2) Any condition for which the use of plant regulators, defoliants, or desiccants would be appropriate.

Product or pesticide product means a pesticide offered for distribution and use, and includes any labeled container and any supplemental labeling.

Similar composition means a pesticide product which contains only the same active ingredient(s), or combinations of active ingredients, and which is in the same toxicity category, as defined in § 156.62 of this chapter, as a federally registered pesticide product.

Similar product means a pesticide product which, when compared to a federally registered product, has a similar composition and a similar use pattern.

Similar use pattern means a use of a pesticide product which, when compared to a federally registered use of a product with a similar composition, does not require a change in precautionary labeling under part 156 of this chapter, and which is substantially the same as the federally registered use. Registrations involving changed use patterns are not included in this term.

Special local need means an existing or imminent pest problem within a State for which the State lead agency, based upon satisfactory supporting information, has determined that an appropriate federally registered pesticide product is not sufficiently available.

State or State lead agency means the State agency designated by the State to be responsible for registering pesticides to meet special local needs under section 24(c) of the Act.

■ 44. Section 162.152 is amended by revising paragraph (b)(1)(i) to read as follows:

§ 162.152 State registration authority.

* * * * *

(b) * * *

(1) * * *

(i)Subject to the provisions of paragraphs (a) and (b)(1)(ii) through (iv) of this section, States may register any new use of a federally registered pesticide product.

* * * * *

■ 45. Section 162.153 is amended by redesignating paragraph (a)(6) as paragraph (j), and by revising the last sentence of paragraph (c)(2) to read as follows:

§ 162.153 State registration procedures.

* * * * *

(c) * * *

(2) * * * Such determinations may also involve consideration of the effect of the anticipated classification of the product or use under paragraph (g) of this section.

* * * * *

PART 164—[AMENDED]

■ 46. The authority citation for part 164 continues to read as follows:

Authority: 7 U.S.C. 136d.

■ 47. Section 164.2 is amended by revising paragraphs (l)(2) and (s) to read as follows:

§ 164.2 Definitions.

* * * * *

(l) * * *

(2) *Qualification.* A judicial officer shall be a permanent or temporary employee or officer of the Agency who may perform other duties for the Agency. Such judicial officer shall not be employed by the Office of Prevention, Pesticides, and Toxic Substances or have any connection with the preparation or presentation of evidence for a hearing.

* * * * *

(s) The term *Respondent* means the Assistant Administrator of the Office of Prevention, Pesticides, and Toxic Substances.

* * * * *

PART 166—[AMENDED]

■ 48. The authority citation for part 166 is revised to read as follows:

Authority: 7 U.S.C. 136p, and 136w.

■ 49. Section 166.3 is revised to read as follows:

§ 166.3 Definitions.

Terms used in this part have the same meaning as in the Act. In addition, as used in this part, the following terms shall apply:

Act means the Federal Insecticide, Fungicide, and Rodenticide Act, as amended.

Agency and EPA mean the U. S. Environmental Protection Agency.

Beneficial organism means any pollinating insect, or any pest predator, parasite, pathogen or other biological control agent which functions naturally or as part of an integrated pest management program to control another pest.

Emergency condition means an urgent, non-routine situation that requires the use of a pesticide(s) and shall be deemed to exist when:

(1) No effective pesticides are available under the Act that have labeled uses registered for control of the pest under the conditions of the emergency; and

(2) No economically or environmentally feasible alternative practices which provide adequate control are available; and

(3) The situation:

(i) Involves the introduction or dissemination of an invasive species or a pesticide new to or not theretofore known to be widely prevalent or distributed within or throughout the United States and its territories; or

(ii) Will present significant risks to human health; or

(iii) Will present significant risks to threatened or endangered species, beneficial organisms, or the environment; or

(iv) Will cause significant economic loss due to:

(A) An outbreak or an expected outbreak of a pest; or

(B) A change in plant growth or development caused by unusual environmental conditions where such change can be rectified by the use of a pesticide(s).

First food use means the use of a pesticide on a food or in a manner which otherwise would be expected to result in residues in a food, if no tolerance or exemption from the requirements of a tolerance for residues of the pesticide on any food has been established for the pesticide under section 408 of the Federal Food, Drug, and Cosmetic Act.

Food means any article used for food or drink for man or animals.

Invasive species means, with respect to a particular ecosystem, any species that is not native to that ecosystem, and whose introduction does or is likely to cause economic or environmental harm or harm to human health.

IR-4 means the Interregional Research Project No. 4, a cooperative effort of the state land grant universities, the U.S. Department of Agriculture and EPA, to address the chronic shortage of pest control options for minor crops, which are generally of too small an acreage to provide economic incentive for registration by the crop protection industry.

New chemical means an active ingredient not contained in any currently registered pesticide.

Significant economic loss means that, compared to the situation without the pest emergency and despite the best efforts of the affected persons, the emergency conditions at the specific use site identified in the application are reasonably expected to cause losses meeting any of the following criteria:

(1) For pest activity that primarily affects the current crop or other output, one or more of the following:

(i) Yield loss greater than or equal to 20%.

(ii) Economic loss, including revenue losses and cost increases, greater than or equal to 20% of gross revenues.

(iii) Economic loss, including revenue losses and cost increases greater than or equal to 50% of net revenues.

(2) For any pest activity where EPA determines that the criteria in paragraph (1) of this definition would not adequately describe the expected loss, substantial loss or impairment of capital assets, or a loss that would affect the long-term financial viability expected from the productive activity.

Special Review means any interim administrative review of the risks and benefits of the use of a pesticide conducted pursuant to the provisions of part 154 of this chapter, or § 162.11 of this chapter prior to November 27, 1985, or any subsequent version of those rules.

Unreasonable adverse effects on the environment means any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.

PART 168—[AMENDED]

■ 50. The authority citation for part 168 continues to read as follows:

Authority: 7 U.S.C. 136 - 136y.

■ 51. Section 168.65 is amended by revising the last sentence of paragraph (b)(1)(ii), and paragraph (b)(1)(vii), to read as set forth below.

§ 168.65 Pesticide export label and labeling requirements.

* * * * *

(b) * * *

(1) * * *

(ii) * * * Where the U.S. warning or caution statement, as translated, is obviously inappropriate to protect residents of the importing country (for example, where a statement calls for a gas mask meeting the specifications of the National Institute of Occupational Safety and Health), an equivalent caution must be substituted.

* * * * *

(vii) *Additional warning for highly toxic pesticides*. If the pesticide, device or active ingredient is highly toxic to humans, the skull and crossbones, the word ''Poison,'' and a first aid statement must appear on the label. The word ''Poison'' and the first aid statement shall be in English and in the appropriate foreign languages, as described in paragraph (b)(4) of this section. The skull and crossbones may be in red or black. For criteria on what pesticides are highly toxic, see § 156.62 of this chapter.

* * * * *

PART 170—[AMENDED]

■ 52. The authority citation for part 170 continues to read as follows:

Authority: 7 U.S.C. 136w.

§ 170.5 [Removed]

■ 53. Section 170.5 is removed.

§ 170.104 [Amended]

■ 54. Section 170.104 is amended by revising the acronym ''PPE'' in paragraph (b)(2)(iii) to read ''personal protective equipment'' and by removing paragraph (c).

§ 170.112 [Amended]

■ 55. Section 170.112 is amended by removing paragraphs (e)(7)(i) and (e)(7)(iv), and by redesignating paragraphs (e)(7)(ii) and (e)(7)(iii) as paragraphs (e)(7)(i) and (e)(7)(ii), respectively.

■ 56. Section 170.130 is amended by revising paragraph (a)(3)(i) to read as follows, by removing paragraph (a)(3)(iii) and by revising paragraph (d)(3) to read as follows:.

§ 170.130 Pesticide safety training for workers.

(a) * * *

(3) * * * (i) *Information before entry*. Except as provided in paragraph (a)(2) of this section, before a worker enters any areas on the agricultural establishment where, within the last 30

days a pesticide to which this subpart applies has been applied or the restricted-entry interval for such pesticide has been in effect, the agricultural employer shall assure that the worker has been provided the pesticide safety information specified in paragraph (c) of this section, in a manner that agricultural workers can understand, such as by providing written materials or oral communication or by other means. The agricultural employer must be able to verify compliance with this requirement.

* * * * *

(d) * * *

(3) Any person who issues an EPA-approved Worker Protection Standard worker training certificate must assure that the worker who receives the training certificate has been trained in accordance with paragraph (d)(4) of this section.

* * * * *

§ 170.204 [Amended]

■ 57. Section 170.204 is amended by removing paragraph (c).

PART 171—[AMENDED]

■ 58. The authority citation for part 171 is revised to read as follows:

Authority: 7 U.S.C. 136i and 136w.

■ 59. Section 171.2 is amended by revising the introductory text of paragraph (a) and by revising paragraph (b)(4) to read as follows:

§ 171.2 Definitions.

(a) Terms used in this subpart have the same meaning as in the Act. In addition, the following definitions are applicable to all aspects of the certification of pesticide applicator program in this part:

* * * * *

(b) * * *

(4) The term *uncertified person* means any person who is not holding a currently valid certification document indicating that he is certified under section 11 of FIFRA in the category of the restricted use pesticide made available for use.

* * * * *

PART 172—[AMENDED]

■ 60. The authority citation for part 172 continues to read as follows:

Authority: 7 U.S.C. 136c, 136w. Section 172.4 is also issued under 31 U.S.C. 9701.

■ 61. Section 172.1 is revised to read as follows

§ 172.1 Definitions.

Terms used in this part have the same meaning as in the Act. In addition, as used in this part, the following terms shall apply:

Act means the Federal Insecticide, Fungicide and Rodenticide Act, as amended.

Applicant means any person who applies for an experimental use permit pursuant to section 5 of the Act.

Cooperator means any person who grants permission to a permittee or a permittee's designated participant for the use of an experimental use pesticide at an application site owned or controlled by the cooperator.

Experimental animals means individual animals or groups of animals, regardless of species, intended for use and used solely for research purposes. The term does not include animals intended to be used for any food purposes

Participant means any person acting as a representative of the permittee and responsible for making available for use, or supervising the use or evaluation of, an experimental use pesticide to be applied at a specific application site.

Permittee means any applicant to whom an experimental use permit has been granted.

Value for pesticide purposes means that characteristic of a substance or mixture of substances which produces an efficacious action on a pest.

§ 172.3 [Amended]

■ 62. Section 172.3(d) is amended by removing the third sentence which reads ''Subdivision I of the Pesticide Assessment Guidelines provides guidance on the procedures, data requirements, and general aspects pertaining to the issuance and use of EUPs.''

■ 63. Section 172.4 is amended by revising paragraph (b)(2)(i) and (ii) to read as follows:

§ 172.4 Applications.

* * * * *

(b) * * *

(2) * * *

(i) Submit evidence that a tolerance or exemption from the requirement of a tolerance has been established for residues of the pesticide in or on such food or feed under section 408 of the Federal Food, Drug, and Cosmetic Act; or

(ii) Submit a petition proposing establishment of a tolerance or an exemption from the requirement of a tolerance under section 408 of the Federal Food, Drug, and Cosmetic Act; or

* * * * *

■ 64. Section 172.21 is revised to read as follows:

§ 172.21 Definitions.

Terms used in this subpart shall have the meaning set forth in FIFRA and in § 172.1.

Designated State Agency means the State agency designated by State law or other authority to be responsible for registering pesticides to meet special local needs.

Public or Private Agricultural Research Agency or Educational Institution means any organization engaged in research pertaining to the agricultural use of pesticides, or any educational institution engaged in pesticide research. Any research agency or educational institution whose principal function is to promote, or whose principal source of income is directly derived from, the sale or distribution of pesticides (or their active ingredients) does not come within the meaning of this term.

■ 65. Section 172.24 is amended by revising paragraphs (b)(3),(d)(1)(i) and (d)(1)(ii) to read as follows:

§ 172.24 State issuance of permits.

* * * * *

(b) * * *

(3) For use of a restricted use pesticide only if the pesticide is to be used by, or under the direct supervision of, an applicator certified in accordance with section 11 of FIFRA.

* * * * *

(d) * * *

(1) * * *

(i) A tolerance or exemption from the requirement of a tolerance has been established for residues of the pesticide in or on such food or feed under section 408 of the Federal Food, Drug and Cosmetic Act; and

(ii) The proposed program would not reasonably be expected to result in residues of the pesticide in or on such food or feed in excess of that authorized under section 408 of the Federal Food, Drug and Cosmetic Act; and

* * * * *

■ 66. Section 172.26 is amended by revising paragraph (c)(1)(iii) to read as follows:

§ 172.26 EPA review of permits.

* * * * *

(c) * * *

(1) * * *

(iii) That new evidence demonstrates that any tolerance upon which the permit is based will be inadequate to protect the public health, or that any exemption from the requirement for a tolerance is no longer appropriate; or

* * * * *

§ 172.46 [Amended]

■ 67. In the introductory text to § 172.46(c), revise ''161.31'' to read ''161.32.''.

PART 180—[AMENDED]

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

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

■ 69. Part 180 is amended as follows:

■ a. By revising the part heading to read ''Tolerances and Exemptions for Pesticide Chemical Residues in Food.''

■ b. By removing the center heading that immediately follows the Subpart A heading.

■ c. Removing the center heading that immediately follows the Subpart B heading.

■ d. By removing the two center headings that immediately precede§ 180.29.

■ 70. Section 180.7 is amended by revising the last sentence in paragraph (b)(1), the last sentence in paragraph (d) and by revising the next to the last sentence in paragraph (f) to read as follows:

§ 180.7 Petitions proposing tolerances or exemptions for pesticide residues in or on raw agricultural commodities or processed foods.

* * * * *

(b) * * *

(1) * * * The electronic copy should be formatted according to the Office of Pesticide Programs' current standard for electronic data submission as specified at *http://www.epa.gov/pesticides/regulating/registering/submissions/index.htm*.

* * * * *

(d) * * * The Administrator shall make the full text of the summary referenced in paragraph (b)(1) of this section available to the public in the public docket at *http://www.regulations.gov* no later than publication in the **Federal Register** of the notice of the petition filing.

* * * * *

(f) * * * The notice shall explicitly reference the specific docket identification number in the public docket at *http://www.regulations.gov* where the full text of the summary required in paragraph (b) of this section is located, and refer interested parties to this document for further information on the petition.* * *

* * * * *

■ 71. Section 180.34 is amended by revising the introductory text of paragraph (e) to read as follows:

§ 180.34 Tests on the amount of residue remaining.

* * * * *

(e) Each of the following groups of crops lists raw agricultural commodities that are considered to be related for the purpose of paragraph (d) of this section. Commodities not listed in this paragraph are not considered to be related for the purpose of paragraph (d) of this section.

* * * * *

[FR Doc. E8–29375 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2008–0166; FRL–8750–2]

Approval and Promulgation of Implementation Plans; Alaska; Interstate Transport of Pollution

AGENCY: Environmental Protection Agency (EPA).

ACTION: Correcting amendment.

SUMMARY: EPA issued a direct final rule on October 15, 2008, entitled ''Approval and Promulgation of Implementation Plans; Alaska; Interstate Transport of Pollution.'' This document makes a minor correction to the October 15, 2008, action to correct a typographical error in the regulatory text for the rule.

DATES: *Effective Date:* This document is effective on December 15, 2008.

FOR FURTHER INFORMATION CONTACT: For questions regarding this correction, contact Donna Deneen, Office of Air, Waste, and Toxics, Mail Code (AWT–107), Environmental Protection Agency Region 10, Seattle, WA 98121; telephone number: (206) 553–6706; fax number: (206) 553–0110; e-mail address: *deneen.donna@epa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The EPA issued ''Approval and Promulgation of Implementation Plans; Alaska; Interstate Transport of Pollution'' as a direct final rule on October 15, 2008, 73 FR 60955. This direct final rule approved the State of Alaska's demonstration that its emissions do not significantly contribute to nonattainment or interfere with maintenance of the NAAQS in another state, or interfere with measures required to be included in the SIP for any other State to prevent significant deterioration of air quality or to protect visibility. For more information about this action, please see the proposed and final rulemaking actions which are available at *www.regulations.gov* and also in the **Federal Register** at 73 FR 60955 and 73 FR 60996.

Need for Correction

As published, the regulatory text in the direct final regulation contains a minor error that, if not corrected, prevents publication of the regulatory amendment in the Code of Federal Regulations. EPA finds that there is good cause to make this correction without providing for notice and comment because neither notice nor comment is necessary and would not be in the public interest due to the nature of the correction which is minor, technical and does not change the obligations already existing in the rule. EPA finds that the corrections are merely correcting the numbering in the amendatory language so that the provision may be published in the Code of Federal Regulations.

Corrections of Publication

In the regulatory text to the direct final rule for ''Approval and Promulgation of Implementation Plans; Alaska; Interstate Transport of Pollution,'' October 15, 2008, 73 FR 60955, EPA is correcting an inadvertent minor error in instruction number 2. Instruction number 2 reads ''Section 52.97 is added to read as follows:'', but in the actual text just below that statement the added section is designated inadvertently as ''Section 52.70.'' EPA is correcting this inadvertent minor error so that the amendatory instruction number 2 continues to read ''Section 52.97 is added to read as follows:'', but the actual text just below that statement ''§ 52.70'' is changed to read ''§ 52.97.''

§ 52.97 [Corrected]

In FR Doc. E8–24279 published October 15, 2008 (73 FR 60955), make the following correction. On page 60957, in the center column, the section heading following amendatory instruction 2 is corrected to read as follows:

§ 52.97 Interstate Transport for the 1997 8-hour ozone and PM2.5 NAAQS.

* * * * *

Dated: December 3, 2008.

Elin D. Miller,

Regional Administrator, Region 10.

[FR Doc. E8–29231 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0567; FRL–8390–9]

Etofenprox; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of etofenprox (2-(4-ethoxyphenyl)-2-methylpropyl 3-phenoxybenzyl ether) in or on rice, grain. Mitsui Chemical, Inc. requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 12, 2008. Objections and requests for hearings must be received on or before February 10, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0567. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Kevin Sweeney, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5063; e-mail address: *sweeney.kevin@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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

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

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

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0567. in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before February 10, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2008–0567, by one of the following methods:

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

II. Petition for Tolerance

In the **Federal Register** of August 13, 2008 (73 FR 47185) (FRL– 8376–8), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 7F7215) by Mitsui Chemicals, Inc., Shiodome City Center, 1–5–2, Higashi-Shimbashi, Minato-ku, Tokyo, Japan 105–7117 c/o Landis International, Inc. P.O. Box 5126, 3185 Madison Highway, Valdosta, GA 31603–5126 USA. The petition requested that 40 CFR 180.620 be amended by establishing tolerances for combined residues or residues of the insecticide etofenprox and the metabolite 2-(4-ethyoxyphenyl)-2-methylpropyl 3-phenoxybenzoate, in or on rice, grain at 0.01 parts per million (ppm) and rice, straw at 0.06 ppm. That notice referenced a summary of the petition prepared by Mitsui Chemicals, Inc., the registrant, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has modified the tolerance expression to include only residues of etofenprox *per se* in or on rice grain of 0.01 ppm. EPA has also concluded that a etofenprox tolerance for rice straw is unnecessary. The reason for these changes is explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for residues of etofenprox in or on rice, grain at 0.01 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

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

Etofenprox has low acute toxicity from the oral, dermal, and inhalation routes of exposure. It is not an acute eye or skin irritant and is not a dermal sensitizer; however, etofenprox does cause skin irritation after repeated exposure. The major target organs of etofenprox are the liver, thyroid, kidney, and hematopoietic system.

Etofenprox was assessed in a complete battery of subchronic, chronic, carcinogenicity, developmental and reproductive studies as well as acute, subchronic, and developmental neurotoxicity studies. Etofenprox is classified as a synthetic pyrethroid ether insecticide and has an excitatory neurotoxic mode of action. Neurotoxicity studies, including a developmental neurotoxicity study in the rat, did show some evidence of neurotoxic effects as is expected of a neurotoxicant but these effects were unremarkable.

The most sensitive target organs in the toxicology database are the thyroid and liver. The kidney is also a common target organ of toxicity. There is no evidence of carcinogenicity and etofenprox is classified as ''Not likely to be carcinogenic to humans at doses that do not alter rat thyroid hormone homeostasis'' and, therefore, no quantitative cancer risk assessment is required. There is no indication of increased quantitative or qualitative susceptibility of the developing offspring in toxicology database for etofenprox. Developmental effects were seen at doses that caused maternal toxicity. There was no evidence of reproductive effects in the 2–generation reproduction study in rats. Etofenprox was negative for mutagenic/genotoxic potential based on the results of mutagenicity studies. There is no evidence of immunotoxicity in the database. Immunotoxicity studies are a new data requirement and are required as a condition of registration. The toxicology database for etofenprox is sufficient to assess human health hazards and the Point of Departure (POD) selected for deriving the chronic reference dose will adequately account for all chronic effects determined to result from exposure to etofenprox in chronic animal studies, including potential immunotoxicity effects.

Specific information on the studies received and the nature of the adverse effects caused by etofenprox, as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies, can be found at *http://www.regulations.gov* in document *Etofenprox: Human Health Risk Assessment for Proposed Section 3 Uses on Rice and as ULV Mosquito Adulticide*, at pages 14–29 in docket ID number EPA–HQ–OPP–2008–0567.

B. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, a toxicological POD is identified as the basis for derivation of reference values for risk assessment. The POD may be defined as the NOAEL in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, LOAEL or a Benchmark Dose (BMD) approach is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the POD to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic dietary risks by comparing aggregate food and water exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the POD by all applicable UFs. Aggregate short-term, intermediate-term, and chronic-term risks are evaluated by comparing food, water, and residential exposure to the POD to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded. This latter value is referred to as the Level of Concern (LOC).

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect greater than that expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for etofenprox used for human risk assessment can be found at *http://www.regulations.gov* in document *Etofenprox: Human Health Risk Assessment for Proposed Section 3 Uses on Rice and as ULV Mosquito Adulticide*, at pages 30–31 in docket ID number EPA–HQ–OPP–2008–0567.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* EPA assessed dietary exposure to etofenprox, the EPA considered exposure under the petitioned for tolerance on rice, grain; the first food use of etofenprox. EPA assessed dietary exposures from etofenprox in food as follows:

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

No such effects were identified in the toxicological studies for etofenprox; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996, 1998 CSFII. As to residue levels in food, EPA assumed that all rice grain contained tolerance level residues of etofenprox

and that 100 percent of the rice crop was treated with etofenprox.

iii. *Cancer*. EPA classified etofenprox as ''Not likely to be carcinogenic to humans at doses that do not alter rat thyroid hormone homeostasis.'' An increased incidence of thyroid follicular adenomas and/or carcinomas was seen in males and females administered etofenprox in their diet at 4,900 ppm, a dose that was considered adequate to assess potential for carcinogenicity. No treatment-related tumors were seen in male or female mice when tested at a dose that was considered adequate to assess carcinogenicity. The non-neoplastic toxicological evidence (i.e. thyroid growth, thyroid hormonal changes) indicated that etofenprox was inducing a disruption in the thyroid-pituitary hormonal status. Rats are substantially more sensitive to humans to the development of thyroid follicular cell tumors in response to thyroid hormone imbalance. There was no mutagenicity concern for etofenprox from *in vivo* or *in vitro* assays. The overall weight-of-evidence was considered sufficient to indicate that etofenprox induces thyroid follicular tumors through an anti-thyroid mode of action. The Agency has determined that quantification of human cancer risk is not appropriate because the chronic reference dose is protective against the chronic effects determined to result from exposure to etofenprox, including potential cancer effects.

iv. *Anticipated residue and percent crop treated (PCT) information*. EPA did not use anticipated residue and/or PCT information in the dietary assessment for etofenprox. Tolerance level residues and/or 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water*. The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for etofenprox in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of etofenprox. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the Tier I Rice Model and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of etofenprox for chronic exposure were calculated based on a maximum application rate of 0.27 pound (lb) active ingredient (ai)/acre(A)/year. The estimated drinking water concentrations (EDWCs) of etofenprox for chronic exposures for non-cancer assessments are estimated to be 0.88 (parts per billion (ppb) for surface water and 1.55 x 10–^{3} ppb for ground water. Acute exposure (single dose or 1–day exposure) effects were not identified in the toxicological studies for etofenprox; therefore, a quantitative acute drinking water assessment is unnecessary.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 0.88 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Etofenprox is currently registered for the following uses that could result in residential exposures: Indoor and outdoor (yard patio) use as an insect fogger, indoor/outdoor crack and crevice/spot treatment; as a cat and dog spot-on treatment; and outdoors as a wide-area mosquito adulticide. EPA assessed residential exposure using the following assumptions: Adults are potentially exposed to etofenprox residues during residential application of etofenprox. Both adults and children are potentially exposed to etofenprox residues after application (post-application) of etofenprox products in residential settings. Exposure estimates were generated for residential handlers and individuals with potential post-application contact with lawn, soil, treated indoor surfaces, and treated pets using the EPA's Draft Standard Operating Procedures (SOPs) for Residential Exposure Assessment, and dissipation or transfer data from a turf transferable residue (TTR) study and a pet transferrable residue study. Short-term and intermediate-term inhalation exposures for adults, and short-term and intermediate-term incidental oral and inhalation exposures for children are anticipated. These estimates are considered conservative, but appropriate, since the study data were generated at maximum application rates.

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

Etofenprox is classified as a synthetic pyrethroid ether insecticide and is a member of the pyrethroid class of pesticides. EPA is not currently following a cumulative risk approach based on a common mechanism of toxicity for the pyrethroids. Although all pyrethroids alter nerve function by modifying the normal biochemistry and physiology of nerve membrane sodium channels, available data show that there are multiple types of sodium channels and it is currently unknown whether the pyrethroids as a class have similar effects on all channels or whether modifications of different types of sodium channels would have a cumulative effect. Nor do we have a clear understanding of effects on key downstream neuronal function, e.g., nerve excitability, or how these key events interact to produce their compound specific patterns of neurotoxicity. Without such understanding, there is no basis to make a common mechanism of toxicity finding. There is ongoing research by the EPA's Office of Research and Development and pyrethroid registrants to evaluate the differential biochemical and physiological actions of pyrethroids in mammals. When available, the Agency will evaluate results of this research and make a determination of common mechanism as a basis for assessing cumulative risk. For information regarding EPA's procedures for cumulating effects from substances found to have a common mechanism on EPA's website at *http://www.epa.gov/pesticides/cumulative/*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408(b)(2)(c) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*. The prenatal and postnatal toxicology database includes a developmental toxicity studies in rabbits and rats; a 2–generation reproduction studies in the

rat; and a developmental (DNT) neurotoxicity study in the rat. There was no evidence of increased quantitative or qualitative susceptibility following *in-utero* and/or postnatal exposure in the development toxicity studies in rats or rabbits, or in the 2–generation rat reproduction study.

3. *Conclusion*. EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for etofenprox is complete, except for immunotoxicity testing. Immunotoxicity studies are a new data requirement and EPA has determined that an additional uncertainty factor is not required to account for potential immunotoxicity. The reasons for this determination are explained as follows:

EPA began requiring functional immunotoxicity testing of all food and non-food use pesticides on December 26, 2007. Since this requirement went into effect after the tolerance petition was submitted, these studies are not yet available for etofenprox. Due to the lack of evidence of immunotoxicity for etofenprox, EPA does not believe that conducting immunotoxicity testing will result in a NOAEL less than the NOAEL of 3.7 milligram/kilogram/day (mg/kg/day), which is already established as the cRfD point of departure for etofenprox. An additional factor (UFDB) for database uncertainties is not needed to account for potential immunotoxicity.

ii. There is no evidence that etofenprox results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2–generation reproduction study.

iii. There are no residual uncertainties identified in the exposure databases for the following reasons:

- The chronic dietary food exposure assessment utilizes proposed tolerance level residues and 100 PCT information for all commodities. By using these screening level assessments, actual exposures/risk will not be underestimated;
- EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to etofenprox in drinking water.
- EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by etofenprox.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. The aPAD and cPAD represent the highest safe exposures, taking into account all appropriate SFs. EPA calculates the aPAD and cPAD by dividing the POD by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given the estimated aggregate exposure. Short-term, intermediate-term, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the POD to ensure that the MOE called for by the product of all applicable UFs is not exceeded.

1. *Acute risk*. An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. No adverse effect resulting from a single-oral exposure was identified and no acute dietary endpoint was selected. Therefore, etofenprox is not expected to pose an acute risk.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to etofenprox from food and water will utilize < 1% of the cPAD for the general U.S. population and all population subgroups. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of etofenprox is not expected.

3. *Short-term-/Intermediate-term risk*. Short-term or intermediate-term aggregate exposure takes into account short-term or intermediate-term residential exposure plus chronic exposure from food and water (considered to be a background exposure level).

Etofenprox is currently registered for uses that could result in short-term and intermediate-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term and intermediate-term residential exposures to etofenprox. Since the doses and endpoints selected for etofenprox to assess short-term and intermediate-term exposure are identical, the short-term and intermediate-term risk estimates for etofenprox are the same.

Using the exposure assumptions described in this unit for short-term and intermediate-term exposures, EPA has concluded the combined short-term and intermediate-term food, water, and residential exposures aggregated result in aggregate MOEs of 1,200 for adults and 170 for toddlers. For adults, the short-term/ intermediate-term aggregate risks combined food and drinking water exposure with short-term/intermediate term inhalation exposure. For toddler short-term and intermediate-term aggregate risks, the average food and drinking water exposure was combined with toddler incidental oral exposures following pet treatments and indoor fogger applications, and inhalation exposure following indoor fogger applications.

4. *Aggregate cancer risk for U.S. population*. The Agency has classified etofenprox as ''Not likely to be carcinogenic to humans at doses that do not alter thyroid hormone homeostasis.'' The chronic reference dose will is protective of chronic effects determined to result from exposure to etofenprox, including potential cancer effects.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

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

B. International Residue Limits

The Codex Alimentarius Commission (CODEX) has established maximum residue levels (MRLs) for the residue of etofenprox *per se* in or on pome fruits at 1 mg/kg and potato at 0.01 mg/kg. Currently, there are no CODEX MRLs for rice commodities. Etofenprox is scheduled for periodic re-evaluation by CODEX in 2012. As discussed in this unit, EPA has adopted a tolerance expression for etofenprox which should make the rice tolerances compatible with proposed CODEX MRLs for rice commodities.

C. Revisions to Petitioned-For Tolerances

The petitioner proposed tolerances for combined residues or residues of the insecticide etofenprox and the metabolite 2-(4-ethyoxyphenyl)-2-

methylpropyl 3-phenoxybenzoate, in or on rice, grain at 0.01 ppm and rice, straw at 0.06 ppm. Although EPA has included the metabolite 2-(4-ethyoxyphenyl)-2-methylpropyl 3-phenoxybenzoate in its assessment of exposure and risk for etofenprox, EPA has decided to exclude the metabolite from the tolerance expression because the metabolism and residue studies show that the parent compound will serve as a better indicator of potential misuse. Limiting the tolerance expression to the parent only also allows for harmonization with the proposed Codex MRLs. EPA has determined that rice, straw is not a significant feedstuff; therefore, a tolerance for residues of etofenprox *per se* in/on rice straw is not needed. The tolerance has been revised to reflect the correct commodity definition, ''rice, grain'' and the proposed tolerance expression has been revised to residues of etofenprox *per se* in or on rice, grain of 0.01 ppm.

V. Conclusion

Therefore, a tolerance is established for residues of etofenprox, (2-(4-ethoxyphenyl)-2-methylpropyl 3-phenoxybenzyl ether), in or on rice, grain at 0.01 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

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

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

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

VII. Congressional Review Act

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

40 CFR Part 180

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

Dated: December 4, 2008.

Debra Edwards,

Director, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. Section 180.620 is amended by revising pargraph (a) to read as follows:

§ 180.620 Etofenprox; tolerance for residues.

(a) *General.* A tolerance is established for residues of the insecticide etofenprox [2-(4-ethoxyphenyl)-2-methylpropyl 3-phenoxybenzyl ether] in or on the following raw agricultural commodity:

Commodity	Parts per million
Rice, grain	0.01

* * * * *

[FR Doc. E8–29346 Filed 12–11–08; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0217; FRL–8393–1]

Isoxaflutole; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation amends the pesticide tolerance for isoxaflutole by removing isoxaflutole's benzoic acid metabolite (RPA 203328) from the established tolerance expression and revising downward tolerance levels for isoxaflutole in or on field corn. Bayer CropScience requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 12, 2008. Objections and requests for hearings must be received on or before February 10, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0217. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some

information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Joanne Miller, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6224; e-mail address: *miller.joanne@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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

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

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

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–217 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before February 10, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2008–217, by one of the following methods:

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

II. Petition for Tolerance

In the **Federal Register** of April 16, 2008 (73 FR 20632) (FRL–8359–1), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8F7328) by Bayer CropScience, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709. The petition requested that the tolerance for isoxaflutole at 40 CFR 180.537 be amended by removing the benzoic acid metabolite (RPA 203328) from the established tolerance expression and revising downward the tolerance levels for the following raw agricultural commodities: Corn, field, grain; corn, field, forage; and corn, field, stover. The proposed level for each of these tolerances is 0.02 parts per million (ppm). Bayer CropScience requested that the tolerance for isoxaflutole be amended based on the results of several toxicology studies submitted for the benzoic acid metabolite, demonstrating RPA 203328 is not of toxicological concern. That notice referenced a summary of the petition prepared by Bayer CropScience the registrant, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has revised the proposed tolerance level for the combined residues of isoxaflutole and its metabolite RPA 202248, calculated as the parent compound, in or on corn, field, forage from 0.02 ppm to 0.04 ppm. Adequate crop field trial data with isoxaflutole showed quantifiable residues of isoxaflutole and RPA 202248 in field corn forage. These residues were found only in samples from a single trial and no residues were found in field corn grain or stover in any of the trials. Because the combined residues of isoxaflutole and RPA 202248 in that forage sample were at 0.029 ppm, a tolerance of 0.04 ppm is necessary for forage. Additionally, in light of the revised, and significantly lower, tolerances for isoxaflutole on field corn commodities, EPA reassessed the necessity for tolerances for isoxaflutole on meat, milk, poultry, and egg commodities. Meat, milk, poultry, and egg tolerances are necessary for a pesticide if pesticide residues in such commodities are likely following consumption by livestock of feed commodities bearing pesticide residues. Using the new tolerances and existing animal feeding studies with isoxaflutole, EPA determined that there was no reasonable expectation of finite isoxaflutole residues in livestock as the maximum residues expected are well below the limit of detection of the analytical enforcement method. Accordingly, EPA is revoking the existing isoxaflutole meat, milk, and egg tolerances as unnecessary.

III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for the combined residues of isoxaflutole and its metabolite RPA 202248, calculated as the parent compound, in or on corn, field, forage at 0.04 ppm; corn, field, grain at 0.02 ppm; and corn, field, stover at 0.02 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Removal of the Benzoic Acid Metabolite RPA 203328

The previous risk assessment concluded that RPA 203328 could not be excluded from the risk assessment and tolerance expression based on a developmental endpoint of parent isoxaflutole until an acceptable rat developmental toxicity study was submitted to the EPA. Additional toxicity studies have been performed on the metabolite RPA 203328 since the last risk assessment, including an acceptable developmental toxicity study on RPA 203328. No evidence of teratogenicity was observed in this study and based on this data EPA concluded that the developmental toxicity observed with isoxaflutole is not due to RPA 203328. EPA thus determined that the residues of concern for both the tolerance expression and risk assessment are isoxaflutole and RPA 202248.

B. Safety of Isoxaflutole Tolerances

EPA's last tolerance rulemaking with regard to isoxaflutole occurred on September 23, 1998. (63 FR 50773) (FRL–6029–3). In that action, isoxaflutole tolerances were established for combined residues of isoxaflutole and its metabolites RPA 202248 and RPA 203328, calculated as the parent compound, in or on the following raw agricultural commodities: Corn, field, forage at 1.0 ppm; corn, field, grain at 0.20 ppm; and corn, field, stover at 0.50 ppm. Tolerances were established for the combined residues of isoxaflutole and its metabolite RPA 202248, calculated as the parent compound, in or on the following raw agricultural commodities: Cattle, fat at 0.20 ppm; cattle, liver at 0.50 ppm; cattle, meat at 0.20 ppm; cattle, meat byproducts, except liver at 0.10 ppm; egg at 0.01 ppm; goat, fat at 0.20 ppm; goat, liver at 0.50 ppm; goat, meat at 0.20 ppm; goat, meat byproducts, except liver at 0.10 ppm; hog, fat at 0.20 ppm; hog, liver at 0.50 ppm; hog, meat at 0.20 ppm; hog, meat byproducts, except liver at 0.10 ppm; horse, fat at 0.20 ppm; horse, liver at 0.50 ppm; horse, meat at 0.20 ppm; horse, meat byproducts, except liver at 0.10 ppm; milk at 0.02 ppm; poultry, fat at 0.20 ppm; poultry, liver at 0.30 ppm; poultry, meat at 0.20 ppm; sheep, fat at 0.20 ppm; sheep, liver at 0.50 ppm; sheep, meat at 0.20 ppm; and sheep, meat byproducts, except liver at 0.10 ppm.

In the 1998 tolerance action, EPA assumed that the residues of concern in field corn were isoxaflutole and its metabolites RPA 202248 and RPA 203328. As explained in this unit, however, EPA has now determined that only the parent isoxaflutole and the RPA 202248 metabolite pose a risk of concern. Thus, the risk assessment done in conjunction with the 1998 rulemaking, which showed isoxaflutole exposure to be safe, greatly overstates isoxaflutole exposure in comparison to the revised tolerances. First, as to exposure through human foods produced from field corn (*e.g.*, corn meal, corn oil), the levels of isoxaflutole residues of concern in such foods are an order of magnitude lower than previously assumed. Second, as to meat, milk, poultry, and eggs from livestock consuming isoxaflutole-treated field corn, EPA has concluded that there is no reasonable expectation of combined residues of isoxaflutole and RPA 202248 in such commodities. Accordingly, there is essentially no human exposure to isoxaflutole residues in meat, milk, poultry, and eggs from use of isoxaflutole on field corn. For these reasons, the 1998 risk assessment is a very conservative assessment of the potential risk from use of isoxaflutole on field corn. Refer to the **Federal Register** of September 23, 1998 (63 FR 50773) (FRL–6029–3), available at *http://www.regulations.gov*, for a detailed discussion of the 1998 isoxaflutole aggregate risk assessments and determination of safety.

Since the 1998 rulemaking, EPA has received a developmental neurotoxicity study with isoxaflutole. Although EPA has required that the study to be redone due to a lack of morphometric analyses of the brain, the maternal and offspring no observed adverse effect levels (NOAELs) in the study were otherwise identified as 25 milligram/kiligram/day (mg/kg/day). This value is above the Point of Departure (POD) used in assessing acute and chronic risk in the 1998 risk assessment. There, EPA used a lowest observed adverse effect level (LOAEL) of 5 mg/kg/day as the POD for acute risks and a NOAEL of 2 mg/kg/day as the POD for chronic risks. Thus, these new data do not suggest that isoxaflutole is more toxic than was assumed in the 1998 assessment. Further, it should be noted that in assessing isoxaflutole risk, EPA applied an additional safety factor of 30X for the protection of infants and children in addressing acute risks and an additional safety factor of 10X for the protection of infants and children in addressing chronic risks. These additional safety factors were used to address the absence of a developmental neurotoxicity study and reliance on a LOAEL. In another development occurring since the 1998 rulemaking, EPA has noted, in tolerance rulemakings for several other pesticides that pesticides such as isoxaflutole which inhibit the liver enzyme 4-hydroxyphenylpyruvate dioxygenase (HPPD) may operate through a common mechanism of toxicity. To address this issue, EPA has conducted a cumulative screening assessment for these pesticides and concluded that, even if there is common mechanism for HPPD-inhibition, cumulative exposure from these pesticides does not raise a risk concern. Refer to the **Federal Register** of February 20, 2008 (73 FR 9221) (FRL–8344–7). Further cumulative analysis is unnecessary for this action because of EPA's conclusion that the revised isoxaflutole tolerances result in substantially lower isoxaflutole exposure than previously assumed.

Accordingly, taking into account the prior risk assessment for isoxaflutole, EPA's revised analysis of the level of human exposure from use of

isoxaflutole on field corn, the developmental neurotoxicity study, and EPA's screening analysis of HPPD-inhibiting pesticides, EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children, from aggregate exposure to isoxaflutole residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

A practical analytical method has been developed for detecting and quantifying levels of isoxaflutole and RPA 202248 in or on raw agricultural commodities obtained from field corn. This method allows monitoring of these commodities with residues at or above the levels proposed. Quantification of analytes as individual components is performed by daughter-ion detection using liquid chromatography/mass spectroscopy (LC/MS/MS). The limit of quantification (LOQ) for all analytes is 0.01 ppm. The proposed analytical enforcement method to determine isoxaflutole-derived residues in plants has been validated by an independent laboratory.

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

B. International Residue Limits

There are no Codex, Canadian, or Mexican maximum residue limits (MRLs) established for residues of isoxaflutole in crop or livestock commodities.

V. Conclusion

Therefore, EPA has revised tolerances for the combined residues of isoxaflutole and its metabolites RPA 202248 and RPA 203328, calculated as the parent compound, in or on corn, field, forage at 0.04 ppm; corn, field, grain at 0.02 ppm; and corn, field, stover at 0.02 ppm; and has removed the benzoic acid metabolite (RPA 203328) from the established tolerance expression. EPA has removed the established tolerances for the combined residues of isoxaflutole and its metabolite RPA 202248, calculated as the parent compound, in or on cattle, fat at 0.20 ppm; cattle, liver at 0.50 ppm; cattle, meat at 0.20 ppm; cattle, meat byproducts, except liver at 0.10 ppm; egg at 0.01 ppm; goat, fat at 0.20 ppm; goat, liver at 0.50 ppm; goat, meat at 0.20 ppm; goat, meat byproducts, except liver at 0.10 ppm; hog, fat at 0.20 ppm; hog, liver at 0.50 ppm; hog, meat at 0.20 ppm; hog, meat byproducts, except liver at 0.10 ppm; horse, fat at 0.20 ppm; horse, liver at 0.50 ppm; horse, meat at 0.20 ppm; horse, meat byproducts, except liver at 0.10 ppm; milk at 0.02 ppm; poultry, fat at 0.20 ppm; poultry, liver at 0.30 ppm; poultry, meat at 0.20 ppm; sheep, fat at 0.20 ppm; sheep, liver at 0.50 ppm; sheep, meat at 0.20 ppm; and sheep, meat byproducts, except liver at 0.10 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

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

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: December 3, 2008.

Donald R. Stubbs,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. In § 180.537, paragraph (a) is revised to read as follows:

§ 180.537 Isoxaflutole; tolerances for residues

(a) *General.* Tolerances are established for the combined residues of

isoxaflutole 5-cyclopropyl-4-(2-methylsulfonyl-4-trifluoromethylbenzoyl) isoxazole and its metabolite 1-(2-methylsulfonyl-4-trifluoromethylphenyl)-2-cyano-3-cyclopropyl propan-1,3-dione (RPA 202248), calculated as the parent compound, in or on the following raw agricultural commodities:

Commodity	Parts per million
Corn, field, forage	0.04
Corn, field, grain	0.02
Corn, field, stover	0.02

* * * * *

[FR Doc. E8–29467 Filed 12–11–08; 8:45 am]
BILLING CODE 6560–50–S

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket No. FEMA–8053]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

DATES: *Effective Date:* The effective date of each community's scheduled suspension is the third date (''Susp.'') listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2953.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the NFIP, 42 U.S.C. 4001 *et seq.*; unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, FEMA has identified the Special Flood Hazard Areas (SFHAs) in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year, on FEMA's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

■ Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain federal assistance no longer available in SFHAs
Region III				
Virginia:				
Goochland County, Unincorporated Areas.	510072	April 19, 1973, Emerg; March 1, 1979, Reg; December 2, 2008, Susp.	Dec. 2, 2008	Dec. 2, 2008.
Hanover County, Unincorporated Areas	510237	April 4, 1974, Emerg; September 2, 1981, Reg; December 2, 2008, Susp.	.....*do	Do.
Region IV				
North Carolina:				
Avery County, Unincorporated Areas	370010	February 12, 1976, Emerg; September 28, 1990, Reg; December 2, 2008, Susp.	.....do	Do.
Banner Elk, Town of, Avery County	370011	November 13, 1974, Emerg; January 15, 1988, Reg; December 2, 2008, Susp.	.....do	Do.
Beech Mountain, Town of, Watauga County.	370480	—, Emerg; March 12, 2004, Reg; December 2, 2008, Susp.	.....do	Do.
Crossnore, Town of, Avery County	370287	January 14, 1980, Emerg; August 19, 1986, Reg; December 2, 2008, Susp.	.....do	Do.
Elk Park, Town of, Avery County	370382	March 23, 1979, Emerg; April 15, 1986, Reg; December 2, 2008, Susp.	.....do	Do.
Newland, Town of, Avery County	370012	September 17, 1975, Emerg; December 4, 1984, Reg; December 2, 2008, Susp.	.....do	Do.
Tennessee:				
Adamsville, Town of, McNairy County ..	470292	March 30, 1982, Emerg; September 29, 1986, Reg; December 2, 2008, Susp.	.....do	Do.
Michie, City of, McNairy County	470336	September 14, 2006, Emerg; December 1, 2006, Reg; December 2, 2008, Susp.	.....do	Do.
Ramer, Town of, McNairy County	470131	July 17, 2002, Emerg; November 1, 2005, Reg; December 2, 2008, Susp.	.....do	Do.
Region V				
Michigan:				
Caseville, Township of, Huron County ..	260257	November 9, 1973, Emerg; December 1, 1977, Reg; December 2, 2008, Susp.	.....do	Do.
Caseville, Village of, Huron County	260677	May 28, 1982, Emerg; January 1, 1992, Reg; December 2, 2008, Susp.	.....do	Do.
Elkton, Village of, Huron County	260569	September 3, 1981, Emerg; May 25, 1984, Reg; December 2, 2008, Susp.	.....do	Do.
Fairhaven, Township of, Huron County	260628	August 12, 1975, Emerg; January 6, 1988, Reg; December 2, 2008, Susp.	.....do	Do.
Gore, Township of, Huron County	260785	December 16, 1986, Emerg; September 18, 1987, Reg; December 2, 2008, Susp.	.....do	Do.
Hume, Township of, Huron County	260792	January 29, 1987, Emerg; September 18, 1987, Reg; December 2, 2008, Susp.	.....do	Do.
Huron, Township of, Huron County	260415	July 15, 1987, Emerg; April 2, 1992, Reg; December 2, 2008, Susp.	.....do	Do.
Lake, Township of, Huron County	260254	January 30, 1974, Emerg; April 3, 1978, Reg; December 2, 2008, Susp.	.....do	Do.
McKinley, Township of, Huron County ..	260322	November 26, 1974, Emerg; July 1, 1987, Reg; December 2, 2008, Susp.	.....do	Do.
Oliver, Township of, Huron County	261312	December 4, 2002, Emerg; —, Reg; December 2, 2008, Susp.	.....do	Do.
Port Austin, Township of, Huron County	260290	April 17, 1974, Emerg; January 1, 1992, Reg; December 2, 2008, Susp.	.....do	Do.
Rubicon, Township of, Huron County ...	260789	December 22, 1986, Emerg; September 30, 1988, Reg; December 2, 2008, Susp.	.....do	Do.
Sand Beach, Township of, Huron County.	260787	December 16, 1986, Emerg; September 18, 1987, Reg; December 2, 2008, Susp.	.....do	Do.
Sebewaing, Village of, Huron County ...	260572	March 24, 1976, Emerg; December 3, 1987, Reg; December 2, 2008, Susp.	.....do	Do.
Sherman, Township of, Huron County ..	260788	December 15, 1986, Emerg; September 18, 1987, Reg; December 2, 2008, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain federal assistance no longer available in SFHAs
Ohio:				
Holmes County, Unincorporated Areas	390276	October 25, 1977, Emerg; December 15, 1990, Reg; December 2, 2008, Susp.	.....do	Do.
Killbuck, Village of, Holmes County	390279	August 27, 1975, Emerg; February 5, 1986, Reg; December 2, 2008, Susp.	.....do	Do.
Region IX				
California:				
Cotati, City of, Sonoma County	060377	July 22, 1975, Emerg; April 15, 1980, Reg; December 2, 2008, Susp.	.....do	Do.

*do = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp—Suspension.

Dated: November 28, 2008.

Michael K. Buckley,

Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–29456 Filed 12–11–08; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 0812081564–81568–01]

RIN 0648–XM18

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan

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

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the Atlantic Large Whale Take Reduction Plan's (ALWTRP) implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1,650 nm² (5,659.5 km²), east of Gloucester, Massachusetts, and Portsmouth, New Hampshire, in the proximity of Jeffreys Ledge, for 15 days. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

DATES: Effective beginning at 0001 hours December 15, 2008, through 2400 hours December 29, 2008.

ADDRESSES: Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at *http://www.nero.noaa.gov/whaletrp/*.

Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specifc authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in order to protect right whales and is applicable to areas north of 42° 30' N. lat. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15–day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15–day period and asking fishermen not to set any additional gear in the DAM zone during the 15–day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm² (139 km²)) such that right whale density is equal to or greater than 0.04 right whales per nm² (1.85 km²). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On December 3, 2008, an aerial survey reported an aggregation of 11 right whales in the general proximity of 42° 54' N. latitude and 70° 19' W. longitude. The position lies east of Gloucester, MA, and Portsmouth, NH, in the proximity of Jeffreys Ledge. After conducting an investigation, NMFS ascertained that the report came from a qualified individual and determined that the report was reliable. Thus, NMFS has received a reliable report from a qualified individual of the requisite right whale density to trigger the DAM provisions of the ALWTRP.

Once a DAM zone is triggered, NMFS determines whether to impose restrictions on fishing and/or fishing gear in the zone. This determination is based on the following factors, including but not limited to: the location of the DAM zone with respect to other fishery closure areas, weather conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data.

NMFS has reviewed the factors and management options noted above relative to the DAM under consideration. As a result of this review, NMFS prohibits lobster trap/pot and anchored gillnet gear in this area during the 15–day restricted period unless it is modified in the manner described in this temporary rule.

The DAM Zone is bound by the following coordinates:

43° 15' N., 70° 35' W. (NW Corner)

43° 15' N., 69° 48' W.

42° 32' N., 69° 48' W.

42° 32' N., 70° 44' W.

43° 34' N., 70° 44' W. Following the shoreline northward to

42° 40' N., 70° 44' W.

43° 02' N., 70° 44' W. Following the shoreline northward to

43° 15' N., 70° 35' W. (NW Corner)

In addition to those gear modifications currently implemented under the ALWTRP at 50 CFR 229.32, the following gear modifications are required in the DAM zone. If the requirements and exceptions for gear modification in the DAM zone, as described below, differ from other ALWTRP requirements for any overlapping areas and times, then the more restrictive requirements will apply in the DAM zone. Special note for gillnet fishermen: a portion of this DAM zone overlaps the year-round Western Gulf of Maine Closure Area for Northeast Multispecies found at 50 CFR 648.81(e).Due to this closure, sink gillnet gear is prohibited from this portion of the DAM zone.

Lobster trap/pot gear

Fishermen utilizing lobster trap/pot gear within portions of Northern Inshore Stae Trap/Pot Waters, Northern Nearshore Trap/Pot Waters, and Stellwagen Bank/Jeffreys Ledge Restricted Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per trawl; and

4. A weak link with a maximum breaking strength of 600 lb (272.4 kg) must be placed at all buoys.

Fishermen utilizing lobster trap/pot gear within the portion of the Offshore Lobster Waters Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per trawl; and

4. A weak link with a maximum breaking strength of 1,500 lb (680.4 kg) must be placed at all buoys.

Anchored Gillnet Gear

Fishermen utilizing anchored gillnet gear within the portions of the Other Northeast Gillnet Waters Area and the Stellwagen Bank/Jeffreys Ledge Restricted Area that overlap with the DAM zone are required to utilize all the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;

2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;

3. Fishermen are allowed to use two buoy lines per string;

4. The breaking strength of each net panel weak link must not exceed 1,100 lb (498.8 kg). The weak link requirements apply to all variations in net panel size. One weak link must be placed in the center of the floatline and one weak link must be placed in the center of each of the up and down lines at both ends of the net panel. Additionally, one weak link must be placed as close as possible to each end of the net panels on the floatline; or, one weak link must be placed between floatline tie-loops between net panels and one weak link must be placed where the floatline tie-loops attach to the bridle, buoy line, or groundline at each end of a net string;

5. A weak link with a maximum breaking strength of 1,100 lb (498.8 kg) must be placed at all buoys; and

6. All anchored gillnets, regardless of the number of net panels, must be securely anchored with the holding power of at least a 22 lb (10.0 kg) Danforth-style anchor at each end of the net string.

The restrictions will be in effect beginning at 0001 hours December 15, 2008, through 2400 hours December 29, 2008, unless terminated sooner or extended by NMFS through another notification in the **Federal Register**.

The restrictions will be announced to state officials, fishermen, ALWTRT members, and other interested parties through e-mail, phone contact, NOAA website, and other appropriate media immediately upon issuance of the rule by the AA.

Classification

In accordance with section 118(f)(9) of the MMPA, the Assistant Administrator (AA) for Fisheries has determined that this action is necessary to implement a take reduction plan to protect North Atlantic right whales.

Environmental Assessments for the DAM program were prepared on December 28, 2001, and August 6, 2003. This action falls within the scope of the analyses of these EAs, which are available from the agency upon request.

NMFS provided prior notice and an opportunity for public comment on the regulations establishing the criteria and procedures for implementing a DAM zone. Providing prior notice and opportunity for comment on this action, pursuant to those regulations, would be impracticable because it would prevent NMFS from executing its functions to protect and reduce serious injury and mortality of endangered right whales. The regulations establishing the DAM program are designed to enable the agency to help protect unexpected concentrations of right whales. In order to meet the goals of the DAM program, the agency needs to be able to create a DAM zone and implement restrictions

on fishing gear as soon as possible once the criteria are triggered and NMFS determines that a DAM restricted zone is appropriate. If NMFS were to provide prior notice and an opportunity for public comment upon the creation of a DAM restricted zone, the aggregated right whales would be vulnerable to entanglement which could result in serious injury and mortality. Additionally, the right whales would most likely move on to another location before NMFS could implement the restrictions designed to protect them, thereby rendering the action obsolete. Therefore, pursuant to 5 U.S.C. 553(b)(B), the AA finds that good cause exists to waive prior notice and an opportunity to comment on this action to implement a DAM restricted zone to reduce the risk of entanglement of endangered right whales in commercial lobster trap/pot and anchored gillnet gear as such procedures would be impracticable.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30–day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, the aggregated right whales would be vulnerable to entanglement, which could cause serious injury and mortality. Additionally, right whales would likely move to another location between the time NMFS approved the action creating the DAM restricted zone and the time it went into effect, thereby rendering the action obsolete and ineffective. Nevertheless, NMFS recognizes the need for fishermen to have time to either modify or remove (if not in compliance with the required restrictions) their gear from a DAM zone once one is approved. Thus, NMFS makes this action effective 2 days after the date of publication of this document in the **Federal Register**. NMFS will also endeavor to provide notice of this action to fishermen through other means upon issuance of the rule by the AA, thereby providing approximately 3 additional days of notice while the Office of the **Federal Register** processes the document for publication.

NMFS determined that the regulations establishing the DAM program and actions such as this one taken pursuant to those regulations are consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of the U.S. Atlantic coastal states. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Following state review of the regulations creating the DAM program, no state disagreed with NMFS' conclusion that the DAM program is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program for that state.

The DAM program under which NMFS is taking this action contains policies with federalism implications warranting preparation of a federalism assessment under Executive Order 13132. Accordingly, in October 2001 and March 2003, the Assistant Secretary for Intergovernmental and Legislative Affairs, Department of Commerce, provided notice of the DAM program and its amendments to the appropriate elected officials in states to be affected by actions taken pursuant to the DAM program. Federalism issues raised by state officials were addressed in the final rules implementing the DAM program. A copy of the federalism Summary Impact Statement for the final rules is available upon request (**ADDRESSES**).

The rule implementing the DAM program has been determined to be not significant under Executive Order 12866.

Authority: 16 U.S.C. 1361 *et seq.* and 50 CFR 229.32(g)(3)

Dated: December 8, 2008.

Samuel D. Rauch III,

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

[FR Doc. E8–29492 Filed 12–9–08; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 0812081566–81570–01]

RIN 0648–XM19

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan

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

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the Atlantic Large Whale Take Reduction Plan's (ALWTRP) implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1,575 nm^2 (5,402.3 km^2), east of Portland, Maine, for 15 days. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

DATES: Effective beginning at 0001 hours December 15, 2008, through 2400 hours December 29, 2008.

ADDRESSES: Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at *http://www.nero.noaa.gov/whaletrp/*.

Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specifc authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/

pot and anchored gillnet fishing gear in order to protect right whales and is applicable to areas north of 42° 30' N. lat. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15–day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15–day period and asking fishermen not to set any additional gear in the DAM zone during the 15–day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm^2 (139 km^2)) such that right whale density is equal to or greater than 0.04 right whales per nm^2 (1.85 km^2). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On December 3, 2008, an aerial survey reported an aggregation of 43 right whales in the general proximity of 43° 37' N. latitude and 68° 54' W. longitude. The position lies approximately 95 nm east of Portland, ME, in proximity to Jeffreys Bank/Jordans Basin. After conducting an investigation, NMFS ascertained that the report came from a qualified individual and determined that the report was reliable. Thus, NMFS has received a reliable report from a qualified individual of the requisite right whale density to trigger the DAM provisions of the ALWTRP.

Once a DAM zone is triggered, NMFS determines whether to impose restrictions on fishing and/or fishing gear in the zone. This determination is based on the following factors, including but not limited to: the location of the DAM zone with respect to other fishery closure areas, weather conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data.

NMFS has reviewed the factors and management options noted above relative to the DAM under consideration. As a result of this review, NMFS prohibits lobster trap/pot and anchored gillnet gear in this area during the 15–day restricted period unless it is modified in the manner described in this temporary rule.

The DAM Zone is bound by the following coordinates:

43° 42' N., 68° 57' W. (NW Corner)
43° 42' N., 68° 00' W.
43° 04' N., 68° 00' W.
43° 04' N., 68° 57' W.
43° 42' N., 68° 57' W. (NW Corner)

In addition to those gear modifications currently implemented under the ALWTRP at 50 CFR 229.32, the following gear modifications are required in the DAM zone. If the requirements and exceptions for gear modification in the DAM zone, as described below, differ from other ALWTRP requirements for any overlapping areas and times, then the more restrictive requirements will apply in the DAM zone.

Lobster trap/pot gear

Fishermen utilizing lobster trap/pot gear within portions of Northern Nearshore Lobster Waters that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per trawl; and
4. A weak link with a maximum breaking strength of 600 lb (272.4 kg) must be placed at all buoys.

Fishermen utilizing lobster trap/pot gear within the portion of the Offshore Lobster Waters Area that overlap with the DAM zone are required to utilize all of the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per trawl; and
4. A weak link with a maximum breaking strength of 1,500 lb (680.4 kg) must be placed at all buoys.

Anchored Gillnet Gear

Fishermen utilizing anchored gillnet gear within the portions of the Other Northeast Gillnet Waters Area that overlap with the DAM zone are required to utilize all the following gear modifications while the DAM zone is in effect:

1. Groundlines must be made of either sinking or neutrally buoyant line. Floating groundlines are prohibited;
2. All buoy lines must be made of either sinking or neutrally buoyant line, except the bottom portion of the line, which may be a section of floating line not to exceed one-third the overall length of the buoy line;
3. Fishermen are allowed to use two buoy lines per string;
4. The breaking strength of each net panel weak link must not exceed 1,100 lb (498.8 kg). The weak link requirements apply to all variations in net panel size. One weak link must be placed in the center of the floatline and one weak link must be placed in the center of each of the up and down lines at both ends of the net panel. Additionally, one weak link must be placed as close as possible to each end of the net panels on the floatline; or, one weak link must be placed between floatline tie-loops between net panels and one weak link must be placed where the floatline tie-loops attach to the bridle, buoy line, or groundline at each end of a net string;
5. A weak link with a maximum breaking strength of 1,100 lb (498.8 kg) must be placed at all buoys; and
6. All anchored gillnets, regardless of the number of net panels, must be securely anchored with the holding power of at least a 22 lb (10.0 kg) Danforth-style anchor at each end of the net string.

The restrictions will be in effect beginning at 0001 hours December 15, 2008, through 2400 hours December 29, 2008, unless terminated sooner or extended by NMFS through another notification in the **Federal Register**.

The restrictions will be announced to state officials, fishermen, ALWTRT members, and other interested parties through e-mail, phone contact, NOAA website, and other appropriate media immediately upon issuance of the rule by the AA.

Classification

In accordance with section 118(f)(9) of the MMPA, the Assistant Administrator (AA) for Fisheries has determined that this action is necessary to implement a

take reduction plan to protect North Atlantic right whales.

Environmental Assessments for the DAM program were prepared on December 28, 2001, and August 6, 2003. This action falls within the scope of the analyses of these EAs, which are available from the agency upon request.

NMFS provided prior notice and an opportunity for public comment on the regulations establishing the criteria and procedures for implementing a DAM zone. Providing prior notice and opportunity for comment on this action, pursuant to those regulations, would be impracticable because it would prevent NMFS from executing its functions to protect and reduce serious injury and mortality of endangered right whales. The regulations establishing the DAM program are designed to enable the agency to help protect unexpected concentrations of right whales. In order to meet the goals of the DAM program, the agency needs to be able to create a DAM zone and implement restrictions on fishing gear as soon as possible once the criteria are triggered and NMFS determines that a DAM restricted zone is appropriate. If NMFS were to provide prior notice and an opportunity for public comment upon the creation of a DAM restricted zone, the aggregated right whales would be vulnerable to entanglement which could result in serious injury and mortality. Additionally, the right whales would most likely move on to another location before NMFS could implement the restrictions designed to protect them, thereby rendering the action obsolete. Therefore, pursuant to 5 U.S.C. 553(b)(B), the AA finds that good cause exists to waive prior notice and an opportunity to comment on this action to implement a DAM restricted zone to reduce the risk of entanglement of endangered right whales in commercial lobster trap/pot and anchored gillnet gear as such procedures would be impracticable.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30–day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, the aggregated right whales would be vulnerable to entanglement, which could cause serious injury and mortality. Additionally, right whales would likely move to another location between the time NMFS approved the action creating the DAM restricted zone and the time it went into effect, thereby rendering the action obsolete and ineffective. Nevertheless, NMFS recognizes the need for fishermen to have time to either modify or remove (if not in compliance with the required restrictions) their gear from a DAM zone once one is approved. Thus, NMFS makes this action effective 2 days after the date of publication of this document in the **Federal Register**. NMFS will also endeavor to provide notice of this action to fishermen through other means upon issuance of the rule by the AA, thereby providing approximately 3 additional days of notice while the Office of the **Federal Register** processes the document for publication.

NMFS determined that the regulations establishing the DAM program and actions such as this one taken pursuant to those regulations are consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of the U.S. Atlantic coastal states. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Following state review of the regulations creating the DAM program, no state disagreed with NMFS' conclusion that the DAM program is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program for that state.

The DAM program under which NMFS is taking this action contains policies with federalism implications warranting preparation of a federalism assessment under Executive Order 13132. Accordingly, in October 2001 and March 2003, the Assistant Secretary for Intergovernmental and Legislative Affairs, Department of Commerce, provided notice of the DAM program and its amendments to the appropriate elected officials in states to be affected by actions taken pursuant to the DAM program. Federalism issues raised by state officials were addressed in the final rules implementing the DAM program. A copy of the federalism Summary Impact Statement for the final rules is available upon request (**ADDRESSES**).

The rule implementing the DAM program has been determined to be not significant under Executive Order 12866.

Authority: 16 U.S.C. 1361 *et seq.* and 50 CFR 229.32(g)(3)

Dated: December 8, 2008.

Samuel D. Rauch III,

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

[FR Doc. E8–29493 Filed 12–9–08; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 070720390–81459–03]

RIN 0648–AV28

Fisheries in the Western Pacific; Bottomfish and Seamount Groundfish Fisheries; Management Measures for the Northern Mariana Islands

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

ACTION: Final rule.

SUMMARY: This final rule establishes Federal permitting and reporting requirements for all commercial bottomfish vessels fishing in the U.S. Exclusive Economic Zone (EEZ) around the Commonwealth of the Northern Mariana Islands (CNMI). The final rule also closes certain EEZ waters around the CNMI to bottomfish fishing by vessels over 40 ft (12.2 m) in length. Vessel monitoring system units must be installed on those larger vessels when fishing in EEZ waters around the CNMI, and the operators of those larger vessels will be required to submit Federal sales reports in addition to catch reports. This final rule is intended to ensure adequate collection of information about the CNMI commercial bottomfish fishery, provide for sustained community participation, and maintain a consistent supply of locally-caught bottomfish to CNMI markets and seafood consumers. Combined, these measures are intended to prevent the depletion of bottomfish stocks in the CNMI, and to sustain the fisheries that depend on them.

DATES: This final rule is effective January 12, 2009, except for the revisions to §§ 665.14, 665.19(a)(4), and 665.61, which require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). When OMB approval is received, the effective date will be announced in the **Federal Register**.

ADDRESSES: The Fishery Management Plan for Bottomfish and Seamount Groundfish Fisheries of the Western Pacific Region and Amendment 10 are available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, fax 808–522–8226, or *www.wpcouncil.org*.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information

requirements contained in this final rule may be submitted to William L. Robinson, Regional Administrator, NMFS, Pacific Islands Region (PIR), 1601 Kapiolani Blvd, Suite 1110, Honolulu, HI 96814–4700, and by e-mail to *David__Rostker@omb.eop.gov*, or fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Brett Wiedoff, NMFS PIR, 808–944–2272.

SUPPLEMENTARY INFORMATION: This **Federal Register** notice is also accessible at the Office of the **Federal Register**'s web site: *www.gpoaccess.gov/fr/*.

Bottomfish in CNMI nearshore waters are caught in subsistence, recreational, and small-scale commercial fisheries. Vessels are typically small (less than 25 ft (7.6 m)), and fishing is more frequent in summer months when weather and sea conditions are calm. Most of these small vessels target shallow-water bottomfish, but some also target deep-water species. The catch from these small vessels is destined for local markets and consumers in the CNMI, and is usually not exported.

In addition to small vessels, several larger vessels (over 40 ft, or 12.2 m, in length) also target deep-water bottomfish at offshore seamounts and banks. Catch from these large vessels does not always enter local markets as a food supply for CNMI residents. It is also possible for large bottomfish vessels based in Guam to travel to fishing grounds within U.S. EEZ waters around the CNMI. Larger-vessel fisheries could result in excessive fishing pressure on bottomfish stocks at nearshore banks, potentially threatening both the fish stocks and the fisheries that have historically been dependent on these resources.

Several other issues regarding bottomfish fishing in the CNMI have been noted. First, existing data collection programs in the CNMI are insufficient to monitor catches and determine the impacts of the fishery on the bottomfish stocks being harvested, or to determine the species composition and amount of discarded catch. Second, large bottomfish vessels need to harvest relatively large catches to cover operational costs, and these large catches could deplete nearshore stocks. Stock depletion would threaten the sustainability of the CNMI bottomfish fishery, and if catch rates were significantly reduced, small vessels would not be able to continue operating. Finally, because the catches from large vessels are typically exported, traditional patterns of supply and consumption of bottomfish in the local community would be disrupted.

This final rule will require the owners of all vessels commercially fishing for bottomfish management unit species (BMUS) in EEZ waters around the CNMI to obtain Federal fishing permits. Permit eligibility will not be restricted, and permits will be renewable on an annual basis.

This final rule will require the operators of all commercial bottomfish vessels to complete and submit Federal catch reports. In addition to the fishing logbook, vessels over 40 ft (12.2 m) fishing for bottomfish in the CNMI will be required to complete and submit Federal sales reports for the bottomfish that they sell.

This final rule will close certain EEZ waters around the CNMI to bottomfish fishing by vessels over 40 ft (12.2 m). The closed areas include EEZ waters from the shoreline to 50 nm (80.5 km) around the southern islands of the CNMI, from the Guam-CNMI EEZ boundary to a line halfway between Farallon de Medinilla and Anatahan Islands, and EEZ waters from the shoreline to 10 nm (18.5 km) around the northern island of Alamagan (Fig. 1). The closed area boundaries are defined by straight lines for clarity and to facilitate enforcement.

Transshipping bottomfish will be allowed within the closed areas. This could facilitate delivery of bottomfish to local and other markets, and provide a potential revenue source other than, or in addition to, fishing. Vessels that transship their catches offshore can remain at sea for longer periods of time, thereby improving operational efficiency and reducing transit costs. Any vessel commercially receiving bottomfish fish or fish products from a fishing vessel will be required to be registered with a valid CNMI commercial bottomfish permit, and the operator will be required to report any bottomfish transshipping activity in the Federal fishing logbook forms.

Commercial CNMI bottomfish vessels over 40 ft (12.2 m) are required to be marked in compliance with current Federal vessel identification requirements, but the final rule exempts CNMI-based commercial bottomfish vessels from the Federal vessel identification requirements if the vessels are less than 40 ft (12.2 m) in length and in compliance with CNMI vessel registration and marking requirements.

BILLING CODE 3510–22–S

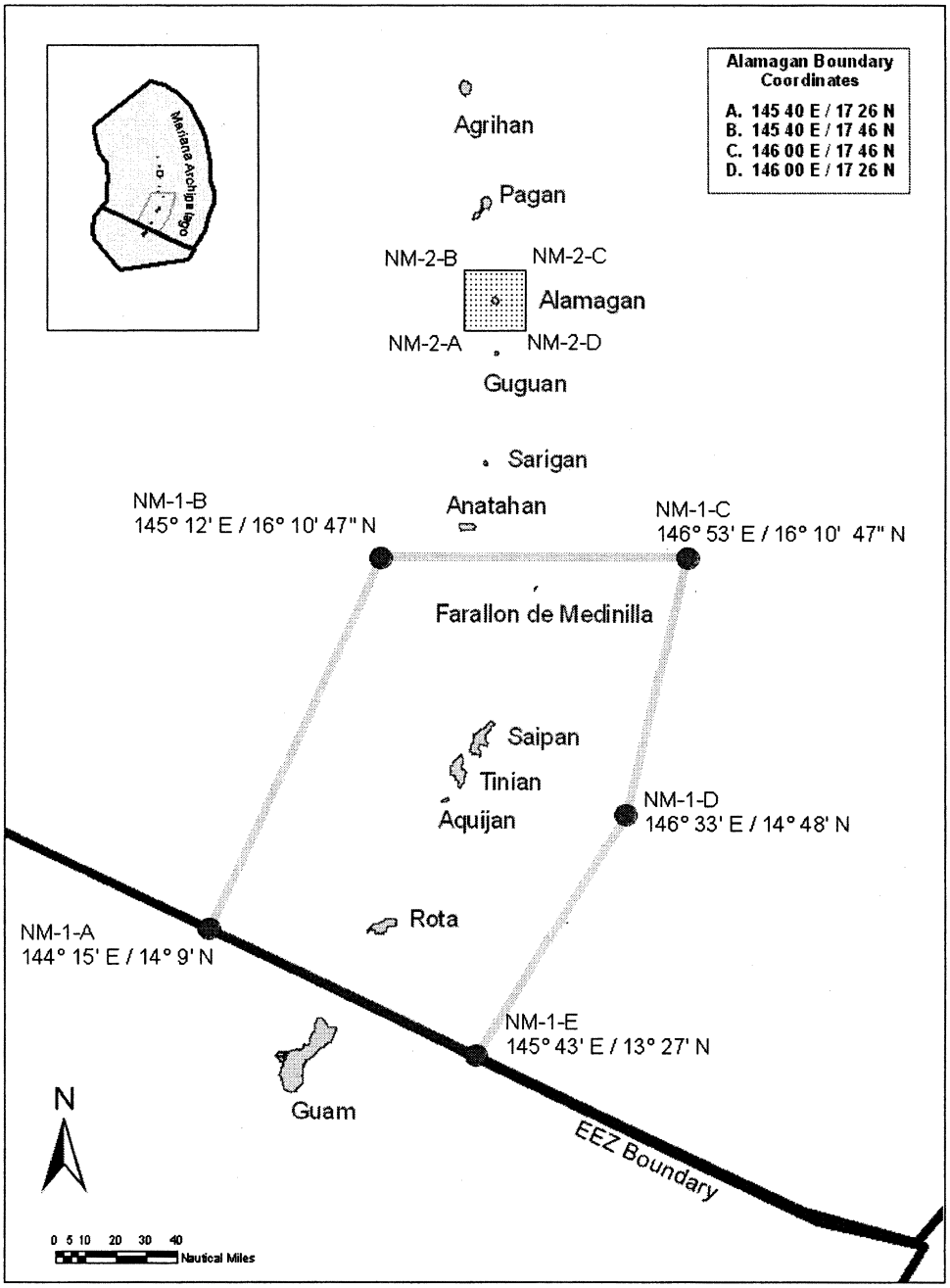

Figure 1. CNMI medium and large bottomfish vessel prohibited areas.

BILLING CODE 3510–22–C

Shipboard vessel monitoring system (VMS) units will be required on vessels over 40 ft (12.2 m). The VMS is an automated, satellite-based system that assists NOAA's Office for Law Enforcement and the U.S. Coast Guard in monitoring compliance with closed areas in a reliable and cost-effective manner. To date, the regional requirements for VMS in 50 CFR 665 have applied only to pelagic longline fishing, so the requirements are located in the pelagic fisheries section of the regulations. (The VMS requirements for the Northwestern Hawaiian Islands bottomfish fishery are found in 50 CFR 404.5 and are not affected by this final rule.) Because the final rule adds VMS requirements for bottomfish fishing, the section regarding the vessel monitoring system (§ 665.25) is moved from the pelagic fishery requirements to the general requirements and renumbered as § 665.19. Accordingly, the VMS-related prohibitions found in § 665.22 are also moved to the general prohibitions in § 665.15. The VMS-related requirements are also clarified to require that VMS units be installed and operational when vessels are at sea.

In the definition of bottomfish management unit species, the scientific name for armorhead is revised to the valid taxonomic name, and the scientific name of the pink snapper is

revised to include the species, which was inadvertently omitted from the definition. The spellings of local names of the longtail and pink snappers are also corrected. In the definition of receiving vessel permit, the cross-reference to receiving vessel permits for pelagic longlining is corrected to the proper paragraph.

Additional background information on this final rule may be found in the preamble to the proposed rule published on September 8, 2008 (73 FR 51992), and is not repeated here.

Comments and Responses

On September 20, 2008, NMFS published a notice of availability and request for public comments on Amendment 10, including a Draft Environmental Assessment (73 FR 49157). The amendment comment period ended on October 20, 2008. On September 8, 2008, NMFS published a proposed rule (73 FR 51992) that would implement the management measures recommended by the Council in Amendment 10. The proposed rule comment period ended on October 23, 2008. NMFS received public comment regarding the EA and proposed rule, and responds as follows:

Comment 1: The initial permit fee should be $100 per vessel to cover and sustain administrative costs.

Response: The amount of the permit fee is calculated in accordance with the procedures of the NOAA Finance Handbook for determining the administrative costs of each special product or service incurred in processing the permit. At the time the rule was proposed, NMFS had preliminarily determined that a permit fee of up to $80 was appropriate. However, more information about the fishery and administrative costs of issuing permits indicates that the actual fee is expected to be approximately $40, and will be specified on the permit application form.

Changes From the Proposed Rule

There are no changes from the proposed rule.

Classification

The Regional Administrator has determined that the Bottomfish FMP Amendment 10 is necessary for the conservation and management of bottomfish and seamount groundfish and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and other applicable laws.

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

NMFS prepared a final regulatory flexibility analysis (FRFA). The FRFA incorporates the initial regulatory flexibility analysis (IRFA) prepared in support of the proposed rule, and the analyses completed to support the action. A summary is provided, as follows. (The preamble to the proposed rule included a detailed summary of the analyses contained in the IRFA, and that discussion is not repeated in its entirety here.)

The need for agency action and the objectives of the action are explained in the preambles to the proposed rule and final rule. While no comments were received specifically on the IRFA, one comment was received on the administrative cost of the permit. NMFS responded to that comment in the preamble of the final rule, and no changes were made to the FRFA as a result of the comment.

Description of Small Entities to Which the Rule Would Apply

The preferred alternative would apply to all vessels commercially fishing for bottomfish in EEZ waters around the CNMI. Given an annual average of 58 known commercial fish harvesting vessels from 2001–05, with an annual average fleet-wide adjusted revenue of $136,827, it is estimated that each vessel operator realized an average of $2,359 in annual ex-vessel gross revenues from their bottomfish fishing operations. Because each vessel has gross receipts under $4.0 million, is independently owned and operated, and is not dominant in its field, all vessels comprising this fishery are deemed to be small entities under the Small Business Administration's definition of a small fish harvester. In 2005, 62 vessels less than 40 ft (12.2 m) participated in the CNMI bottomfish fishery. As many as eleven medium/large vessels (i.e., greater than 40 feet or 12.2 m) are believed to have participated in this fishery since 1997. Information from fisheries officials in the CNMI indicate that there were six active medium and large vessels in 2006, and one in 2007.

Description of Alternatives with Economic Impacts on Small Businesses

Alternative 1 - No Action.

In the short term, fishing operations would be expected to continue their operations. In the longer-term, economic impacts (including market and non-market impacts) on small-vessel commercial, recreational and charter fishery participants could be negative if localized depletion of bottomfish occurs within their limited fishing range. Due to their larger vessel sizes, larger-scale commercial fishing operations would still have access to offshore fishing areas, but smaller vessels would not and would likely see bigger losses. Operators of smaller vessels already generally participate in more than one fishery over the course of a year and would likely shift their bottomfish fishing effort to other boat-based fisheries (e.g., pelagic troll or handline). Whether they would be able to recoup their lost bottomfish income or not is unclear, but a disruption of the nearshore bottomfish fishery would represent a reduction in their portfolio of fishing opportunities.

Alternative 2 - Prohibit commercial fishing for BMUS by vessels greater than 50 ft (15.2 m) within U.S. EEZ waters 3–50 nm (5.6–80.5 km) around the CNMI; require that operators of vessels greater than 50 ft (15.2 m) that land BMUS in the CNMI have Federal fishing permits and submit Federal logbooks of their associated catch and effort.

Alternative 2 is more positive than Alternative 1 for small-vessel commercial, recreational, and charter fishery participants by somewhat maintaining the opportunity for viable catch rates at banks within their limited fishing range around the CNMI. Unlike Alternative 1, Alternative 2 could cause negative impacts on the large-vessel commercial sector of the fishery through the realization of increased operating costs necessitated by the requirement that large vessels fish on banks greater than 50 nm (80.5 km) from the CNMI, although this impact might be offset initially by higher bottomfish catch rates at more distant seamounts that remain open to large vessels. Likely areas for bottomfish fishing over 50 nm (80.5 km) from shore are a chain of seamounts, some rising to shallow depths, about 200 nm (370 km) west of the Marianas Archipelago. As these areas have not been previously fished by the CNMI fleet, there would be a high cost associated with exploring the bottomfish fishing potential of these seamounts and their catch rates are unknown.

As compared to the No Action Alternative, Alternative 2 would eliminate commercial bottomfish fishing by large vessels within waters 3–50 nm (5.6–80.5 km) around the CNMI. There may be immediate impacts to vessel operations under this alternative as there may be some large commercial bottomfish vessels active within 50 nm (80.5 km) of the Northern Islands, though none are believed to be active in waters around the Southern Islands. This alternative would eliminate the potential renewal or expansion of the large vessel fishery sector in waters around the Saipan. Thus, Alternative 2 would have greater potential than Alternative 1 for controlling the risk of local depletion of areas around Saipan that are fished by small-scale fishermen. A chain of seamounts parallels the Marianas Archipelago nearly 200 nm (370 km) to the west. Some of these seamounts rise to shallow depths, but this chain is poorly charted and the amount of associated bottomfish habitat is not known. Whether large vessels would invest time and money in exploring this chain for bottomfish fishing grounds under this alternative is unknown. In the long-term, this alternative would foreclose the opportunity for commercial bottomfish fishing using large vessels in the closed areas.

This alternative would require the operators of CNMI-based vessels larger than 50 ft (15.2 m) in length commercially fishing for bottomfish in EEZ waters around the CNMI to obtain Federal permits and to submit Federal catch reports. Permit eligibility would not be restricted in any way, and the permit would be renewable on an annual basis. It is anticipated that initial

permit applications would require 0.5 hr per applicant, with renewals requiring an additional 0.5 hr annually. The fee for Federal permits is expected to be approximately $40 and will be specified in the permit application. This represents approximately 1.7 percent of revenues earned by individuals vessels in the 2001–05 fishery.

Alternative 3 - Limit onaga landings to no more than 250 lb (113 kg) per trip for any vessel fishing in U.S. EEZ waters beyond 3 nm (5.6 km) around the CNMI.

Alternative 3 would be expected to yield beneficial economic impacts for vessels less than or equal to 40 feet that target onaga. They would be expected to maintain their opportunities for viable onaga catch rates at banks within their limited fishing range, as the reduced fishing revenues expected with a per-trip limit of 250 lb (113 kg) of onaga would discourage competition from large-scale commercial onaga fishing operations. Economic impacts on these large-scale operations would be adverse as a 250 lb (113 kg) trip limit would not yield enough revenues to cover trip costs and these trips would be expected to become economically inefficient. This would be expected to discourage vessels greater than 40 ft (12.2 m) from entering the fishery.

Alternative 4 - Establish a limited access program with Federal permit and reporting requirements, for vessels targeting BMUS more than 3 nm (5.6 km) around the CNMI.

Alternative 4 would be likely to have a positive economic impact on catch rates and ex-vessel revenues for fishery participants with a documented history of bottomfish fishing in the EEZ, but a negative impact for undocumented or future potential participants. Limiting total fishery participation would be expected to result in increased catch rates for qualifying participants, fishing efficiency, and profits for those who qualify and continue fishing. Economic impacts on existing (and future) non-qualifiers would be highly adverse with no bottomfish catches or revenues available for this group. If limited access permits were transferable, this alternative would also create an economic value for these permits as the original qualifiers could subsequently sell(or lease) them to a new round of participants. This would represent a windfall profit to the original qualifiers.

This alternative would require the operators of all CNMI-based vessels commercially fishing for bottomfish in waters beyond 3 nm around the CNMI to obtain Federal permits and to submit Federal catch reports. Permit eligibility would not be restricted in any way, and the permit would be renewable on an annual basis. It is anticipated that initial permit applications would require 0.5 hr per applicant, with renewals requiring an additional 0.5 hr annually. The fee for Federal permits is expected to be approximately $40 and will be specified in the permit application. This represents approximately 1.7 percent of revenues earned by individuals vessels in the 2001–05 fishery Based on experience in other fisheries, it is expected that the time requirement for filling out Federal catch reports would be approximately 20 min per vessel per fishing day. No special skills beyond the ability to read and write in English would be required to fill out the permit application or logbooks.

Alternative 5 (Preferred) - Prohibit commercial fishing for BMUS by medium and large vessels within U.S. EEZ waters 0–50 nm (0–80.5 km) around CNMI in the area from the southern boundary of the EEZ (south of Rota) to the north latitude of 16 10' 47'' (halfway between Farallon de Medinilla to Anatahan) and within EEZ waters 0–10 nm (0–18.5 km) around Alamagan Island; require that medium and large vessels fishing commercially for BMUS in EEZ waters around the CNMI carry operating VMS units, and complete Federal sales reports for any BMUS sold in the CNMI; require that operators of all vessels fishing commercially for BMUS in EEZ waters around the CNMI have Federal fishing permits and submit Federal logbooks of their associated catch and effort.

The impacts of Alternative 5 on medium/large vessels would be similar to those of Alternative 2. However, the impacts to the catch rates and ex-vessel revenues of small vessel fishermen would be more pronounced as both medium and large commercial bottomfish vessels over 40 feet (12.2 m) in length would be prohibited from fishing around Saipan and Alamagan. The general absence of medium/large vessels from the recent fishery suggests that the area is not optimal for the profitability of these vessels and fishing in the restricted area may be more opportunistic than planned. Therefore, restricting medium/large vessels in the area may yield only a minimal adverse economic impact to individual vessels mitigated by profitable opportunities elsewhere.

This alternative would require the operators of all CNMI-based vessels commercially fishing for bottomfish in waters around the CNMI to obtain Federal permits and to submit Federal catch reports. Permit eligibility would not be restricted in any way, and the permit would be renewable on an annual basis. It is anticipated that initial permit applications would require 0.5 hr per applicant, with renewals requiring an additional 0.5 hr annually. The fee for Federal permits has not been determined, but it may be approximately $40. This represents approximately 1.7 percent of revenues earned by individuals vessels in the 2001–05 fishery. Based on experience in other fisheries, it is expected that the time requirement for filling out Federal catch reports would be approximately 20 min per vessel per fishing day. No special skills beyond the ability to read and write in English would be required to fill out the permit application, logbooks, or sales reports.

Steps Taken by the Agency to Minimize Adverse Impacts

Choosing the no-action alternative would yield no economic impact and would be preferred by the potentially impacted vessels. However, the no-action alternative could result in excessive fishing pressure and, in the worst-case scenario, contribute to overfishing which is inconsistent with the Magnuson-Stevens Act. All other alternatives would be more restrictive and would yield more adverse economic impact than the preferred alternative. Therefore, NMFS concludes that the preferred alternative best minimizes the economic impacts on small entities consistent with the objectives of the Magnuson-Stevens Act and this rulemaking.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide was prepared and will be provided to affected small entities. In addition, copies of this final rule and the guide are available from the William L. Robinson(see **ADDRESSES**) and from *www.fpir.noaa.gov*.

This final rule contains collection-of-information requirements subject to the PRA. These requirements have been submitted to OMB for approval. NMFS will publish a notice when these requirements have been approved by OMB and are effective (see **DATES**).

Permit eligibility would not be restricted in any way, and the permit would be renewable on an annual basis. The initial permit applications will require 0.5 hr per applicant, with renewals requiring an additional 0.5 hr annually. It is estimated that NMFS may receive and process up to 50 to 125 permit applications each year. Thus, the total collection-of-information burden to fishermen for permit applications is estimated at 25 to 62 hours per year. NMFS has determined that a permit fee of up to $80 is appropriate to cover the administrative costs of the permit. The fee is expected to be approximately $40 and will be specified in the permit application.

The final rule will require the operators of all vessels commercially fishing for bottomfish in U.S. EEZ waters around the CNMI to complete and submit Federal catch reports. The time requirement to complete Federal catch reports is approximately 20 minutes per vessel per fishing day. Assuming that the 50 to 125 vessels make 10 to 50 trips per year, and average 1.2 days per trip, the program will generate in the range of 600 to 7,500 daily fishing logbooks per year. Thus, the total collection-of-information burden estimate for fishing data reporting is estimated at 200 to 2,500 hours per year.

The final rule will also require the operators of medium and large commercial bottomfish vessels to complete and submit Federal sales

reports. The time requirement for completing Federal sales reports is approximately 35 minutes per vessel per fishing trip. Assuming six medium and large vessels make 15 trips per year, the program will generate approximately 90 sales reports per year. Thus, the total collection-of-information burden estimate for sales data reporting by fishermen is estimated at 52 hours per year. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining data needed, and completing and reviewing the information.

For the medium and large vessel identification requirements, the burden is estimated at 45 minutes to paint each vessel (15 minutes for each of three locations on the vessel where marking is required), and about $10 for paint and supplies. Assuming six medium and large bottomfish vessels are active, the total collection-of-information burden estimate is 4.5 hours and $60.

For the medium and large vessel VMS requirements, the estimated time per response is four hours to install a VMS unit, and two hours per year to repair and maintain a VMS unit. Assuming six medium and large bottomfish vessels are active, the total collection-of-information burden estimate for compliance with VMS requirements is 24 hours the first year and 12 hours annually after that.

Send comments on these or any other aspects of the collection of information to William L. Robinson (see **ADDRESSES**), and by email to *David__Rostker@omb.eop.gov* or by fax to 202–395–7285.

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

List of Subjects in 50 CFR Part 665

Administrative practice and procedure, American Samoa, Fisheries, Fishing, Guam, Hawaii, Hawaiian Natives, Northern Mariana Islands, Reporting and recordkeeping requirements.

Dated: December 3, 2008.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 665 is amended as follows:

PART 665—FISHERIES IN THE WESTERN PACIFIC

■ 1. The authority citation for part 665 continues to read as follows:

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

■ 2. In § 665.12 add the definitions of ''CNMI commercial bottomfish permit'', ''Medium vessel'', and ''Receiving vessel'' in alphabetical order; in the definition of ''Bottomfish management unit species'' revise the entries for longtail snapper and pink snapper; in the definition of ''Seamount groundfish'' revise the entry for armorhead, and revise the definitions of ''Receiving vessel permit'' and ''Vessel monitoring system unit'' to read as follows:

§ 665.12 Definitions.

* * * * *

*Bottomfish management unit species** * *

Common name	Local Name	Scientific
* * * * * * *		
Longtail snapper	Onaga, ula'ula (H); palu-loa (S)	*Etelis coruscans*
* * * * * * *		
Pink snapper	Opakapaka (H); palu-ena'ena (S); gadao (G)	*Pristipomoides filamentosus*
* * * * * * *		

CNMI commercial bottomfish permit means the permit required by § 665.61 (a)(5) to engage in commercial fishing for bottomfish management unit species in U.S. EEZ waters around the CNMI.

* * * * *

Medium vessel, as used in §§ 665.61 through 665.72, means any vessel equal to or more than 40 ft (12.2 m) and less than 50 ft (15.2 m) in length overall.

* * * * *

Receiving vessel means a vessel that receives fish or fish products from a fishing vessel, and with regard to a vessel holding a permit under § 665.21(e) that also lands Pacific Pelagic Management Unit Species taken by other vessels using longline gear.

Receiving vessel permit means a permit required by § 665.21(e) for a receiving vessel to transship or land Pacific pelagic management unit species taken by other vessels using longline gear.

* * * * *

Seamount groundfish means the following species:

Common name	Scientific name
Armorhead	*Pseudopentaceros richardsoni*
* * * * * * *	

* * * * *

Vessel monitoring system unit (VMS unit) means the hardware and software owned by NMFS, installed on vessels by NMFS, and required to track and transmit the positions of certain vessels.

* * * * *

■ 3. In § 665.13, add a new paragraph (f)(2)(viii) to read as follows:

§ 665.13 Permits and fees.

* * * * *

(f) *Fees.* * * *

(2) * * *

(viii) CNMI commercial bottomfish permit.

* * * * *

■ 4. In § 665.14, revise paragraphs (a)(1), (a)(2)(i), and (c) to read as follows:

§ 665.14 Reporting and recordkeeping.

(a) *Fishing record forms.* (1) *Applicability.* The operator of any fishing vessel subject to the requirements of §§ 665.21, 665.41, 665.61(a)(2), 665.61(a)(3), 665.61(a)(4), 665.61(a)(5), 665.81, or 665.602 must maintain on board the vessel an accurate and complete record of catch, effort, and other data on paper report forms provided by the Regional Administrator, or electronically as specified and approved by the Regional

Administrator. All information specified by the Regional Administrator must be recorded on paper or electronically within 24 hours after the completion of each fishing day. The logbook information, reported on paper or electronically, for each day of the fishing trip must be signed and dated or otherwise authenticated by the vessel operator in the manner determined by the Regional Administrator, and be submitted or transmitted via an approved method as specified by the Regional Administrator, and as required by this paragraph (a).

(2) *Timeliness of submission.* (i) If fishing was authorized under a permit pursuant to §§ 665.21, 665.41, 665.61(a)(3), 665.61(a)(5), or 665.81, the vessel operator must submit the original logbook form for each day of the fishing trip to the Regional Administrator within 72 hours of the end of each fishing trip, except as allowed in paragraph (a)(2)(iii) of this section.

* * * * *

(c) *Sales report.* The operator of any fishing vessel subject to the requirements of § 665.41, or the owner of a medium or large fishing vessel subject to the requirements of § 665.61(a)(5), must submit to the Regional Administrator, within 72 hours of offloading crustacean or bottomfish management unit species, respectively, an accurate and complete sales report on a form provided by the Regional Administrator. The form must be signed and dated by the fishing vessel operator.

* * * * *

§ 665.22 [Redesignated in part]

■ 5. Redesignate paragraphs (o) through (u) in § 665.22 as paragraphs (m) through (s) in § 665.15.

■ 6. In § 665.15, revise newly redesignated paragraphs (m) through (s) to read as follows:

§ 665.15 Prohibitions.

* * * * *

(m) Fish for, catch, or harvest management unit species with longline gear without an operational VMS unit on board the vessel after installation of the VMS unit by NMFS, in violation of § 665.19(e)(2).

(n) Possess management unit species, that were harvested after NMFS has installed the VMS unit on the vessel, on board that vessel without an operation VMS unit, in violation of 665.19(e)(2).

(o) Interfere with, tamper with, alter, damage, disable, or impede the operation of a VMS unit or attempt any of the same; or move or remove a VMS unit without the prior permission of the SAC in violation of § 665.19(e)(3).

(p) Make a false statement, oral or written, to an authorized officer, regarding the use, operation, or maintenance of a VMS unit, in violation of § 665.19(e)(1).

(q) Interfere with, impede, delay, or prevent the installation, maintenance, repair, inspection, or removal of a VMS unit, in violation of § 665.19(e)(1).

(r) Interfere with, impede, delay, or prevent access to a VMS unit by a NMFS observer, in violation of § 665.28(f)(4).

(s) Connect or leave connected additional equipment to a VMS unit without the prior approval of the SAC, in violation of § 665.19(f).

■ 7. In § 665.16, add new paragraph (e)(2) to read as follows:

§ 665.16 Vessel identification.

* * * * *

(e) * * *

(2) A vessel less than 40 ft (12.2 m) in length registered for use under a CNMI commercial bottomfish permit that is in compliance with CNMI bottomfish vessel registration and marking requirements.

§ 665.25 [Redesignated as § 665.29]

■ 8. Redesignate § 665.25 as new § 665.19, and revise newly-redesignated § 665.19 to read as follows:

§ 665.19 Vessel monitoring system.

(a) *Applicability.* The holder of any of the following permits is subject to the vessel monitoring system requirements in this part:

(1) Hawaii longline limited access permit issued pursuant to 665.21(b);

(2) American Samoa longline limited entry permit, for vessel size Class C or D, issued pursuant to 665.21(c);

(3) Vessels permitted to fish in Crustaceans Permit Area 1 VMS Subarea; or

(4) CNMI commercial bottomfish permit, if the vessel is a medium or large bottomfish vessel, issued pursuant to 665.61(a)(5).

(b) *VMS unit.* Only a VMS unit owned by NMFS and installed by NMFS complies with the requirement of this subpart.

(c) *Notification.* After a permit holder subject to this part has been notified by the SAC of a specific date for installation of a VMS unit on the permit holder's vessel, the vessel must carry and operate the VMS unit after the date scheduled for installation.

(d) *Fees and charges.* During the experimental VMS program, the holder of a permit subject to this part shall not be assessed any fee or other charges to obtain and use a VMS unit, including the communication charges related directly to requirements under this section. Communication charges related to any additional equipment attached to the VMS unit by the owner or operator shall be the responsibility of the owner or operator and not NMFS.

(e) *Permit holder duties.* The holder of a permit subject to this part, and master of the vessel, must:

(1) Provide opportunity for the SAC to install and make operational a VMS unit after notification.

(2) Carry and continuously operate the VMS unit on board whenever the vessel is at sea.

(3) Not remove, relocate, or make non-operational the VMS unit without prior approval from the SAC.

(f) *Authorization by the SAC.* The SAC has authority over the installation and operation of the VMS unit. The SAC may authorize the connection or order the disconnection of additional equipment, including a computer, to any VMS unit when deemed appropriate by the SAC.

■ 9. In § 665.61, add new paragraph (a)(5) to read as follows:

§ 665.61 Permits.

(a)* * *

* * * * *

(5) *Commonwealth of the Northern Mariana Islands (CNMI) commercial.* The owner of any vessel used to commercially fish for, transship, receive, or land bottomfish management unit species shoreward of the outer boundary of the CNMI management subarea must have a permit issued under this section, and the permit must be registered for use with that vessel.

* * * * *

■ 10. In § 665.62, add new paragraphs (o) through (r) to read as follows:

§ 665.62 Prohibitions.

* * * * *

(o) Use a vessel to fish commercially for bottomfish management unit species shoreward of the outer boundary of the CNMI subarea without a valid CNMI commercial bottomfish permit registered for use with that vessel, in violation of § 665.61(a)(5).

(p) Use a medium or large vessel to fish for bottomfish management unit species within the CNMI medium and large vessel bottomfish prohibited areas, as defined in § 665.70(b).

(q) Retain, land, possess, sell, or offer for sale, shoreward of the outer boundary of the CNMI subarea, bottomfish management unit species that were harvested in violation of § 665.62(p), except that bottomfish management unit species that are harvested legally may be transferred to

a receiving vessel shoreward of the outer boundary of the CNMI medium and large vessel bottomfish prohibited area as defined in § 665.70(b).

(r) Falsify or fail to make, keep, maintain, or submit a Federal logbook as required under § 665.14(a) when using a vessel to engage in commercial fishing for bottomfish management unit species shoreward of the outer boundary of the CNMI subarea in violation of § 665.14(a).

■ 11. In § 665.69, remove paragraph (a)(7) and redesignate paragraph (a)(8) as paragraph (a)(7), and revise paragraphs (a) introductory text, (a)(6), and (c) to read as follows:

§ 665.69 Management subareas.

(a) The bottomfish fishery management area is divided into subareas with the following designations and boundaries:

* * * * *

(6) CNMI Management Subarea means the EEZ seaward of the CNMI. The CNMI Management Subarea is further divided into subareas with the following designations and boundaries:

(i) CNMI Inshore Area means that portion of the EEZ within 3 nautical miles of the shoreline of the CNMI.

(ii) CNMI Offshore Area means that portion of the EEZ seaward of 3 nautical miles from the shoreline of the CNMI.

* * * * *

(c) The outer boundary of each fishery management area is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured, or is coterminous with adjacent international maritime boundaries, except that the outer boundary of the CNMI Inshore Area is 3 nautical miles from the shoreline. The boundary between the fishery management areas of Guam and the CNMI extends to those points which are equidistant between Guam and the island of Rota in the CNMI.

■ 12. Revise § 665.70 to read as follows:

§ 665.70 Bottomfish fishery area management.

(a) *Guam large vessel bottomfish prohibited area (Area GU–1).* A large vessel of the United States may not be used to fish for bottomfish management unit species in the Guam large vessel bottomfish prohibited area, defined as the U.S. EEZ waters surrounding Guam that are enclosed by straight lines connecting the following coordinates in the order listed:

Point	N. lat.	E. long.
GU-1-A	14° 16′	144° 17′
GU-1-B	13° 50′	143° 52′
GU-1-C	13° 17′	143° 46′
GU-1-D	12° 50′	143° 54′
GU-1-E	12° 30′	144° 14′
GU-1-F	12° 25′	144° 51′
GU-1-G	12° 57′	145° 33″
GU-1-H	13° 12′	145° 43′
GU-1-I	13° 29′ 44″	145° 48′ 27″
GU-1-A	14° 16′	144° 17′

(b) *CNMI medium and large vessel bottomfish prohibited areas.* A medium or large vessel of the United States may not be used to fish commercially for bottomfish management unit species in the following areas:

(1) *CNMI Southern Islands (Area NM–1).* The CNMI Southern Islands prohibited area is defined as the waters of the U.S. EEZ surrounding the CNMI that are enclosed by straight lines connecting the following coordinates in the order listed:

Point	N. lat.	E. long.
NM–1–A	14° 9′	144° 15′
NM–1–B	16° 10′ 47″	145° 12′
NM–1–C	16° 10′ 47″	146° 53′
NM–1–D	14° 48′	146° 33′
NM–1–E	13° 27′	145° 43′
NM–1–A	14° 9′	144° 15′

(2) *CNMI Alamagan Island (Area NM–2).* The CNMI Alamagan Island prohibited area is defined as the waters of the U.S. EEZ surrounding the CNMI that are enclosed by straight lines connecting the following coordinates in the order listed:

Point	N. lat.	E. long.
NM–2–A	17° 26′	145° 40′
NM–2–B	17° 46′	145° 40′
NM–2–C	17° 46′	146° 00′
NM–2–D	17° 26′	146° 00′
NM–2–A	17° 26′	145° 40′

[FR Doc. E8–29512 Filed 12–9–08; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

RIN 0648–AV29

Fisheries in the Western Pacific; Crustacean Fisheries; Deepwater Shrimp

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

ACTION: Final rule; correction.

SUMMARY: This document contains a correction to the final regulations that were published in the **Federal Register** on November 21, 2008. This correction revises the amendatory instruction in the final rule to accurately reflect paragraph designation in the section on permit fees.

DATES: The amendment to § 665.13 will require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). When OMB approval is received, the effective date will be announced in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Brett Wiedoff, NMFS Pacific Islands Region, Sustainable Fisheries, 808–944–2272.

SUPPLEMENTARY INFORMATION: The final rule published on November 21, 2008, designated deepwater shrimp of the genus Heterocarpus as management unit species (MUS), and requires Federal permits and data reporting for deepwater shrimp fishing in Federal waters of the western Pacific (73 FR 70603). Also on November 21, 2008, NMFS published another final rule that designated three species of pelagic squid as management unit species, and established permitting and reporting requirements for squid jig fishing vessels (73 FR 70600). In the amendatory instruction for § 665.13 in both final rules, an identical paragraph designation was assigned for both new permits fees.

This correction makes a change to the amendatory instruction in the deepwater shrimp final rule to accurately designate the paragraphs in § 665.13. This change is necessary to prevent duplicate paragraph designation. In the amendatory instruction for § 665.13, the phrase, ''...and add a new paragraph (f)(2)(vi)...'', is revised to read ''...and add a new paragraph (f)(2)(vii)....''

Correction

Accordingly, the final rule amendatory instruction published on November 21, 2008 (73 FR 70603), is corrected to read as follows:

§ 665.13 [Amended]

On page 70604, column 3, the third amendatory instruction is corrected to read as follows:

■ 3. In § 665.13, revise paragraphs (f)(2)(i) through (f)(2)(v), and add a new paragraph (f)(2)(vii) to read as follows:

§ 665.13 Permits and fees.

* * * * *

(f) * * *

(2) * * *

(i) Hawaii longline limited access permit.

(ii) Mau Zone limited access permit.

(iii) Coral reef ecosystem special permit.

(iv) American Samoa longline limited access permit.

(v) Main Hawaiian Islands non-commercial bottomfish permit.

* * * * *

(vii) Crustaceans permit.

* * * * *

Dated: December 5, 2008.

Emily H. Menashes,

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

[FR Doc. E8–29496 Filed 12–11–08; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 73, No. 240
Friday, December 12, 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 COMMERCE

International Trade Administration

19 CFR Part 360

[Docket Number 0809261282–81283–01]

RIN 0625–AA82

Steel Import Monitoring and Analysis System

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Proposed rule.

SUMMARY: The Department of Commerce publishes this proposed rule to request public comment on modifications to the Steel Import Monitoring and Analysis (SIMA) System. These modifications are proposed to extend the current SIMA system until March 21, 2013. This extension would continue the Department's ability to track steel imports and make them publicly available in advance of the full trade data release.

DATES: Comments must be submitted on or before 5 p.m. EST, January 12, 2009.

ADDRESSES: Comments on the SIMA system may be submitted through any of the following:

- *Mail:* Kelly Parkhill, Director for Industry Support and Analysis, Import Administration, Room 3713, Department of Commerce, 14th and Constitution Ave., NW., Washington, DC 20230.
- *E-mail: steel_license@ita.doc.gov*. Please state ''Comments on the 2008 Proposed Rule'' in the subject line.
- *Federal e-Rulemaking portal: http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: For information on the SIMA system, please contact Kelly Parkhill (202) 482–3791; Julie Al-Saadawi (202) 482–1930.

SUPPLEMENTARY INFORMATION: An interim final rule revising part 360 was published in the **Federal Register** March 11, 2005, 70 FR 12136. On December 5, 2005, the Department of Commerce published its final rule on the current SIMA system (70 FR 72373). Under the final rule, the system expires on March 21, 2009, unless extended upon review and notification in the **Federal Register**.

The purpose of the SIMA system is to provide steel producers, steel consumers, importers, and the general public with accurate and timely information on anticipated imports of certain steel products. Import licenses, obtained through the Internet-based SIMA licensing system, are required on U.S. imports of basic steel mill products. Aggregate import data obtained from the licenses is updated weekly and posted on the SIMA Web site monitor. Details of the current system can be found at *http://ia.ita.doc.gov/steel/license/*.

Proposal: The Department proposes to extend the SIMA system beyond its current expiration date for an additional period of four years (see 19 CFR part 360).

All comments responding to this notice will be a matter of public record and available for public inspection and copying at Import Administration's Central Records Unit, Room 1117, between the hours of 8:30 a.m. and 5 p.m. on business days.

Classification

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 that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities as that term is defined in the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* A summary of the factual basis for this certification is below.

This proposed rule will not have a significant economic impact on a substantial number of companies. Companies are already familiar with the licensing of certain steel products under the current system. In most cases, brokerage companies will apply for the license for the steel importers. Most brokerage companies that are currently involved in filing documentation for importing goods into the U.S., are accustomed to Customs and Border Protection's automated systems. Today, more than 99% of the Customs filings are handled electronically. Therefore, the Web-based nature of this simple license application should not be a significant obstacle to any firm in completing this requirement. However, should a company need to apply for an ID or license non-electronically, a fax/phone option will be available at Commerce during regular business hours. There is no cost to register for a company-specific ID user code and no cost to file for the license. Each license form is expected to take less than 10 minutes to complete using much of the same information used to complete the Customs Entry Summary documentation. This is the one additional requirement of the importers or their representative to fulfill U.S. entry requirements to import each covered steel product shipment. Commerce estimates that fewer than five percent of the licenses would be filed by brokerage companies or other businesses that would be considered small entities. Therefore, Commerce estimates that the likely aggregate license costs attributable to small entities would be one percent of the estimated total $2,000,000 cost to all steel importers, or $20,000 would represent the cost that small entities will incur as a result of this proposed rule.

Paperwork Reduction Act. This proposed rule contains collection-of-information requirements subject to review and approval by OMB under the Paperwork Reduction Act (PRA). These requirements have been approved by OMB (OMB No.: 0625–0245; Expiration Date: 09/30/2011). Public reporting for this collection of information is estimated to be less than 10 minutes per response, including the time for reviewing instructions, and completing and reviewing the collection of information.

Paperwork Reduction Act Data:
OMB Number: 0625–0245.
ITA Number: ITA–4141P.
Type of Review: Regular Submission.
Affected Public: Business or other for-profit.
Estimated Number of Registered Users: 3,500.
Estimated Time per Response: Less than 10 minutes.
Estimated Total Annual Burden Hours: 100,000 hours.
Estimated Total Annual Costs: $2,000,000.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a

penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number.

Executive Order 12866

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

Executive Order 13132

This rule does not contain policies with federalism implications as that term is defined in EO 13132.

List of Subjects in 19 CFR Part 360

Administrative practice and procedure, Business and industry, Imports, Reporting and recordkeeping requirements, Steel.

For reasons discussed in the preamble, we propose amending 19 CFR 360 as follows:

PART 360—STEEL IMPORT MONITORING AND ANALYSIS SYSTEM

1. The authority citation for part 360 continues to read as follows:

Authority: 13 U.S.C. 301(a) and 302.

2. Section 360.105 is revised to read as follows.

§ 360.105 Duration of the steel import licensing requirement.

The licensing program will be in effect through March 21, 2013, but may be extended upon review and notification in the **Federal Register** prior to this expiration date. Licenses will be required on all subject imports entered during this period, even if the entry summary documents are not filed until after the expiration of this program. The licenses will be valid for 10 business days after the expiration of this program to allow for the final filing of required Customs documentation.

Dated: November 26, 2008.

Christopher A. Padilla,

Under Secretary for International Trade.

[FR Doc. E8–28683 Filed 12–11–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Chapter I

[Docket No. FDA–2008–N–0622]

Withdrawal of Certain Proposed Rules and Other Proposed Actions

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of withdrawal.

SUMMARY: The Food and Drug Administration (FDA) is announcing the withdrawal of a certain advance notice of proposed rulemaking (ANPRM) and proposed rules (NPRMs) that published in the **Federal Register** more than 5 years ago. These proposals are no longer considered viable candidates for final action at this time.

DATES: The proposals identified in this document are withdrawn as of December 12, 2008.

FOR FURTHER INFORMATION CONTACT:

For Center for Drug Evaluation and Research actions: Michael D. Bernstein, Office of Regulatory Policy, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6240, Silver Spring, MD 20993–0002, 301–796–3478.

For Center for Food Safety and Nutrition actions: Felicia Ellison, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1264.

For all other actions: Erik Mettler, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., WO1, Rm. 4324, Silver Spring, MD 20993, 301–796–4830.

SUPPLEMENTARY INFORMATION:

I. Background

In 1990, the Food and Drug Administration (FDA) began the process of conducting periodic, comprehensive reviews of its regulations process that included reviewing the backlog of ANPRMs, notices of proposed rulemaking, and other notices for which no final action or withdrawal notice had been issued. In the **Federal Register** of December 30, 1991 (56 FR 67440), FDA issued its first notice withdrawing 89 proposed rules that had published before December 31, 1985, but had never been finalized. Then again, in the **Federal Register** of January 20, 1994 (59 FR 3042), the agency withdrew an additional nine outstanding proposed rules.

FDA published a notice in the **Federal Register** of April 22, 2003 (68 FR 19766), announcing its intent to withdraw 84 proposed rules and other proposed actions that had published in the **Federal Register** more than 5 years ago, but that had never been finalized. Included in this list were 19 proposed rules that were originally proposed for withdrawal in 1991, but at that time the agency decided to defer its decision to withdraw or finalize them until a later date. In the **Federal Register** of November 26, 2004 (69 FR 68831), the agency withdrew 81 proposed rules and other proposed actions.

The agency has conducted another review of its regulations process and found withdrawal is justified for four proposals.

II. NPRMs and ANPRMs To Be Withdrawn

Title: Labeling Declaration for FD&C Yellow No. 6 and FD&C Yellow No. 5; Amendment of Standard of Identity for Cheese Product (Proposed Rule, 92N–0334 (60 FR 37611, July 21, 1995))

Reason: Since the publication of this proposal, the underlying science and economic analyses have become outdated.

Title: Over-the-Counter Drug Products Containing Phenylpropanolamine; Required Labeling (Proposed Rule, 95N–0060 (61 FR 5912, February 14, 1996))

Reason: The agency's ''Over-the-Counter Drug Products Containing Phenylpropanolamine; Required Labeling'' (Proposed Rule, 95N–0060 (61 FR 5912, February 14, 1996)) has been superseded by the issuance of a new proposed rule entitled ''Phenylpropanolamine-Containing Drug Products for Over-the-Counter Human Use; Tentative Final Monographs'' (1976N–0052N and 1981N–0022 (70 FR 75988, December 22, 2005)).

Title: Reinvention of Administrative Procedures Regulations (ANPRM, 96N–0163 (61 FR 28116, June 4, 1996))

Reason: The ANPRM requested comments on whether there should be possible changes to various existing administrative regulations under the ''Reinventing Government'' initiative. Since publication, some of the regulations have been addressed in separate rulemakings. The remaining regulations are not under current consideration for rulemaking.

Title: Marketing Exclusivity and Patent Provisions for Certain Antibiotic Drugs (Proposed Rule, 99N–3088 (65 FR 3623, January 24, 2000))

Reason: The provision of law which ''Marketing Exclusivity and Patent Provisions for Certain Antibiotic Drugs'' (Proposed Rule) was intended to implement, section 125(d) of the Medicare Modernization Act (Public Law 105–115), was superseded by the enactment of Public Law 110–379 (S. 3560) on October 8, 2008, which included new provisions on marketing exclusivity and patent provisions for certain antibiotic drugs.

The withdrawal of the proposals identified in this document does not preclude the agency from reinstituting rulemaking concerning the issues addressed in the proposals listed in the previous paragraphs. Should we decide to undertake such rulemakings in the future, we will re-propose the actions and provide new opportunities for comment. Furthermore, this notice is only intended to address the specific actions identified in this document, and not any other pending proposals that the agency has issued or is considering.

The agency notes that withdrawal of a proposal does not necessarily mean that the preamble statement of the proposal no longer reflects the current position of FDA on the matter addressed. You may wish to review the agency's Web site (*http://www.fda.gov*) for any current guidance on the matter.

III. Withdrawal of the Proposed Rules and ANPRM

For the reasons described in this document, FDA is withdrawing the aforementioned proposed rules and ANPRM.

Dated: December 3, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–29331 Filed 12–11–08; 8:45 am]

BILLING CODE 4160–01–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0863; FRL–8751–5]

Revisions to the California State Implementation Plan, Approval of the Ventura County Air Pollution Control District—Reasonably Available Control Technology Analysis

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Ventura County Air Pollution Control District (VCAPCD) portion of the California State Implementation Plan (SIP). These revisions concern the District's analysis of whether its rules meet Reasonably Available Control Technology (RACT) under the 8-hour ozone National Ambient Air Quality Standard (NAAQS). We are approving the analysis under the Clean Air Act as amended in 1990 (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

DATES: Any comments must arrive by January 12, 2009.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2008–0863, by one of the following methods:

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

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.*, copyrighted material), and some may not be publicly available in either location (*e.g.*, CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Stanley Tong, EPA Region IX, (415) 947–4122, *tong.stanley@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

Table of Contents

I. The State's Submittal
- A. What document did the State submit?
- B. Are there other versions of this document?
- C. What is the purpose of the submitted RACT SIP analysis?

II. EPA's Evaluation and Action
- A. How is EPA evaluating the RACT SIP analysis?
- B. Does the analysis meet the evaluation criteria?
- C. EPA recommendations to strengthen the SIP
- D. Public Comment and Final Action

III. Statutory and Executive Order Reviews

I. The State's Submittal

A. What document did the State submit?

Table 1 lists the document addressed by this proposal with the date that it was adopted by the local air agency and submitted by the California Air Resources Board.

TABLE 1—SUBMITTED DOCUMENT

Local agency	Document	Adopted	Submitted
VCAPCD	2006 Reasonably Available Control Technology Analysis	06/27/06	01/31/07

This submittal became complete by operation of law on July 31, 2007.

B. Are there other versions of this document?

There is no previous version of this document in the SIP.

C. What is the purpose of the submitted RACT SIP analysis?

VOCs and NO_X help produce ground-level ozone and smog, which harm human health and the environment. Section 110(a) of the CAA requires States to submit regulations that control VOC and NO_X emissions. Section 172(c)(1) and 182 require areas that are designated as moderate or above for ozone non-attainment to adopt RACT. The VCAPCD falls under this requirement as it is designated as a moderate ozone non-attainment area under the 8-hour NAAQS for ozone (40 CFR 81.305; 69 FR 23858, at 23889, April 30, 2004). On May 20, 2008, EPA granted California's request for voluntary reclassification of the Ventura County ozone non-attainment area from ''moderate'' to ''serious''. (73 FR 29073). Therefore, under both the 2004 classification as a moderate ozone non-attainment area, and the 2008 reclassification as a serious ozone non-attainment area, the VCAPCD must, at a minimum, adopt RACT-level controls for sources covered by a Control Techniques Guidelines (CTG) document and for any major non-CTG source. EPA evaluated VCAPCD's submittal based on a moderate ozone non-attainment area classification since the District adopted its 2006 certification based on this classification. We note, however, that the VCAPCD still has an obligation to submit a RACT SIP certification for the serious classification.

Section IV.G. of EPA's final rule to implement the 8-hour ozone NAAQS (70 FR 71612, November 29, 2005) discusses RACT requirements. It states in part that where a RACT SIP is required, State SIPs implementing the 8-hour standard generally must assure that RACT is met, either through a certification that previously required RACT controls represent RACT for 8-hour implementation purposes or through a new RACT determination. The submitted document provides VCAPCD's analysis of their RACT rules for the 8-hour NAAQS for ozone. EPA's technical support document (TSD) has more information about VCAPCD's RACT analysis.

II. EPA's Evaluation and Action

A. How is EPA evaluating the RACT SIP analysis?

Rules, guidance and policy documents that we use to evaluate whether the analysis fulfills RACT include the following:

1. Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard (70 FR 71612; November 29, 2005).
2. Letter from William T. Harnett to Regional Air Division Directors, (May 18, 2006), ''RACT Qs & As—Reasonably Available Control Technology (RACT) Questions and Answers''.
3. State Implementation Plans, General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990 (57 FR 13498; April 16, 1992).
4. RACT SIPs, Letter dated March 9, 2006 from EPA Region IX (Andrew Steckel) to CARB (Kurt Karperos) describing Region IX's understanding of what constitutes a minimally acceptable RACT SIP.
5. RACT SIPs, Letter dated April 4, 2006 from EPA Region IX (Andrew Steckel) to CARB (Kurt Karperos) listing EPA's current CTGs, ACTs, and other documents which may help to establish RACT.
6. Comment letter dated June 5, 2006 from EPA Region IX (Andrew Steckel) to VCAPCD (Chuck Thomas) on the 8-hour Ozone Reasonably Available Control Technology—State Implementation Plan (RACT SIP) Analysis, draft staff report dated May 2006.

B. Does the analysis meet the evaluation criteria?

VCAPCD's staff report included a listing of all CTG source categories and matched those categories with the corresponding District rule which implemented RACT. Given its designation as a moderate ozone non-attainment area, VCAPCD was also required to analyze RACT for all sources that emit or have the potential to emit at least 100 tons per year (tpy) of VOC or NO_X. VCAPCD staff searched their permitting database for all facilities that emitted at least 25 tpy of VOC or NO_X, identified approximately 27 such facilities, and listed them in Table B of their staff report. Table B also provides a matrix of the major sources of VOC and NO_X emissions in Ventura County and the district rules applicable to those facilities. We reviewed the California Air Resources Board's (CARB) emissions database and did not identify any major sources in VCAPCD for which there was no corresponding District rule. Generally, VCAPCD's certification is based on the District's conclusion that District rules met RACT because their rule development process requires them to analyze CARB and EPA publications, including CTGs, to assess the feasibility and the cost of control techniques, and California State regulations require them to apply RACT and Best Available Retrofit Technology (BARCT) because VCAPCD is classified as a severe ozone non-attainment area for the State ozone standard. Based on a comparison of a sampling of VCAPCD's rules with rules in other air districts and States, we conclude that the VCAPCD rules meet RACT.

Table A–2 of VCAPCD's staff report includes a listing of source categories and CTG/ACTs for which there are no applicable District Rules and no stationary sources within the District. The table lists not only CTGs, but also ACTs and other documents relevant to establishing RACT at major sources. Negative declarations are only required for CTG source categories for which the District has no sources covered by the CTGs. A negative declaration is not required for ACTs or for major non-CTG source categories. Table 1 below lists the CTG source categories that remain after excluding the ACTs and non-CTG source categories from VCAPCD's Table A–2. EPA is acting on the negative declarations listed in Table 1 below instead of VCAPCD's Table A–2 which includes both CTGs and non-CTG source categories.

TABLE 1—VCAPCD NEGATIVE DECLARATIONS

CTG source category	CTG reference document
Automobile Coatings; Metal Coil, Container, and Closure.	EPA–450/2–77–008—Control of Volatile Organic Emissions from Existing Stationary Sources—Volume II: Surface Coating of Cans, Coils, Paper, Fabrics, Automobiles, and Light-Duty Trucks.
Wood Coating	EPA–450/2–78–032—Control of Volatile Organic Emissions from Existing Stationary Sources, Volume VII: Factory Surface of Flat Wood Paneling.
Large Appliances, Surface Coating	EPA–450/2–77–034—Control of Volatile Organic Emissions from Existing Stationary Sources, Volume V: Surface Coating of Large Appliances.

TABLE 1—VCAPCD NEGATIVE DECLARATIONS—Continued

CTG source category	CTG reference document
Magnetic Wire	EPA–450/2–77–033—Control of Volatile Organic Emissions from Existing Stationary Sources, Volume IV: Surface Coating of Insulation of Magnet Wire.
Synthetic Organic Chemical	EPA–450/3–84–015—Control of VOC Emissions from Air Oxidation Processes in Synthetic Organic Manufacturing Industry. EPA–450/4–91–031—Control of VOC Emissions from Reactor Processes and Distillation Operations in SOCMI.
Pharmaceutical Products	EPA–450/2–78–029—Control of Volatile Organic Emissions from Manufacture of Synthesized Pharmaceutical Products.
Rubber Tires	EPA–450/2–78–030—Control of Volatile Organic Emissions from Manufacture of Pneumatic Rubber Tires.
Polyester Resin	EPA–450/3–83–006—Control of VOC Fugitive Emissions from Synthetic Organic Chemical Polymer and Resin Manufacturing Equipment. EPA–450/3–83–008—Control of VOC Emissions from Manufacture of High-Density Polyethylene, Polypropylene, and Polystyrene Resins.

VCAPCD's staff report indicates the District has a large agricultural industry and that agricultural pesticide use is a substantial source of VOCs in the county. The District points out, however, that agricultural pesticide usage is regulated by the State of California and not under the District's jurisdiction. EPA agrees the California Department of Pesticide Regulation (DPR), and not the VCAPCD, has jurisdiction over pesticide regulations in California. VCAPCD is not required, therefore, to adopt RACT rules for these activities.

VCAPCD's RACT SIP analysis was made available for public comment prior to being adopted by the District. The District did not receive any public comments during the public comment period. We propose to find that the RACT SIP analysis performed by the VCACPD is reasonable and demonstrates their rules meet RACT. We also propose to find that the analysis is consistent with the CAA, EPA regulations and the relevant policy and guidance documents listed above. The TSD has more information on our evaluation.

C. EPA Recommendation To Strengthen the SIP

The TSD describes recommendations for further strengthening the VCAPCD SIP by reviewing and tightening controls in the following rules as appropriate: Rule 71.3, ''Transfer of Organic Reactive Compound Liquids''; Rule 74.26, Crude Oil Storage, Degassing Operations; and Rule 74.27, Gasoline and ROC Liquid Storage Tank Degassing Operations.

EPA further notes that due to the recent reclassification of VCAPCD to a serious ozone non-attainment area, it will need to certify in a future action that District rules meet CTGs issued since 2006.

D. Public Comment and Final Action

Because EPA believes the submitted analysis fulfills all relevant requirements, we are proposing to fully approve it as described in section 110(k)(3) of the Act. We will accept comments from the public on this proposal for the next 30 days. Unless we receive convincing new information during the comment period, we intend to publish a final approval action that will incorporate this document into the federally enforceable SIP.

III. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: November 20, 2008.

Jane Diamond,

Acting Regional Administrator, Region IX.

[FR Doc. E8–29468 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 158 and 161

[EPA–HQ–OPP–2008–0110; FRL–8358–2]

RIN 2070–2070–AD30

Data Requirements for Antimicrobial Pesticides; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: EPA issued a proposed rule in the **Federal Register** of October 8, 2008 proposing data requirements for antimicrobial pesticides. EPA received two requests to extend the comment period on the proposed rule. Today's document extends the comment period for 90 days, from January 6, 2009 to April 6, 2009.

DATES: Comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0110 must be received on or before April 6, 2009.

ADDRESSES: Follow the detailed instructions as provided under **ADDRESSES** in the **Federal Register** document of October 8, 2008.

FOR FURTHER INFORMATION CONTACT: Kathryn Boyle, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; mailcode 7506P; telephone number: 703.305.6304; fax number: 703.305.5884; e-mail address: *boyle.kathryn@epa.gov*.

SUPPLEMENTARY INFORMATION: Two requests for an extension of the comment period on the proposed rule were submitted by the American Chemistry Council, Biocides Panel and the Consumer Specialty Products Association. Both of these requests are in docket EPA–HQ–OPP–2008–0110, accessible via *http://www.regulations.gov*. Today's document extends the public comment period established in the **Federal Register** of October 8, 2008 (73 FR 59382)(FRL–8358–2) for the proposed rule entitled ''Data Requirements for Antimicrobial Pesticides.'' EPA is extending the comment period, which was set to end on January 6, 2009, to April 6, 2009.

To submit comments, or access the public docket, please follow the detailed instructions as provided under **ADDRESSES** in the October 8, 2008 **Federal Register** document. If you have questions, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects in 40 CFR Part 158 and 161

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

Dated: December 5, 2008.

James B. Gulliford,

Assistant Administrator for Prevention, Pesticides, and Toxic Substances.

[FR Doc. E8–29477 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter 1

[DA 08–2576; RM No. 11497]

Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of comment period.

SUMMARY: In this document, the Commission extends the deadlines for filing comments and reply comments concerning the Rural Cellular Association's (RCA's) petition for rulemaking on the effects of exclusive arrangements between commercial wireless carriers and handset manufacturers.

DATES: Comments must be filed on or before February 2, 2009, and reply comments must be filed on or before February 20, 2009.

ADDRESSES: You may submit comments, identified in DA 08–2576, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/*. Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Monica DeLong at 202–418–1337.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Order*, DA 08–2576, which was adopted and released on November 26, 2008. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of the *Order* and related Commission documents may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, or you may contact BCPI at its Web site *http://www.BCPIWEB.com*, or by calling (800) 378–3160, facsimiles (202) 488–5563. When ordering documents from BCPI please provide the appropriate FCC document number, for example, DA–2576. The *Order* is available on the Commission's Web site: *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-7-164A1.doc*.

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov*. Filers should follow the instructions provided on the Web site for submitting comments.
- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov*, and include the following words in the body of the

message, ''get form.'' A sample form and directions will be sent in response.

• *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

• U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Summary of Order

1. On May 20, 2008, the Rural Cellular Association (RCA) filed a Petition for Rulemaking (*Petition*) asking the Commission to ''initiate a rulemaking to investigate the widespread use and anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers, and, as necessary, adopt rules that prohibit such arrangements when contrary to the public interest.'' The Commission issued a *Public Notice* on October 10, 2008, seeking comments on the *Petition*. Comments and reply comments were due on December 2, and December 22, 2008, respectively, 72 FR 63127, October 23, 2008.

2. On November 20, 2008, RCA and CTIA—The Wireless Association filed a joint request (*Request*) for a 60-day extension of the comment and reply comment deadlines ''to enable the Associations and their members to continue industry discussions regarding the issues raised in the RCA Petition with the goal of reaching an agreement among interested parties on the issues raised * * * or, at the very least, narrowing the issues for Commission consideration.'' No party opposed the *Request*.

3. It is the policy of the Commission that extensions of time are not routinely granted. In the instant case, however, we find that providing a limited extension will serve the public interest by allowing parties to discuss the complex issues at stake and develop consensus approaches where possible. Accordingly, we are granting the *Request* by extending the deadline for all comments and reply comments to February 2, and February 20, 2009, respectively.

4. Pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), and 1.46 of the Commission's rules, 47 CFR 1.46, the Rural Cellular Association and CTIA—The Wireless Association Joint Request for Extension of Comment and Reply Comment Deadlines, filed on November 20, 2008, is granted, and the deadline for filing comments in response to the *Public Notice* is extended to February 2, 2009, and until February 20, 2009, to file reply comments.

5. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 CFR 0.131 and 0.331.

Federal Communications Commission.

Joel D. Taubenblatt,

Deputy Chief, Wireless Telecommunications Bureau.

[FR Doc. E8–29533 Filed 12–11–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–2569; MB Docket No. 08–226; RM–11494].

Radio Broadcasting Services; Mount Enterprise, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document sets forth a proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's rules, 47 CFR 73.202(b). The Commission requests comment on a petition filed by JER Licenses, LLC. Petitioner proposes the substitution of FM Channel 279A for vacant Channel 231A at Mount Enterprise, Texas. The purpose of the requested channel substitution at Mount Enterprise is to accommodate Petitioner's proposed change of community for Channel 232C3 from Grapeland, Texas, to Bullard, Texas. Channel 279A can be allotted at Mount Enterprise in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.9 km (3.7 miles) north of Mount Enterprise. The proposed coordinates for Channel 279A at Mount Enterprise are 31–58–15 North Latitude and 94–41–01 West Longitude. *See* **SUPPLEMENTARY INFORMATION** *infra*.

DATES: Comments must be filed on or before January 21, 2009, and reply comments on or before February 5, 2009.

ADDRESSES: Secretary, Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve petitioner's counsel as follows: A. Wray Fitch, III, Esq., Gammon & Grange, P.C., 8280 Greensboro Drive, 7th Floor, McLean, Virginia 22102–3807.

FOR FURTHER INFORMATION CONTACT: Deborah A. Dupont, Media Bureau (202) 418–7072.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rule Making*, MB Docket No. 08–226, adopted November 26, 2008, and released November 28, 2008. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room 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, (800) 378–3160, or via the company's Web site, *http://www.bcpiweb.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

The Provisions of the Regulatory Flexibility Act of 1980 do not apply to

this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Channel 231A and by adding Channel 279A at Mount Enterprise.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E8–29499 Filed 12–11–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–2590; MB Docket No. 08–228; RM–11481]

Radio Broadcasting Services; Port Angeles, WA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Audio Division requests comment on a petition filed by Jodesha Broadcasting, Inc., licensee of Station KANY(FM), Ocean Shores, Washington, and permittee of Station KSWW(FM), Montesano, Washington, proposing the substitution of FM Channel 271A for vacant Channel 229A at Port Angeles, Washington. The reference coordinates for Channel 271A at Port Angeles, Washington, are 48–06–54 NL and 123–26–36 WL. *See* **SUPPLEMENTARY INFORMATION**, *infra*.

DATES: Comments must be filed on or before January 21, 2009, and reply comments on or before February 5, 2009.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, his counsel, or consultant, as follows: David Tillotson, Esq., 4606 Charleston Terrace, NW., Washington, DC 20007 (Counsel for Jodesha Broadcasting, Inc.).

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rulemaking, MB Docket No. 08–228, adopted November 26, 2008, and released November 28, 2008. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

The proposed channel substitution at Port Angeles is part of a hybrid application and rulemaking proceeding. In the first application, Jodesha Broadcasting proposes the upgrade of Channel 229C3 to Channel 229C0 at Ocean Shores, the reallotment of Channel 229C0 to Montesano, Washington, and the associated modification of the Station KANY(FM) license. To retain a first local service at Ocean Shores, the second application proposes the downgrade of Channel 271C2 to Channel 271C3 at Montesano, Washington, the reallotment of Channel 271C3 to Ocean Shores, and the modification of the Station KSWW(FM) construction permit. *See* 73 FR 50015 (August 25, 2008).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Washington, is amended by removing 229A and adding Channel 271A at Port Angeles.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E8–29516 Filed 12–11–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

RIN 0648–AW78

Taking and Importing Marine Mammals; U.S. Navy Training in the Virginia Capes Range Complex

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for authorization to take marine mammals incidental to training activities conducted within the Virginia Capes (VACAPES) Range Complex for the

period of April 2009 through April 2014. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to govern that take and requesting information, suggestions, and comments on these proposed regulations.

DATES: Comments and information must be received no later than January 12, 2009.

ADDRESSES: You may submit comments, identified by 0648–AW78, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*
- Hand delivery or mailing of paper, disk, or CD-ROM comments should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 713–2289, ext. 137.

SUPPLEMENTARY INFORMATION:

Availability

A copy of the Navy's application may be obtained by writing to the address specified above (See ADDRESSES), telephoning the contact listed above (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. The Navy's Draft Environmental Impact Statement (DEIS) for the VACAPES Range Complex was published on June 27, 2008, and may be viewed at *http://www.VACAPESRangeComplexEIS.com*. NMFS participated in the development of the Navy's DEIS as a cooperating agency under the National Environmental Policy Act (NEPA).

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) during periods of not more than five consecutive years each if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as:

> an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The National Defense Authorization Act of 2004 (NDAA) (Public Law 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations and amended the definition of ''harassment'' as it applies to a ''military readiness activity'' to read as follows (Section 3(18)(B) of the MMPA):

> (i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Summary of Request

On March 17, 2008, NMFS received an application from the Navy requesting authorization for the take of 13 species of cetacean incidental to the proposed training activities in VACAPES Range Complex over the course of 5 years. These training activities are classified as military readiness activities. The Navy states that these training activities may cause various impacts to marine mammal species in the proposed VACAPES Range Complex area. The Navy requests an authorization to take individuals of these cetacean species by Level B Harassment. Further, the Navy requests authorization to take 1 individual Atlantic spotted, 20 common, 1 pantropical spotted, and 3 striped dolphins per year by injury, and 1 individual common dolphin per year by mortality, as a result of the proposed training activities at VACAPES Range Complex. Please refer to Table 29 of the LOA application for detailed information of the potential exposures from explosive ordnance (per year) for marine mammals in the VACAPES Range Complex. However, due to the proposed mitigation and monitoring measures, NMFS does not believe the proposed action would result in marine mammal mortalities. Therefore, no mortality would be authorized for the Navy's VACAPES Range Complex training activities.

Background of Navy Request

The Navy's mission is to maintain, train, and equip combat-ready naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas. Title 10, U.S. Code (U.S.C.) section 5062 directs the Chief of Naval Operations to train all naval forces for combat. The Chief of Naval Operations meets that direction, in part, by conducting at-sea training exercises and ensuring naval forces have access to ranges, operating areas (OPAREAs) and airspace where they can develop and maintain skills for wartime missions and conduct research, development, test, and evaluation (RDT&E) of naval weapons systems.

The VACAPES Range Complex represents an essential three-dimensional space that provides a realistic and safe training area for Navy personnel. For nearly a century the area has supported Navy training activities, and is now host to a wide range of training every year to ensure the U.S. military members are ready for combat.

The VACAPES Range Complex is the principal training area for air, surface and submarine units located in Hampton Roads, Virginia. The VACAPES Range Complex is also the primary homeport of the Atlantic Fleet. The Hampton Roads area includes more than 80,000 active duty Navy personnel. In addition to serving as the site for essential Navy training, the VACAPES Range Complex is host to activities for the RDT&E of emerging technologies. The RDT&E activities addressed in the VACAPES EIS/OEIS are those RDT&E activities that are substantially similar to training, involving existing systems or systems with similar operating parameters.

The VACAPES Study Area geographically encompasses offshore, near-shore, and onshore OPAREAs,

ranges, and Special Use Airspace (SUA) (Figure 1 of the application). The lower Chesapeake Bay is also part of the Study Area, although no training involving explosions would be performed in this area. Together, components of the VACAPES Study Area encompass:

- 27,661 square nautical miles (nm^2) of sea space (not including the portion of the Lower Chesapeake Bay); and
- 28,672 nm^2 of SUA warning areas

The portions of the VACAPES Study Area addressed in the Navy's application consist of the offshore OPAREA (surface and subsurface waters) and the SUA warning areas (and not the SUA associated with land ranges), and waters extending from the shoreline to the OPAREA boundary (Table 1 of the application). Table 6 of the LOA application provides a list of marine mammal species that have been confirmed and/or have the potential to occur in the VACAPES Study Area.

The VACAPES OPAREA is a set of operating and maneuver areas with defined ocean surface and subsurface operating areas described in detail in Table 1 of the application. The OPAREA is located in the coastal and offshore waters of the western North Atlantic Ocean adjacent to Delaware, Maryland, Virginia, and North Carolina (Figure 1 of the application; 27,661 nm^2 of surface waters). The northernmost boundary of the OPAREA is located 37 nautical miles (nm) off the entrance to Delaware Bay at latitude 38° 45' N, the farthest point of the eastern boundary is 184 nm east of Chesapeake Bay at longitude 72° 41' W, and the southernmost point is 105 nm southeast of Cape Hatteras, North Carolina, at latitude of 34° 19' N. The western boundary of the OPAREA lies 3 nm from the shoreline at the boundary separating state and Federal waters.

A warning area is airspace of defined dimensions, extending from 3 nm outward from the U.S. coast, which contains activity that may be hazardous to nonparticipating aircraft. The purpose of such warning area is to warn nonparticipating pilots of the potential danger. A warning area may be located over domestic or international waters or both.

Description of the Specified Activities

The Navy requests an authorization for take of marine mammals incidental to conducting training operations within the VACAPES Range Complex. These training activities consist of surface warfare, mine warfare, amphibious warfare, strike warfare, and vessel movement. The locations of these activities are described in Figure 1 of the application. A description of each of these training activities within the VACAPES Range Complex is provided below:

Surface Warfare

Surface Warfare (SUW) supports defense of a geographical area (e.g., a zone or barrier) in cooperation with surface, subsurface, and air forces. SUW operations detect, localize, and track surface targets, primarily ships. Detected ships are monitored visually and with radar. Operations include identifying surface contacts, engaging with weapons, disengaging, evasion and avoiding attack, including implementation of radio silence and deceptive measures.

For the proposed VACAPES Range Complex training operations, SUW involving the use of explosive ordnance includes air-to-surface Missile Exercises and air-to-surface Bombing Exercises that occur at sea.

(1) Missile Exercise (Air-to-Surface) (MISSILEX (A-S)): This exercise would involve fixed winged aircraft crews and helicopter crews who launch missiles at at-sea surface targets with the goal of destroying or disabling the target. MISSILEX (A-S) training in the VACAPES Range Complex can occur during the day or at night in locations described in Figure 1 of the LOA application. Table 1 below summarizes the levels of MISSILEX planned in the VACAPES Range Complex for the proposed action.

TABLE 1. LEVELS OF MISSILEX PLANNED IN THE VACAPES RANGE COMPLEX PER YEAR

Operation	Platform	System/Ordnance	Number of Events
Missile Exercise (MISSILEX) (Air to Surface)	MH-60S, HH-60H	AGM-114 (Hellfire missile)	60 sorties (60 missiles)
	F/A-18, P-3C, and P-8A	AGM-65 E/F (Maverick missile)	20 sorties (20 missiles)

(2) Bombing Exercise (BOMBEX) (A-S): This exercise would involve strike fighter aircraft (F/A–18s) delivering explosive bombs against at-sea surface targets with the goal of destroying the target. BOMBEX (A-S) training in the VACAPES Study Area occurs only during daylight hours in the locations described in Figure 1 of the LOA application. Table 2 below summarizes the levels of BOMBEX planned in the VACAPES Range Complex for the proposed action.

TABLE 2. LEVELS OF BOMBEX PLANNED IN THE VACAPES RANGE COMPLEX PER YEAR

Operation	Platform	System/Ordnance	Number of Events
Bombing Exercise (BOMBEX) (Air-to-Surface, At-Sea)	F/A–18	MK–83/GBU–32 [1,000 lb High Explosive (HE) bomb]	5 events (20 bombs 4 bombs/ event)

Mine Warfare/Mine Exercises

Mine Warfare (MIW) includes the strategic, operational, and tactical use of mines and mine countermine measures (MCM). MIW training events are also collectively referred to as Mine Exercises (MINEX). MIW training/MINEX utilizes shapes to simulate mines. These shapes are either concrete-filled shapes or metal shapes. No actual explosive mines are used during MIW training in the VACAPES Range Complex study area. MIW training or MINEX is divided into the following.

(1) Mine laying: Crews practice the laying of mine shapes in simulated enemy areas;

(2) Mine countermeasures: Crews practice ''countering'' simulated enemy mines to permit the maneuver of friendly vessels and troops.

''Countering'' refers to both the detection and identification of enemy mines, the marking and maneuver of vessels and troops around identified enemy mines and mine fields, and the disabling of enemy mines. A subset of mine countermeasures is mine neutralization. Mine neutralization refers to the disabling of enemy mines by causing them to self-detonate either by setting a small explosive charge in the vicinity of the enemy mine, or by using various types of equipment that emit a sound, pressure, or a magnetic field that causes the mine to trip and self-detonate. In all cases, actual explosive (live) mines would not be used during training events. Rather, mine shapes are used to simulate real enemy mines. Table 3 below summarizes the levels of mine warfare/mine exercises planned in the VACAPES Range Complex for the proposed action.

TABLE 3. LEVELS OF MINE WARFARE/MINE EXERCISES PLANNED IN THE VACAPES RANGE COMPLEX PER YEAR

Operation	Platform	System/Ordnance	Number of Events
Mine Neutralization	MH-60S	AMNS	30 rounds
	EOD	20 lb charges	24 events

In the VACAPES Range Complex study areas, MIW training/MINEX events include the use of explosive charges for two and one types of mine countermeasures and neutralization training, respectively. This training would use the Airborne Mine Neutralization System (AMNS) and underwater detonations of mine shapes by Explosive Ordnance Disposal (EOD) divers. MIW training/MINEX would occur only during daylight hours in the locations described in Figure 1 of the LOA application.

Amphibious Warfare

Amphibious Warfare (AMW) involves the utilization of naval firepower and logistics in combination with U.S. Marine Corps landing forces to project military power ashore. AMW encompasses a broad spectrum of operations involving maneuver from the sea to objectives ashore, ranging from shore assaults, boat raids, ship-to-shore maneuver, shore bombardment and other naval fire support, and air strike and close air support training. AMW that involves the use of explosive ordnance is limited to Firing Exercises (FIREX).

During a FIREX, surface ships use their main battery guns to fire from sea at land targets in support of military forces ashore. On the east coast, the land ranges where FIREX training can take place are limited. Therefore, land masses are simulated during east coast FIREX training using the Integrated Maritime Portable Acoustic Scoring and Simulation System (IMPASS) system, a system of buoys that simulate a land mass. FIREX training using IMPASS would occur only during daylight hours in the locations described in Figure 1 of the LOA application. Table 4 below summarizes the levels of FIREX and IMPASS planned in the VACAPES Range Complex for the proposed action.

TABLE 4. LEVELS OF FIREX AND IMPASS PLANNED IN THE VACAPES RANGE COMPLEX PER YEAR

Operation	Platform	System/Ordnance	Number of Events
FIREX with IMPASS	CG, DDG	5'' gun (IMPASS)	22 events (858 HE rounds)

Strike Warfare

Strike Warfare (STW) operations are the applications of offensive military power at any chosen time and place to help carry out national goals. The systems required to conduct STW include: weapons, launch platforms, and command and control systems, intelligence, surveillance, reconnaissance, and targeting systems, and pilots or crews to operate the systems. STW involving the use of explosive ordnance includes air-to-air Missile Exercises (MISSILEX (A-A)).

Strike fighter and electronic attack aircraft use sensors to detect radar signals from a simulated threat radar site and either simulate or actually launch an explosive or non-explosive high-speed anti-radiation missile (HARM) with the goal of destroying or disabling the threat radar site. HARM missiles are designed to detonate 30 - 60 ft (9 - 18 m) above the water surface so as to not destroy the barge target below. Therefore HARM missiles are not included in the underwater explosive exposure modeling since no marine mammal exposures are anticipated. HARM training events are conducted in the daytime and at night in locations described in Figure 1 of the LOA application. Table 5 below summarizes the levels of HARMEX (A-A) planned in the VACAPES Range Complex for the proposed action.

TABLE 5. LEVELS OF HARMEX (A-A) PLANNED IN THE VACAPES RANGE COMPLEX PER YEAR

Operation	Platform	System/Ordnance	Number of Events
HARM Missile Exercise (HARMEX)	F/A–18	AGM–88 (HARM)	26 sorties (26 missiles)

Vessel Movement

Vessel movements are associated with most training operations in the VACAPES Range Complex and include transits to and from the port. Some training operations are strictly vessel movements such as Man Overboard Drills, Tow/Be Towed Exercises, Underway Replenishment, Aircraft Carrier Flight Operations, and use of the transit lanes by submarines when surfaced. Currently, the number of Navy vessels operating in the VACAPES Range Complex study area varies based on training schedules and can range

from 0 to about 10 vessels at any given time. Ship sizes range from 362 ft (110 m) for a SSN to 1,092 ft (333 m) for a CVN and speeds generally range from 10 to 14 knots during training operations. Operations involving vessel movements occur intermittently and are variable in duration, ranging from a few hours up to 2 weeks. These operations are widely dispersed throughout the operation areas, which is a vast area encompassing 27,661 nm^2 (an area approximately the size of Indiana) for the VACAPES Range Complex. The Navy logs about 1,400 total vessel days within the Range Complex during a typical year. Consequently, the density of ships within the study area at any given time is extremely low (i.e., less than 0.0004 ships/nm^2).

Description of Marine Mammals in the Area of the Specified Activities

There are 34 marine mammal species with possible or confirmed occurrence in the VACAPES Range Complex. As indicated in Table 6, there are 33 cetacean species (7 mysticetes and 26 odontocetes) and one pinniped species. Table 6 also includes the federal status of these marine mammal species. Six marine mammal species listed as federally endangered under the Endangered Species Act (ESA) occur in the VACAPES Range Complex: the humpback whale, North Atlantic right whale, sei whale, fin whale, blue whale, and sperm whale. Although it is possible that any of the 34 species of marine mammals may occur in the VACAPES Range Complex, only 24 of those species are expected to occur regularly in the region.

TABLE 6. MARINE MAMMAL SPECIES FOUND IN THE VACAPES RANGE COMPLEX

Family and Scientific Name	Common Name	Federal Status
Order Cetacea		
Suborder Mysticeti (baleen whales)		
Eubalaena glacialis	North Atlantic right whale	Endangered
Megaptera novaeangliae	Humpback whale	Endangered
Balaenoptera acutorostrata	Minke whale	
B. brydei	Bryde's whale	
B. borealis	Sei whale	Endangered
B. physalus	Fin whale	Endangered
B. musculus	Blue whale	Endangered
Suborder Odontoceti (toothed whales)		
Physeter macrocephalus	Sperm whale	Endangered
Kogia breviceps	Pygmy sperm whale	
K. sima	Dwarf sperm whale	
Ziphius cavirostris	Cuvier's beaked whale	
Mesoplodon minus	True's beaked whale	
M. europaeus	Gervais' beaked whale	
M. bidens	Sowerby's beaked whale	
M. densirostris	Blainville's beaked whale	
Steno bredanensis	Rough-toothed dolphin	
Tursiops truncatus	Bottlenose dolphin	
Stenella attenuata	Pantropical spotted dolphin	
S. frontalis	Atlantic spotted dolphin	
S. longirostris	Spinner dolphin	
S. clymene	Clymene dolphin	
S. coeruleoalba	Striped dolphin	
Delphinus delphis	Common dolphin	
Lagenodephis hosei	Fraser's dolphin	
Lagenorhynchus acutus	Atlantic white-sided dolphin	

TABLE 6. MARINE MAMMAL SPECIES FOUND IN THE VACAPES RANGE COMPLEX—Continued

Family and Scientific Name	Common Name	Federal Status
Grampus griseus	Risso's dolphin	
Peponocephala electra	Melon-headed whale	
Feresa attenuata	Pygmy killer whale	
Pseudorca crassidens	False killer whale	
Orcinus orca	Killer whale	
Globicephala melas	Long-finned pilot whale	
G. macrorhynchus	Short-finned pilot whale	
Phocoena phocoena	Harbor porpoise	
Order Carnivora		
Suborder Pinnipedia		
Phoca vitulina	Harbor seal	

The information contained herein relies heavily on the data gathered in the Marine Resource Assessments (MRAs). The Navy MRA Program was implemented by the Commander, Fleet Forces Command, to initiate collection of data and information concerning the protected and commercial marine resources found in the Navy's OPAREAs. Specifically, the goal of the MRA program is to describe and document the marine resources present in each of the Navy's OPAREAs. The MRA for the VACAPES OPAREA was recently updated in 2007 (DoN, 2008).

The MRA data were used to provide a regional context for each species. The MRA represents a compilation and synthesis of available scientific literature (for example, journals, periodicals, theses, dissertations, project reports, and other technical reports published by government agencies, private businesses, or consulting firms), and NMFS reports including stock assessment reports, recovery plans, and survey reports.

The density estimates that were used in previous Navy environmental documents have been recently updated to provide a compilation of the most recent data and information on the occurrence, distribution, and density of marine mammals. The updated density estimates used for the analyses are derived from the Navy OPAREA Density Estimates (NODE) for the Southeast OPAREAS report (DON, 2007).

Density estimates for cetaceans were either modeled using available line-transect survey data or derived using available data in order of preference: (1) through spatial models using line-transect survey data provided by NMFS; (2) using abundance estimates from Mullin and Fulling (2003); (3) or based on the cetacean abundance estimates found in the most current NMFS stock assessment report (SAR) (Waring *et al.*, 2007), which can be viewed at: *http://www.nmfs.noaa.gov/pr/sars/species.htm*.

For the model-based approach, density estimates were calculated for each species within areas containing survey effort. A relationship between these density estimates and the associated

environmental parameters such as depth, slope, distance from the shelf break, sea surface temperature, and chlorophyll a concentration was formulated using generalized additive models. This relationship was then used to generate a two-dimensional density surface for the region by predicting densities in areas where no survey data exist.

The analyses for cetaceans were based on sighting data collected through shipboard surveys conducted by NMFS-Northeast Fisheries Science Center (NEFSC) and Southeast Fisheries Science Center (SEFSC) between 1998 and 2005. Species-specific density estimates derived through spatial modeling were compared with abundance estimates found in the most current NMFS SAR to ensure consistency. All spatial models and density estimates were reviewed by and coordinated with NMFS Science Center technical staff and scientists with the University of St. Andrews, Scotland, Centre for Environmental and Ecological Modeling (CREEM). For a more detailed description of the methodology involved in calculating the density estimates provided in this LOA, please refer to the NODE report for the Southeast (DON 2007).

Potential Impacts to Marine Mammal Species

The Navy considers that explosions associated with BOMBEX, MISSILEX, FIREX, and MINEX are the activities with the potential to result in Level A or Level B harassment or mortality of marine mammals. Vessel strikes were also analyzed for their potential effect to marine mammals.

Vessel Strikes

Ship strikes are known to affect large whales and sirenians in the VACAPES Study Area. The most vulnerable marine mammals are those that spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (e.g., the sperm whale). In addition, some baleen whales, such as the North Atlantic right whale seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek *et al.*, 2004). These species are primarily large, slow moving whales. Smaller marine mammals, for example, Atlantic bottlenose and Atlantic spotted dolphins-move quickly throughout the water column and are often seen riding the bow wave of large ships. Marine mammal responses to vessels may include avoidance and changes in dive pattern (NRC, 2003).

After reviewing historical records and computerized stranding databases for evidence of ship strikes involving baleen and sperm whales, Laist *et al.* (2001) found that accounts of large whale ship strikes involving motorized

boats in the area date back to at least the late 1800s. Ship collisions remained infrequent until the 1950s, after which point they increased. Laist *et al.* (2001) report that both the number and speed of motorized vessels have increased over time for trans-Atlantic passenger services, which transit through the area. They concluded that most strikes occur over or near the continental shelf, that ship strikes likely have a negligible effect on the status of most whale populations, but that for small populations or segments of populations the impact of ship strikes may be significant.

Although ship strikes may result in the mortality of a limited number of whales within a population or stock, Laist *et al.* (2001) also concluded that, when considered in combination with other human-related mortalities in the area (e.g., entanglement in fishing gear), these ship strikes may present a concern for whale populations.

Of 11 species known to be hit by ships, fin whales are struck most frequently; right whales, humpback whales, sperm whales, and gray whales are all hit commonly (Laist *et al.*, 2001). In some areas, one-third of all fin whale and right whale strandings appear to involve ship strikes. Sperm whales spend long periods (typically up to 10 minutes; Jacquet *et al.*, 1996) ''rafting'' at the surface between deep dives. This could make them exceptionally vulnerable to ship strikes. Berzin (1972) noted that there were ''many'' reports of sperm whales of different age classes being struck by vessels, including passenger ships and tug boats. There were also instances in which sperm whales approached vessels too closely and were cut by the propellers (NMFS, 2006d).

The east coast is a principal migratory corridor for North Atlantic right whales that travel between the calving/nursery areas in the Southeastern United States and feeding grounds in the northeast U.S. and Canada. Transit to the Study Area from mid-Atlantic ports requires Navy vessels to cross the migratory route of North Atlantic right whales. Southward right whale migration generally occurs from mid- to late November, although some right whales may arrive off the Florida coast in early November and stay into late March (Kraus *et al.*, 1993). The northbound migration generally takes place between January and late March. Data indicate that during the spring and fall migration, right whales typically occur in shallow water immediately adjacent to the coast, with over half the sightings (63 percent) occurring within 18.5 km (10 NM), and 94.1 percent reported within 55 km (30 NM) of the coast (Knowlton *et al.*, 2002). Given the low abundance of North Atlantic right whales relative to other species, the frequency of occurrence of vessel collisions to right whales suggests that the threat of ship strikes is proportionally greater to this species (Jensen and Silber, 2003). Therefore, in 2004, NMFS proposed a right whale vessel collision reduction strategy to consider the establishment of operational measures for the shipping industry to reduce the potential for large vessel collisions with North Atlantic right whales while transiting to and from mid-Atlantic ports during right whale migratory periods. Although Navy vessel traffic generally represents only 2 - 3 percent of overall large vessel traffic, based on this biological characteristic and the presence of critical Navy ports along the whales of mid-Atlantic migratory corridor, the Navy was the first Federal agency to proactively adopt additional mitigation measures for transits in the vicinity of mid-Atlantic ports during right whale migration. For purposes of these measures, the mid-Atlantic is defined broadly to include ports south and east of Block Island Sound southward to South Carolina.

Accordingly, the Navy has proposed mitigation measures to reduce the potential for collisions with surfaced marine mammals (for more details refer to Proposed Mitigation section below). Based on the implementation of Navy mitigation measures, especially during times of anticipated right whale occurrence, and the relatively low density of Navy ships in the Study Area the likelihood that a vessel collision would occur is very low.

Assessment of Marine Mammal Response to Anthropogenic Sound

Marine mammals respond to various types of anthropogenic sounds introduced into the ocean environment. Responses are typically subtle and can include shorter surfacings, shorter dives, fewer blows per surfacing, longer intervals between blows (breaths), ceasing or increasing vocalizations, shortening or lengthening vocalizations, and changing frequency or intensity of vocalizations (NRC, 2005). However, it is not known how these responses relate to significant effects (e.g., long-term effects or population consequences). The following is an assessment of marine mammal responses and disturbances when exposed to anthropogenic sound.

I. Physiology

Potential impacts to the auditory system are assessed by considering the characteristics of the received sound (e.g., amplitude, frequency, duration) and the sensitivity of the exposed animals. Some of these assessments can be numerically based (e.g., temporary threshold shift [TTS] of hearing sensitivity, permanent threshold shift [PTS] of hearing sensitivity, perception). Others will be necessarily qualitative, due to lack of information, or will need to be extrapolated from other species for which information exists.

Potential physiological responses to the sound exposure are ranked in descending order, with the most severe impact (auditory trauma) occurring at the top and the least severe impact occurring at the bottom (the sound is not perceived).

Auditory trauma represents direct mechanical injury to hearing related structures, including tympanic membrane rupture, disarticulation of the middle ear ossicles, and trauma to the inner ear structures such as the organ of Corti and the associated hair cells. Auditory trauma is always injurious that could result in PTS. Auditory trauma is always assumed to result in a stress response.

Auditory fatigue refers to a loss of hearing sensitivity after sound stimulation. The loss of sensitivity persists after, sometimes long after, the cessation of the sound. The mechanisms responsible for auditory fatigue differ from auditory trauma and would primarily consist of metabolic exhaustion of the hair cells and cochlear tissues. The features of the exposure (e.g., amplitude, frequency, duration, temporal pattern) and the individual animal's susceptibility would determine the severity of fatigue and whether the effects were temporary (TTS) or permanent (PTS). Auditory fatigue (PTS or TTS) is always assumed to result in a stress response.

Sounds with sufficient amplitude and duration to be detected among the background ambient noise are considered to be perceived. This category includes sounds from the threshold of audibility through the normal dynamic range of hearing (i.e., not capable of producing fatigue).

To determine whether an animal perceives the sound, the received level, frequency, and duration of the sound are compared to what is known of the species' hearing sensitivity.

Since audible sounds may interfere with an animal's ability to detect other sounds at the same time, perceived sounds have the potential to result in

auditory masking. Unlike auditory fatigue, which always results in a stress response because the sensory tissues are being stimulated beyond their normal physiological range, masking may or may not result in a stress response, depending on the degree and duration of the masking effect. Masking may also result in a unique circumstance where an animal's ability to detect other sounds is compromised without the animal's knowledge. This could conceivably result in sensory impairment and subsequent behavior change; in this case, the change in behavior is the lack of a response that would normally be made if sensory impairment did not occur. For this reason, masking also may lead directly to behavior change without first causing a stress response.

The features of perceived sound (e.g., amplitude, duration, temporal pattern) are also used to judge whether the sound exposure is capable of producing a stress response. Factors to consider in this decision include the probability of the animal being naive or experienced with the sound (i.e., what are the known/unknown consequences of the exposure).

The received level is not of sufficient amplitude, frequency, and duration to be perceptible by the animal. By extension, this does not result in a stress response (not perceived).

Potential impacts to tissues other than those related to the auditory system are assessed by considering the characteristics of the sound (e.g., amplitude, frequency, duration) and the known or estimated response characteristics of nonauditory tissues. Some of these assessments can be numerically based (e.g., exposure required for rectified diffusion). Others will be necessarily qualitative, due to lack of information. Each of the potential responses may or may not result in a stress response.

Direct tissue effects – Direct tissue responses to sound stimulation may range from tissue shearing (injury) to mechanical vibration with no resulting injury. Any tissue injury would produce a stress response, whereas noninjurious stimulation may or may not.

Indirect tissue effects – Based on the amplitude, frequency, and duration of the sound, it must be assessed whether exposure is sufficient to indirectly affect tissues. For example, the hypothesis that rectified diffusion occurs is based on the idea that bubbles that naturally exist in biological tissues can be stimulated to grow by an acoustic field. Under this hypothesis, one of three things could happen: (a) bubbles grow to the extent that tissue hemorrhage occurs (injury); (b) bubbles develop to the extent that a complement immune response is triggered or nervous tissue is subjected to enough localized pressure that pain or dysfunction occurs (a stress response without injury); or (c) the bubbles are cleared by the lung without negative consequence to the animal.

No tissue effects – The received sound is insufficient to cause either direct (mechanical) or indirect effects to tissues. No stress response occurs.

II. The Stress Response

The acoustic source is considered a potential stressor if, by its action on the animal, via auditory or nonauditory means, it may produce a stress response in the animal. The term ''stress'' has taken on an ambiguous meaning in the scientific literature, but with respect to the later discussions of allostasis and allostatic loading, the stress response will refer to an increase in energetic expenditure that results from exposure to the stressor and which is predominantly characterized by either the stimulation of the sympathetic nervous system (SNS) or the hypothalamic-pituitary-adrenal (HPA) axis (Reeder and Kramer, 2005). The SNS response to a stressor is immediate and acute and is characterized by the release of the catecholamine neurohormones norepinephrine and epinephrine (i.e., adrenaline). These hormones produce elevations in the heart and respiration rate, increase awareness, and increase the availability of glucose and lipids for energy. The HPA response is ultimately defined by increases in the secretion of the glucocorticoid steroid hormones, predominantly cortisol in mammals. The amount of increase in circulating glucocorticoids above baseline may be an indicator of the overall severity of a stress response (Hennessy *et al.*, 1979). Each component of the stress response is variable in time; e.g., adrenalines are released nearly immediately and are used or cleared by the system quickly, whereas cortisol levels may take long periods of time to return to baseline.

The presence and magnitude of a stress response in an animal depends on a number of factors. These include the animal's life history stage (e.g., neonate, juvenile, adult), the environmental conditions, reproductive or developmental state, and experience with the stressor. Not only will these factors be subject to individual variation, but they will also vary within an individual over time. In considering potential stress responses of marine mammals to acoustic stressors, each of these should be considered. For example, is the acoustic stressor in an area where animals engage in breeding activity? Are animals in the region resident and likely to have experience with the stressor (i.e., repeated exposures)? Is the region a foraging ground or are the animals passing through as transients? What is the ratio of young (naive) to old (experienced) animals in the population? It is unlikely that all such questions can be answered from empirical data; however, they should be addressed in any qualitative assessment of a potential stress response as based on the available literature.

The stress response may or may not result in a behavioral change, depending on the characteristics of the exposed animal. However, provided a stress response occurs, we assume that some contribution is made to the animal's allostatic load. Allostasis is the ability of an animal to maintain stability through change by adjusting its physiology in response to both predictable and unpredictable events (McEwen and Wingfield, 2003). The same hormones associated with the stress response vary naturally throughout an animal's life, providing support for particular life history events (e.g., pregnancy) and predictable environmental conditions (e.g., seasonal changes). The allostatic load is the cumulative cost of allostasis incurred by an animal and is generally characterized with respect to an animal's energetic expenditure. Perturbations to an animal that may occur with the presence of a stressor, either biological (e.g., predator) or anthropogenic (e.g., construction), can contribute to the allostatic load (Wingfield, 2003). Additional costs are cumulative and additions to the allostatic load over time may contribute to reductions in the probability of achieving ultimate life history functions (e.g., survival, maturation, reproductive effort and success) by producing pathophysiological states. The contribution to the allostatic load from a stressor requires estimating the magnitude and duration of the stress response, as well as any secondary contributions that might result from a change in behavior.

If the acoustic source does not produce tissue effects, is not perceived by the animal, or does not produce a stress response by any other means, we assume that the exposure does not contribute to the allostatic load. Additionally, without a stress response or auditory masking, it is assumed that there can be no behavioral change. Conversely, any immediate effect of exposure that produces an injury is assumed to also produce a stress response and contribute to the allostatic load.

III. Behavior

Changes in marine mammal behavior are expected to result from an acute stress response. This expectation is based on the idea that some sort of physiological trigger must exist to change any behavior that is already being performed. The exception to this rule is the case of auditory masking. The presence of a masking sound may not produce a stress response, but may interfere with the animal's ability to detect and discriminate biologically relevant signals. The inability to detect and discriminate biologically relevant signals hinders the potential for normal behavioral responses to auditory cues and is thus considered a behavioral change.

Impulsive sounds from explosions have very short durations as compared to other sounds like sonar or ship noise, which are more likely to produce auditory masking. Additionally the explosive sources analyzed in this document are used infrequently and the training events are typically of short duration. Therefore, the potential for auditory masking is unlikely and no impacts to marine mammals due to auditory masking are anticipated due to implementing the proposed action.

Numerous behavioral changes can occur as a result of stress response. For each potential behavioral change, the magnitude in the change and the severity of the response needs to be estimated. Certain conditions, such as stampeding (i.e., flight response) or a response to a predator, might have a probability of resulting in injury. For example, a flight response, if significant enough, could produce a stranding event. Each altered behavior may also have the potential to disrupt biologically significant events (e.g., breeding or nursing) and may need to be classified as Level B harassment. All behavioral disruptions have the potential to contribute to the allostatic load. This secondary potential is signified by the feedback from the collective behaviors to allostatic loading.

IV. Life Function

IV.1. Proximate Life Functions

Proximate life history functions are the functions that the animal is engaged in at the time of acoustic exposure. The disruption of these functions, and the magnitude of the disruption, is something that must be considered in determining how the ultimate life history functions are affected. Consideration of the magnitude of the effect to each of the proximate life history functions is dependent upon the life stage of the animal. For example, an animal on a breeding ground which is sexually immature will suffer relatively little consequence to disruption of breeding behavior when compared to an actively displaying adult of prime reproductive age.

IV.2. Ultimate Life Functions

The ultimate life functions are those that enable an animal to contribute to the population (or stock, or species, etc.). The impact to ultimate life functions will depend on the nature and magnitude of the perturbation to proximate life history functions. Depending on the severity of the response to the stressor, acute perturbations may have nominal to profound impacts on ultimate life functions. For example, unit-level use of sonar by a vessel transiting through an area that is utilized for foraging, but not for breeding, may disrupt feeding by exposed animals for a brief period of time. Because of the brevity of the perturbation, the impact to ultimate life functions may be negligible. By contrast, weekly training over a period of years may have a more substantial impact because the stressor is chronic. Assessment of the magnitude of the stress response from the chronic perturbation would require an understanding of how and whether animals acclimate to a specific, repeated stressor and whether chronic elevations in the stress response (e.g., cortisol levels) produce fitness deficits.

The proximate life functions are loosely ordered in decreasing severity of impact. Mortality (survival) has an immediate effect, in that no future reproductive success is feasible and there is no further addition to the population resulting from reproduction. Severe injuries may also lead to reduced survivorship (longevity) and prolonged alterations in behavior. The latter may further affect an animal's overall reproductive success and reproductive effort. Disruptions of breeding have an immediate impact on reproductive effort and may impact reproductive success. The magnitude of the effect will depend on the duration of the disruption and the type of behavior change that was provoked. Disruptions to feeding and migration can affect all of the ultimate life functions; however, the impacts to reproductive effort and success are not likely to be as severe or immediate as those incurred by mortality and breeding disruptions.

Explosive Ordnance Exposure Analysis

The underwater explosion from a weapon would send a shock wave and blast noise through the water, release gaseous by-products, create an oscillating bubble, and cause a plume of water to shoot up from the water surface. The shock wave and blast noise are of most concern to marine animals. The effects of an underwater explosion on a marine mammal depends on many factors, including the size, type, and depth of both the animal and the explosive charge; the depth of the water column; and the standoff distance between the charge and the animal, as well as the sound propagation properties of the environment. Potential impacts can range from brief effects (such as behavioral disturbance), tactile perception, physical discomfort, slight injury of the internal organs and the auditory system, to death of the animal (Yelverton *et al.*, 1973; O'Keeffe and Young, 1984; DoN, 2001). Non-lethal injury includes slight injury to internal organs and the auditory system; however, delayed lethality can be a result of individual or cumulative sublethal injuries (DoN, 2001). Immediate lethal injury would be a result of massive combined trauma to internal organs as a direct result of proximity to the point of detonation (DoN, 2001). Generally, exposures to higher levels of impulse and pressure levels would result in worse impacts to an individual animal.

Injuries resulting from a shock wave take place at boundaries between tissues of different density. Different velocities are imparted to tissues of different densities, and this can lead to their physical disruption. Blast effects are greatest at the gas-liquid interface (Landsberg, 2000). Gas-containing organs, particularly the lungs and gastrointestinal tract, are especially susceptible (Goertner, 1982; Hill, 1978; Yelverton *et al.*, 1973). In addition, gas-containing organs including the nasal sacs, larynx, pharynx, trachea, and lungs may be damaged by compression/expansion caused by the oscillations of the blast gas bubble (Reidenberg and Laitman, 2003). Intestinal walls can bruise or rupture, with subsequent hemorrhage and escape of gut contents into the body cavity. Less severe gastrointestinal tract injuries include contusions, petechiae (small red or purple spots caused by bleeding in the skin), and slight hemorrhaging (Yelverton *et al.*, 1973).

Because the ears are the most sensitive to pressure, they are the organs most sensitive to injury (Ketten, 2000). Sound-related damage associated with blast noise can be theoretically distinct from injury from the shock wave, particularly farther from the explosion. If an animal is able to hear a noise, at some level it can damage its hearing by

causing decreased sensitivity (Ketten, 1995) (See *Assessment of Marine Mammal Response to Anthropogenic Sound* Section above). Sound-related trauma can be lethal or sublethal. Lethal impacts are those that result in immediate death or serious debilitation in or near an intense source and are not, technically, pure acoustic trauma (Ketten, 1995). Sublethal impacts include hearing loss, which is caused by exposures to perceptible sounds. Severe damage (from the shock wave) to the ears includes tympanic membrane rupture, fracture of the ossicles, damage to the cochlea, hemorrhage, and cerebrospinal fluid leakage into the middle ear. Moderate injury implies partial hearing loss due to tympanic membrane rupture and blood in the middle ear. Permanent hearing loss also can occur when the hair cells are damaged by one very loud event, as well as by prolonged exposure to a loud noise or chronic exposure to noise. The level of impact from blasts depends on both an animal's location and, at outer zones, on its sensitivity to the residual noise (Ketten, 1995).

The exercises that use explosives include: FIREX with IMPASS, MISSILEX, BOMBEX, and MINEX. Table 7 summarizes the number of events (per year by season) and specific areas where each occurs for each type of explosive ordnance used. For most of the operations, there is no difference in how many events take place between the different seasons. Fractional values are a result of evenly distributing the annual totals over the four seasons. For example, there are 45 Hellfire events per year that can take place in Air Kilo during any season, so there are 11.25 events modeled for each season. However, the 20 lb charge MINEX events are more likely to take place in the summer and this is represented in the seasonal allocation of events.

TABLE 7. NUMBER OF EXPLOSIVE EVENTS WITHIN THE VACAPES RANGE COMPLEX

Sub-Area	Ordnance	Winter	Spring	Summer	Fall	Annual Totals
	MISSILEX					106
Air-K	Hellfire	11.25	11.25	11.25	11.25	
W-72A (2)	Hellfire	3.75	3.75	3.75	3.75	
Air-E, F, I, J	Harm	6.50	6.50	6.50	6.50	
Air-K	Maverick	5	5	5	5	
	FIREX					22
5C/D	5″ rounds	1.83	1.83	1.83	1.83	
7C/D and 8C/D	5″ rounds	1.83	1.83	1.83	1.83	
1C1/2	5″ rounds	1.83	1.83	1.83	1.83	
	MINEX					54
W-50 UNDET	5 LB*	7.50	7.50	7.50	7.50	
W-50 UNDET	20 LB	4.00	4.00	12.00	4.00	
	BOMBEX					5
Air-K	MK-83**	1.25	1.25	1.25	1.25	

* The use of 3.24 lb charges during AMNS training were conservatively modeled as 5 lb charges.
** One event using the MK 83 bombs consists of 4 bombs being dropped in succession. For example, in VACAPES Air K there are 5 MK 83 events, which mean that a total of 20 bombs will be dropped per year.

Acoustic Environment

Sound propagation (the spreading or attenuation of sound) in the oceans of the world is affected by several environmental factors: water depth, variations in sound speed within the water column, surface roughness, and the geo-acoustic properties of the ocean bottom. These parameters can vary widely with location.

Four types of data are used to define the acoustic environment for each analysis site:

Seasonal Sound Velocity Profiles (SVP) – Plots of propagation speed (velocity) as a function of depth, or SVPs, are a fundamental tool used for predicting how sound will travel. Seasonal SVP averages were obtained for each training area.

Seabed Geo-acoustics – The type of sea floor influences how much sound is absorbed and how much sound is reflected back into the water column.

Wind Speeds –\ Several environmental inputs, such as wind speed and surface roughness, are necessary to model acoustic propagation in the prospective training areas.

Bathymetry data – Bathymetry data are necessary to model acoustic propagation and were obtained for each of the training areas.

Acoustic Effects Analysis

The acoustic effects analysis presented in the following sections is briefly described for each major type of exercise. A more in-depth effects analysis is in Appendix A of the LOA application.

1. FIREX (with IMPASS)

Modeling was completed for a 5–in. round, 8–lb NEW charge exploding at a depth of 1 ft (0.3 m). The analytical approach begins using a high-fidelity acoustic model to estimate energy in each 5–in. explosive round. Impact areas are calculated by summing the energy from multiple explosions over a firing exercise (FIREX) mission, and determining the impact area based on the thresholds and criteria. Level B exposures were determined based on

the 177 dB re 1 microPa²–sec (energy) criteria for behavioral disturbance (without TTS) due to the use of multiple explosions.

Impact areas for a full FIREX (with IMPASS) event must account for the time and space distribution of 39 explosions, as well as the movement of animals over the several hours of the exercise. The total impact area for the 39–shot event is calculated as the sum of small effect areas for seven FIREX missions (each with four to six rounds fired) and one pre-FIREX action (with six rounds fired). Table 8 shows the Zone of Influence (ZOI) results of the model estimation.

TABLE 8. ESTIMATED ZOIS (KM2) FOR A SINGLE FIREX (WITH IMPASS) EVENT (39 ROUNDS)

Area*	Level B ZOI @ 177 dB re 1 μPa²–sec (multiple detonations only)	Level B ZOI @ 23 psi-ms	Level A ZOI @ 205 dB re 1 microPa²–sec or 13 psi-ms
5C/D	NA**	3.7044	0.16464
7C/D and 8C/D VACAPES 5C/D	5.6595	3.7044	0.16464
1C1/2	NA**	3.7044	0.16464

*Please see Figure 1 on page 2–2 of the LOA application for the locations of these areas.
**In these areas, which occur in deeper water, the 23 psi-ms criteria dominates over the 177 dB re 1 microPa²–sec behavioral disturbance criteria and therefore was used in the analysis.

The ZOI, when multiplied by the animal densities and the total number of events (Table 7), provides the exposure estimates for that animal species for the nominal exercise case of 39 5–in. explosive rounds. The potential effects would occur within a series of small impact areas associated with the pre-calibration rounds and missions spread out over a period of several hours. Additionally, target locations are changed from event to event and because of the time lag between events, it is highly unlikely, even if a marine mammal were present (not accounting for mitigation), that the marine mammal would be within the small exposure zone for more than one event.

FIREX (with IMPASS) is restricted to three locations in the VACAPES Range Complex. In addition to other mitigation measures, dedicated lookouts monitor the target area for marine mammals before the exercise, during the deployment of the IMPASS array, and during the return to firing position. Prior to the exercise, the area would be visually monitored when the IMPASS sonobuoy array is being deployed by the ship at the detonation location, as well as while returning to the firing position. During the actual firing of the weapon, the participants involved must be able to observe the intended ordnance impact area to ensure the area is free of range transients, however, this observation would be conducted from the firing position or other safe distance. Due to distance between the firing position and the safety zone, lookouts are only expected to visually detect breaching whales, whale blows, and large pods of dolphins and porpoises. Firing would not commence unless the intended ordnance impact area is visible. Implementation of mitigation measures like these reduce the likelihood of exposure and potential effects in the ZOI and eliminate the likelihood of mortality.

2. BOMBEX

Modeling was completed for one explosive source involved in BOMBEX, each assumed detonation at 1–m depth. The NEW used in simulations of the MK83 is 415.8–lb. Determining the ZOI for the thresholds in terms of total energy flux density (EFD), impulse, peak pressure and 1/3–octave bands EFD must treat the sequential explosions differently than the single detonations. For the MK–83, two factors are involved for the sequential explosives that deal with the spatial and temporal distribution of the detonations as well as the effective accumulation of the resultant acoustics. In view of the ZOI determinations, the sequential detonations are modeled as a single point event with only the EFD summed incoherently. The multiple explosion energy criterion was used to determine the ZOI for the Level B without TTS exposure analysis.

Table 9 shows the ZOI results of the model estimation. The ZOI, when multiplied by the animal densities and total number of events (Table 7), provides the exposure estimates for that animal species for the given bomb source.

BOMBEX is restricted to one location in the VACAPES Range Complex. In addition to other mitigation measures, aircraft will survey the target area for marine mammals before and during the exercise. Ships will not fire on the target until the area is surveyed and determined to be free of marine mammals. The exercise will be suspended if any marine mammals enter the buffer area. Implementation of mitigation measures like these effectively reduce exposures in the ZOI and eliminate the likelihood of mortality.

TABLE 9. ESTIMATED ZOIS (KM²) FOR BOMBEX

Area	Ordnance	Level B ZOI @ 177 dB re 1 microPa²-sec (multiple detonations only)				Level B ZOI @ 182 dB re 1 microPa²-sec or 23 psi				Level A ZOI @ 205 dB re 1 microPa²-sec or 13 psi				Mortality ZOI @ 30.5 psi			
		Win	Spr	Sum	Fall	Win	Spr	Sum	Fall	Win	Spr	Sum	Fall	Win	Spr	Sum	Fall
Air-K	MK-83*	135.04	555.51	713.99	912.05	NA	NA	NA	NA	4.28	4.01	6.39	4.55	0.05	0.05	0.05	0.05

3. MINEX

The Comprehensive Acoustic System Simulation/Gaussian Ray Bundle (CASS/GRAB) (OAML, 2002) model, modified to account for impulse response, shock-wave waveform, and nonlinear shock-wave effects, was run for acoustic-environmental conditions derived from the Oceanographic and Atmospheric Master Library (OAML) standard databases. The explosive source was modeled with standard similitude formulas, as in the Churchill FEIS. Because all the sites are shallow (less than 50 m), propagation model runs were made for bathymetry in the range from 10 m to 40 m.

Estimated ZOIs varied as much within a single area as from one area to another, which had been the case for the Virtual At Sea Training (VAST)/IMPASS (DoN, 2003). There was, however, little seasonal dependence. As a result, the ZOIs are stated as mean values with a percentage variation. Generally, in the case of ranges determined from energy metrics, as the depth of water increases, the range shortens. The single explosion TTS-energy criterion (182 dB re 1 microPa^2•sec) was dominant and therefore used to determine the ZOI for the Level B exposure analysis. Table 10 shows the ZOI results of the model estimation.

The total ZOI, when multiplied by the animal densities and total number of events (Table 7), provides the exposure estimates for that animal species for each specified charge. Because of the time lag between detonations, it is highly unlikely, even if a marine mammal were present (not accounting for mitigation), that the marine mammal would be within the small exposure zone for more than one detonation. Underwater detonations are restricted to one area in the VACAPES Range Complex. In addition to other mitigation measures, observers will survey the target area for marine mammals for 30 minutes pre- and 30 minutes post-detonation. Detonations will be suspended if a marine mammal enters the Zone of Influence and will only restart after the area has been clear for a full 30 minutes. Implementation of mitigation measures like these reduce the likelihood of exposure and potential effects in the ZOI and eliminate the likelihood of mortality.

TABLE 10. ESTIMATED ZOIS (KM^2) FOR MINEX

Threshold	ZOIs	
	5–lb shot	20–lb shot
Level A ZOI @ 13 psi	0.03 km^2 ± 10%	0.13 km^2 ± 10%
Level B ZOI @ 182 dB re 1 microPa^2•sec	0.2 km^2 ± 25%	0.8 km^2 ± 25%

4. MISSILEX (Hellfire, Harm, and Maverick)

The HARM missile explodes no less than 30 feet (9.1 m) above the surface of the water, so it is assumed the amount of acoustic energy entering the water will be negligible. Therefore, modeling was completed for two of the explosive missiles involved in MISSILEX, each assumed detonation at 1–meter depth. The NEW used in simulations of the Hellfire and Maverick missiles are 8 lbs and 100 lbs, respectively. The single explosion TTS-energy criterion (182 dB re 1 microPa^2–sec) was used to determine the ZOI for the Level B exposure analysis. Table 11 shows the ZOI results of the model estimation. MISSILEX is restricted two locations in the VACAPES Range Complex. In addition to other mitigation measures, aircraft will survey the target area for marine mammals before and during the exercise. Ships will not fire on the target until the area is clear of marine mammals, and will suspend the exercise if any enter the buffer area. Implementation of mitigation measures like these reduce the likelihood of exposure and potential effects in the ZOI.

TABLE 11. ESTIMATED ZOIS (KM^2) FOR MISSILEX

Area	Ordnance	@ 182 dB re 1 microPa^2-s Level B ZOI or 23 psi				@ 205 dB re 1 microPa^2-s Level A ZOI or 13 psi				Mortality ZOI @ 30.5 psi			
		Win	Spr	Sum	Fall	Win	Spr	Sum	Fall	Win	Spr	Sum	Fall
Air-K	Hellfire	0.44	0.49	0.48	0.49	0.02	0.02	0.02	0.02	<0.01	<0.01	<0.01	<0.01
W-72A (2)	Hellfire	0.58	0.60	0.57	0.59	0.03	0.02	0.02	0.02	<0.01	<0.01	<0.01	<0.01
Air-K	Maverick	1.99	2.80	10.56	1.64	0.09	0.07	0.07	0.09	0.04	0.02	0.04	0.04

The total ZOI, when multiplied by the animal densities and total number of events (Table 7), provides the exposure estimates for that animal species for each specified missile. Because of the time lag between detonations, it is highly unlikely, even if a marine mammal were present (not accounting for mitigation), that the marine mammal would be within the small exposure zone for more than one detonation.

Summary of Potential Expsosures from Explosive Ordnance Use

Explosions that occur in the VACAPES Range Complex are associated with training exercises that use explosive ordnance, including bombs (BOMBEX), missiles (MISSILEX), 5–in. explosive naval gun shells with FIREX (with IMPASS), as well as underwater detonations associated with Mine Neutralization training (MINEX). Explosive ordnance use is limited to specific training areas.

An explosive analysis was conducted to estimate the number of marine mammals that could be exposed to impacts from explosions. Table 12 provides a summary of the explosive analysis results. Exposure estimates could not be calculated for many species (blue whale, sei whale, Bryde's whale, killer whale, pygmy killer whale, false killer whale, melon-headed whale, spinner dolphin, Fraser's dolphin, Atlantic white-sided dolphin, and harbor porpoise) because density data could not be calculated due to the

limited available data for these species. However, since these species are considered rare in the VACAPES Range Complex, they are not expected to be exposed to explosive detonations. Fin, humpback whales, and sperm whales would have high detection rates at the surface because of their large body size and pronounced blows. Because of large group sizes, it is likely that lookouts would detect Atlantic spotted dolphins, bottlenose dolphins, Clymene, common, pantropical spotted dolphins, Risso's dolphins, rough-toothed dolphin, and striped dolphins. Implementation of mitigation measures will reduce the likelihood of exposure and potential effects.

TABLE 12. SUMMARY OF POTENTIAL EXPOSURES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE VACAPES RANGE COMPLEX

Species/Training Operation	Potential Exposures @ 177 dB re 1 microPa^2-s (multiple detonations only)	Potential Exposures @ 182 dB re 1 microPa^2-s or 23 psi	Potential Exposures @ 205 dB re 1 microPa^2-s or 13 psi	Potential Exposures @ 30.5 psi
Fin whale				
BOMBEX training	2	NA	0	0
MISSILEX training	NA	0	0	0
FIREX training	0	NA	0	0
MINEX training	NA	0	0	0
Total Exposures	2	0	0	0
Humpback whale				
BOMBEX training	2	NA	0	0
MISSILEX training	NA	0	0	0
FIREX training	0	NA	0	0
MINEX training	NA	0	0	0
Total Exposures	2	0	0	0
North Atlantic right whale				
BOMBEX training	0	NA	0	0
MISSILEX training	NA	0	0	0
FIREX training	0	NA	0	0
MINEX training	NA	0	0	0
Total Exposures	0	0	0	0
Sperm whale				
BOMBEX training	0	NA	0	0
MISSILEX training	NA	0	0	0
FIREX training	2	NA	0	0
MINEX training	NA	0	0	0
Total Exposures	2	0	0	0
Atlantic Spotted dolphin				
BOMBEX training	9	NA	0	0
MISSILEX training	NA	4	0	0
FIREX training	30	NA	1	0
MINEX training	NA	0	0	0
Total Exposures	39	4	1	0
Beaked whale				

TABLE 12. SUMMARY OF POTENTIAL EXPOSURES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE VACAPES RANGE COMPLEX—Continued

Species/Training Operation	Potential Exposures @ 177 dB re 1 microPa^2-s (multiple detonations only)	Potential Exposures @ 182 dB re 1 microPa^2-s or 23 psi	Potential Exposures @ 205 dB re 1 microPa^2-s or 13 psi	Potential Exposures @ 30.5 psi
BOMBEX training	0	NA	0	0
MISSILEX training	NA	0	0	0
FIREX training	0	NA	0	0
MINEX training	NA	0	0	0
Total Exposures	0	0	0	0
Bottlenose dolphin				
BOMBEX training	17	NA	0	0
MISSILEX training	NA	7	0	0
FIREX training	5	NA	0	0
MINEX training	NA	0	0	0
Total Exposures	22	7	0	0
Clymene dolphin				
BOMBEX training	31	NA	0	0
MISSILEX training	NA	1	0	0
FIREX training	1	NA	0	0
MINEX training	NA	0	0	0
Total Exposures	32	1	0	0
Common dolphin				
BOMBEX training	2,059	NA	17	0
MISSILEX training	NA	97	2	1
FIREX training	37	NA	1	0
MINEX training	NA	0	0	0
Total Exposures	2,096	97	20	1
Kogia spp.				
BOMBEX training	3	NA	0	0
MISSILEX training	NA	0	0	0
FIREX training	0	NA	0	0
MINEX training	NA	0	0	0
Total Exposures	3	0	0	0
Minke whale				
BOMBEX training	0	NA	0	0
MISSILEX training	NA	0	0	0
FIREX training	0	NA	0	0
MINEX training	NA	0	0	0
Total Exposures	0	0	0	0

TABLE 12. SUMMARY OF POTENTIAL EXPOSURES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE VACAPES RANGE COMPLEX—Continued

Species/Training Operation	Potential Exposures @ 177 dB re 1 microPa^2-s (multiple detonations only)	Potential Exposures @ 182 dB re 1 microPa^2-s or 23 psi	Potential Exposures @ 205 dB re 1 microPa^2-s or 13 psi	Potential Exposures @ 30.5 psi
Pantropical spotted dolphin				
BOMBEX training	64	NA	1	0
MISSILEX training	NA	3	0	0
FIREX training	2	NA	0	0
MINEX training	NA	1	0	0
Total Exposures	66	4	1	0
Pilot whales				
BOMBEX training	1	NA	0	0
MISSILEX training	NA	2	0	0
FIREX training	7	NA	0	0
MINEX training	NA	0	0	0
Total Exposures	8	2	0	0
Risso's dolphin				
BOMBEX training	11	NA	0	0
MISSILEX training	NA	2	0	0
FIREX training	3	NA	0	0
MINEX training	NA	0	0	0
Total Exposures	14	2	0	0
Rough-toothed dolphin				
BOMBEX training	1	NA	0	0
MISSILEX training	NA	0	0	0
FIREX training	0	NA	0	0
MINEX training	NA	0	0	0
Total Exposures	1	0	0	0
Striped dolphin				
BOMBEX training	1	NA	0	0
MISSILEX training	NA	26	1	0
FIREX training	41	NA	2	0
MINEX training	NA	0	0	0
Total Exposures	42	26	3	0

Note: Events were either modeled for 177 dB re 1 microPa^2 sec due to multiple detonations (BOMBEX and FIREX) or modeled for 182 dB re 1 microPa^2 sec or 23 psi due to single detonations (MISSILEX and MINEX). Therefore, for BOMBEX and FIREX the NA refers to the criteria that were less dominant and therefore not used in the analysis. For MISSILEX and MINEX the NA refers to the fact that these events are not multiple detonations and therefore not modeled at 177 dB re 1 microPa^2 sec.

VI. Potential Effects of Exposures to Explosives

Effects from exposure to explosives vary depending on the level of exposure. Animals exposed to levels that constitute MMPA Level B harassment may experience a behavioral disruption from the use of explosive ordnance. Behavioral responses can include shorter surfacings, shorter dives, fewer blows per surfacing, longer intervals between blows (breaths), ceasing or increasing vocalizations, shortening or lengthening vocalizations, and changing frequency or intensity of vocalizations (NRC, 2005). However, it is not known how these responses relate to significant effects (e.g., long-term effects or population consequences) (NRC, 2005). In addition, animals exposed to levels that constitute MMPA Level B harassment may experience a temporary threshold shift (TTS), which may result in a slight, recoverable loss of hearing sensitivity (DoN, 2001).

Exposures that reach Level A harassment may result in long-term injuries such as permanent threshold shift (PTS). The resulting injuries may limit an animal's ability to find food, communicate with other animals, and/or interpret the environment around them. Impairment of these abilities can decrease an individual's chance of survival or impact their ability to successfully reproduce. Level A harassment will have a long-term impact on an exposed individual.

Mortality of an animal will remove the animal entirely from the population as well as eliminate any future reproductive potential.

Based on best available science, NMFS preliminarily concludes that takes from explosive ordnance and underwater detonations would result in only short-term effects to most individuals exposed and would likely not affect annual rates of recruitment or survival of the species. The mitigation measures presented below would further reduce the potential for exposures, and there would be no mortality of marine mammals from the proposed training activities. Table 13 provides a list of potential takes of marine mammal species as a result of the proposed VACAPES Range Complex training activities.

TABLE 13. SUMMARY OF POTENTIAL TAKES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE VACAPES RANGE COMPLEX

Species	Level B harassment	Level A harassment	Mortality
Fin whale	2	0	0
Humpback whale	2	0	0
North Atlantic right whale	0	0	0
Sperm whale	2	0	0
Atlantic spotted dolphin	39	5	0
Beaked whales	0	0	0
Bottlenose dolphin	22	7	0
Clymene dolphin	32	1	0
Common dolphin	2,096	117	0
Kogia sp.	3	0	0
Pantropical spotted dolphin	66	5	0
Pilot whale	8	2	0
Risso's dolphin	14	2	0
Rough-toothed dolphin	1	0	0
Striped dolphin	42	29	0

Proposed Mitigation Measures

General Maritime Measures

I. Personnel Training Lookouts

The use of shipboard lookouts is a critical component of all Navy standard operating procedures. Navy shipboard lookouts (also referred to as ''watchstanders'') are highly qualified and experienced observers of the marine environment. Their duties require that they report all objects sighted in the water to the Officer of the Deck (OOD) (e.g., trash, a periscope, marine mammals, sea turtles) and all disturbances (e.g., surface disturbance, discoloration) that may be indicative of a threat to the vessel and its crew. There are personnel serving as lookouts on station at all times (day and night) when a ship or surfaced submarine is moving through the water.

For the past few years, the Navy has implemented marine mammal spotter training for its bridge lookout personnel on ships and submarines. This training has been revamped and updated as the Marine Species Awareness Training (MSAT) and is provided to all applicable units. The lookout training program incorporates MSAT, which addresses the lookout's role in environmental protection, laws governing the protection of marine species, Navy stewardship commitments, and general observation information, including more detailed information for spotting marine mammals. MSAT has been reviewed by NMFS and acknowledged as suitable training. MSAT may also be viewed on-line at *https://portal.navfac.navy.mil/go/msat*.

1. All bridge personnel, Commanding Officers, Executive Officers, officers standing watch on the bridge, maritime patrol aircraft aircrews, and Mine Warfare (MIW) helicopter crews will complete MSAT.

2. Navy lookouts will undertake extensive training to qualify as a watchstander in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

3. Lookout training will include on-the-job instruction under the supervision of a qualified, experienced watchstander. Following successful completion of this supervised training period, lookouts will complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects).

4. Lookouts will be trained in the most effective means to ensure quick and effective communication within the command structure to facilitate implementation of protective measures if marine species are spotted.

5. Surface lookouts would scan the water from the ship to the horizon and be responsible for all contacts in their sector. In searching the assigned sector, the lookout would always start at the forward part of the sector and search aft (toward the back). To search and scan, the lookout would hold the binoculars steady so the horizon is in the top third of the field of vision and direct the eyes just below the horizon. The lookout would scan for approximately five seconds in as many small steps as possible across the field seen through the binoculars. They would search the entire sector in approximately five-degree steps, pausing between steps for approximately five seconds to scan the field of view. At the end of the sector search, the glasses would be lowered to allow the eyes to rest for a few seconds, and then the lookout would search back across the sector with the naked eye.

6. At night, lookouts would not sweep the horizon with their eyes, because eyes do not see well when they are moving. Lookouts would scan the horizon in a series of movements that would allow their eyes to come to periodic rests as they scan the sector. When visually searching at night, they would look a little to one side and out of the corners of their eyes, paying attention to the things on the outer edges of their field of vision. Lookouts will also have night vision devices available for use.

II. Operating Procedures & Collision Avoidance

1. Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order will be issued to further disseminate the personnel training requirement and general marine species mitigation measures.

2. Commanding Officers will make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

3. While underway, surface vessels will have at least two lookouts with binoculars; surfaced submarines will have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts will watch for and report to the OOD the presence of marine mammals and sea turtles.

4. On surface vessels equipped with a mid-frequency active sonar, pedestal mounted ''Big Eye'' (20x110) binoculars will be properly installed and in good working order to assist in the detection of marine mammals and sea turtles in the vicinity of the vessel.

5. Personnel on lookout will employ visual search procedures employing a scanning method in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

6. After sunset and prior to sunrise, lookouts will employ Night Lookouts Techniques in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

7. While in transit, naval vessels will be alert at all times, use extreme caution, and proceed at a ''safe speed'' so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions.

8. When whales have been sighted in the area, Navy vessels will increase vigilance and implement measures to avoid collisions with marine mammals and activities that might result in close interaction of naval assets and marine mammals. Such measures shall include changing speed and/or direction and would be dictated by environmental and other conditions (e.g., safety, weather).

9. Naval vessels will maneuver to keep at least 500 yds (460 m) away from any observed whale and avoid approaching whales head-on. This requirement does not apply if a vessel's safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Restricted maneuverability includes, but is not limited to, situations when vessels are engaged in dredging, submerged operations, launching and recovering aircraft or landing craft, minesweeping operations, replenishment while underway and towing operations that severely restrict a vessel's ability to deviate course. Vessels will take reasonable steps to alert other vessels in the vicinity of the whale.

10. Where feasible and consistent with mission and safety, vessels will avoid closing to within 200–yd (183 m) of marine mammals other than whales (whales addressed above).

11. Floating weeds, algal mats, Sargassum rafts, clusters of seabirds, and jellyfish are good indicators of and marine mammal presence. Therefore, increased vigilance in watching for marine mammals will be taken where these indicators are present.

12. Navy aircraft participating in exercises at sea will conduct and maintain, when operationally feasible and safe, surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties. Marine mammal detections will be reported immediately to the assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

13. All vessels will maintain logs and records documenting training operations to support event reconstruction, as necessary. Logs and records will be kept for a period of 30 days following completion of a major training exercise.

Coordination and Reporting Requirements

The Navy will coordinate with the local NMFS Stranding Coordinator for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that may occur at any time during or within 24 hours after completion of training activities. Additionally, the Navy will follow internal chain of command reporting procedures as promulgated through Navy instructions and orders.

Mitigation Measures Applicable to Vessel Transits in the Mid-Atlantic during North Atlantic Right Whale Migration

For purposes of these measures, the mid-Atlantic is defined broadly to include ports south and east of Block Island Sound southward to South Carolina. The procedure described below would be established as mitigation measures for Navy vessel transits during North Atlantic right whale migratory seasons near ports located off the western North Atlantic, offshore of the eastern United States. The mitigation measures would apply to all Navy vessel transits, including those vessels that would transit to and from East Coast ports and OPAREAs. Seasonal migration of right whales is generally described by NMFS as occuring from October 15th through April 30th, when right whales migrate between feeding grounds farther north and calving grounds farther south. The Navy mitigation measures have been established in accordance with rolling dates identified by NMFS consistent with these seasonal patterns.

NMFS has identified ports located in the western Atlantic Ocean, offshore of the southeastern United States, where vessel transit during right whale migration is of highest concern for potential ship strike. The ports include the Hampton Roads entrance to the Chesapeake Bay, which includes the concentration of Atlantic Fleet vessels in Norfolk, Virginia. Navy vessels are required to use extreme caution and operate at a slow, safe speed consistent with mission and safety during the months indicated in Table 13 below and within a 20 nm (37 km) arc (except as noted) of the specified reference points.

During the indicated months, Navy vessels would practice increased vigilance with respect to avoidance of vessel-whale interactions along the mid-Atlantic coast, including transits to and from any mid-Atlantic ports not specifically identified above.

TABLE 14. NORTH ATLANTIC RIGHT WHALE MIGRATION PORT REFERENCES

Region	Months	Port Reference Points
South and East of Block Island	Sep-Oct and Mar-Apr	37 km (20 nm) seaward of line 41°4.49 N, 71°51.15 W and 41°18.58 N, 70°50.23 W
New York/New Jersey	Sep-Oct and Feb-Apr	40°30.64 N, 73°57.76 W
Delaware Bay (Philadelphia)	Oct-Dec and Feb-Mar	38°52.13 N, 75°01.93 W
Chesapeake Bay (Hampton Roads and Baltimore)	Nov-Dec and Feb-Apr	37°01.11 N, 75°57.56 W
North Carolina	Dec-Apr	34°41.54 N, 76°40.20 W
South Carolina	Oct-Apr	33°11.84 N, 79°08.99 W and 32°43.39 N, 79°48.72 W

Proposed Mitigation Measures for Specific At-sea Training Events

The proposed mitigation measures in the following sections are standard operating procedures currently in place and would be used in the future for all activities being analyzed in this document.

I. Firing Exercise (FIREX) Using the Integrated Maritime Portable Acoustic Scoring System (IMPASS) (5–in. Explosive Rounds)

Historically FIREX using IMPASS occurs in four areas in the VACAPES Range Complex. The locations were established to be far enough from shore to reduce civilian encounters (e.g., diving and recreational fishing), while remaining a reasonable day's distance from the homeport of Norfolk, Virginia of participating ships. Surface ships conducting FIREX with IMPASS do not have strict distance from land restrictions like aircraft that embark from shore-based facilities.

1. FIREX using IMPASS would only be conducted in the four designated areas in the VACAPES Range Complex.

2. Pre-exercise monitoring of the target area will be conducted with ''Big Eyes'' prior to the event, during deployment of the IMPASS sonobuoy array, and during return to the firing position.

Ships will maintain a lookout dedicated to visually searching for marine mammals 180o along the ship track line and 360o at each buoy drop-off location.

3. ''Big Eyes'' on the ship will be used to monitor a 640 yd (585 m) buffer zone around the target area for marine mammals during naval-gunfire events. Due to the distance between the firing position and the buffer zone, lookouts are only expected to visually detect breaching whales, whale blows, and large pods of dolphins and porpoises.

4. Ships will not fire on the target if marine mammals are detected within or approaching the 640 yd (585 m) buffer zone. If marine mammals are present, operations would be suspended. Visual observation will occur for approximately 45 minutes, or until the animal has been observed to have cleared the area and is heading away from the buffer zone.

5. Post-exercise monitoring of the entire effect range will take place with ''Big Eyes'' and the naked eye during the retrieval of the IMPASS sonobuoy array following each firing exercise.

6. FIREX with IMPASS will take place during daylight hours only.

7. FIREX with IMPASS will only be used in Beaufort Sea State three (3) or less.

8. The visibility must be such that the fall of shot is visible from the firing ship during the exercise.

9. No firing would occur if marine mammals are detected within 70 yd (64 m) of the vessel.

II. Air-to-Surface At-Sea Bombing Exercises (250–lbs to 2,000–lbs explosive bombs)

This activity occurs in two locations in the VACAPES Study Area. The locations were established to be far enough from shore to reduce civilian encounters (e.g., diving and recreational fishing), while remaining within 150 nm from shore-based facilities (the established flight distance restriction for F-A18 jets during unit level training events).

1. Aircraft will visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area will be made by flying at 1,500 ft

altitude or lower, if safe to do so, and at the slowest safe speed. Release of ordnance through cloud cover is prohibited: aircraft must be able to actually see ordnance impact areas. Survey aircraft should employ most effective search tactics and capabilities.

2. A buffer zone of 5,100–yd (4,663 m) radius would be established around the intended target zone. The exercises will be conducted only if the buffer zone is clear of sighted marine mammals.

3. At-sea BOMBEXs using live ordnance will occur during daylight hours only.

III. Air-to-Surface Missile Exercises (Explosive)

1. Aircraft will initially survey the intended ordnance impact area for marine mammals. During the actual firing of the weapon, the aircraft involved must be able to observe the intended ordnance impact area to ensure the area is free of range transients, however, this observation would be conducted from the firing position or other safe distance. Visual inspection of the target area will be made by flying at 1,500 ft altitude or lower, if safe to do so, and at slowest safe speed. Firing or range clearance aircraft must be able to actually see ordnance impact areas. Explosive ordnance shall not be targeted to impact within 1,800 yd (1,646 m) of sighted marine mammals.

IV. Mine Neutralization Training Involving Underwater Detonations (up to 20–lb charges)

Mine neutralization involving underwater detonations occurs in shallow water (0 - 120 ft, or 0 – 36 m) and is executed by divers using scuba. NMFS issued a Biological Opinion (BO) in 2002 for underwater detonations of up to 20–lb explosive charges related to MINEX training (NMFS, 2002). Historically this activity has occurred in shallow water portions of W–50 in the VACAPES Study Area per this BO. This location is just offshore from NAS Oceana Dam Neck Annex, a restricted-access Naval Installation and overlaps an established Surface Danger Zone for live ordnance use, therefore civilian encounters are minimized. This location has a low bathymetric relief and a sand-silt bottom.

These exercises utilize small boats that deploy from shore based facilities. Often times these small boats are rigid-hulled inflatable boats (RHIBs) which are designed for shallow water and have limited seaworthiness necessitating a nearshore location. The exercise is a one-day event that occurs only during daylight hours therefore the distance from shore is limited.

1. This activity will only occur in W–50 of the VACAPES Range Complex.

2. Observers will survey the Zone of Influence (ZOI), a 656 yd (600 m) radius from detonation location, for marine mammals from all participating vessels during the entire operation. A survey of the ZOI (minimum of 3 parallel tracklines 219 yd [200 m] apart) using support craft will be conducted at the detonation location 30 minutes prior through 30 minutes post detonation. Aerial survey support will be utilized whenever assets are available.

3. Detonation operations will be conducted during daylight hours.

4. If a marine mammal is sighted within the ZOI, the animal will be allowed to leave of its own volition. The Navy will suspend detonation exercises and ensure the area is clear for a full 30 minutes prior to detonation.

5. Divers placing the charges on mines and dive support vessel personnel will survey the area for marine mammals and will report any sightings to the surface observers. These animals will be allowed to leave of their own volition and the ZOI will be clear for 30 minutes prior to detonation.

6. No detonations will take place within 3.2 NM (6 km) of an estuarine inlet (Chesapeake Bay Inlets).

7. No detonations will take place within 1.6 nm (3 km) of shoreline.

8. No detonations will take place within 1,000 ft (305 m) of any artificial reef, shipwreck, or live hard-bottom community.

9. Personnel will record any protected species observations during the exercise as well as measures taken if species are detected within the ZOI.

Adaptive Management

The final regulations governing the take of marine mammals incidental to Navy training exercises in VACAPES will contain an adaptive management component. The use of adaptive management will give NMFS the ability to consider new data from different sources to determine (in coordination with the Navy), on an annual basis, if new or modified mitigation or monitoring measures are appropriate for subsequent annual LOAs. Following are some of the possible sources of applicable data:

- Results from the Navy's monitoring from the previous year (either from VACAPES or other locations)
- Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the ICMP, which is discussed elsewhere in this document)
- Results from general marine mammal and sound research (funded by the Navy (described below) or otherwise)

Mitigation measures could be modified or added if new data suggests that such modifications would have a reasonable likelihood of accomplishing the goals of mitigation laid out in this proposed rule and if the measures are practicable. NMFS would also coordinate with the Navy to modify or add to the existing monitoring requirements if the new data suggest that the addition of a particular measure would more effectively accomplish the goals of monitoring laid out in this proposed rule. The reporting requirements associated with this rule are designed to provide NMFS with monitoring data from the previous year to allow NMFS to consider the data in issuing annual LOAs. NMFS and the Navy will meet annually prior to LOA issuance to discuss the monitoring reports, Navy R&D developments, and current science and whether mitigation or monitoring modifications are appropriate.

Monitoring and Reporting Measures

The Navy would be required to cooperate with the NMFS, and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals.

The Navy must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity is thought to have resulted in the mortality or injury of any marine mammals, or in any take of marine mammals not identified in this document.

The Navy must conduct all monitoring and/or research required under the Letter of Authorization, if issued. The monitoring methods proposed for use during training events in the VACAPES Range Complex include a combination of individual elements designed to allow a comprehensive assessment and include:

(1) Vessel and aerial surveys

(i) Visual surveillance of 2 events per year. The primary goal will be to survey two different types of explosive events with one of them being a multiple detonation event.

(ii) For specified training events, aerial or vessel surveys will be used 1–2 days prior to, during (if reasonably safe), and 1–5 days post detonation. The variation in the number of days after allows for the detection of animals that gradually return to an area, if they indeed do change their distribution in response to underwater detonation events.

(iii) Surveys will include any specified exclusion zone around a particular detonation point plus 2000 yards beyond the exclusion zone. For vessel-based surveys a passive acoustic system (hydrophone or towed array) could be used to determine if marine mammals are in the area before and/or after a detonation event. Depending on animals sighted, it may be possible to conduct focal surveys of animals outside of the exclusion zone (detonations could be delayed if marine mammals are observed within the exclusion zone) to record behavioral responses to the detonations.

(iv) When conducting a particular survey, the survey team will collect:

(A) species identification and group size;

(B) location and relative distance from the detonation site;

(C) the behavior of marine mammals including standard environmental and oceanographic parameters;

(D) date, time and visual conditions associated with each observation;

(E) direction of travel relative to the detonation site; and

(F) duration of the observation.

(v) An aerial survey team will conduct pre- and post-aerial surveys, taking local oceanographic currents into account, of the exercise area.

(2) Passive acoustic monitoring

(i) When practicable, towed hydrophone array should be used whenever shipboard surveys are being conducted. The towed array would be deployed during daylight hours for each of the days the ship is at sea.

(ii) A towed hydrophone array is towed from the boat and can detect and localize marine mammals that vocalize and would be used to supplement the ship-based systematic line-transect surveys (particularly for species such as beaked whales that are rarely seen).

(iii) The array would need to detect low frequency vocalizations (<1,000 Hz) for baleen whales and relatively high frequency vocalizations (up to 30 kHz) for odontocetes such as sperm whales. The use of two simultaneously deployed arrays can also allow more accurate localization and determination of diving patterns.

(3) Marine mammal observers on Navy platforms

(i) Marine mammal observers (MMOs) will be placed on a Navy platform during one of the exercises being monitored per year.

(ii) Qualifications must include expertise in species identification of regional marine mammal species and experience collecting behavioral data. Experience as a NMFS marine mammal observer is preferred, but not required. Navy biologists and contracted biologists will be used; contracted MMOs must have appropriate security clearance to board Navy platforms.

(iii) MMOs will not be placed aboard Navy platforms for every Navy training event or major exercise, but during specifically identified opportunities deemed appropriate for data collection efforts. The events selected for MMO participation will take into account safety, logistics, and operational concerns.

(iv) MMOs will observe from the same height above water as the lookouts.

(v) The MMOs will not be part of the Navy's formal reporting chain of command during their data collection efforts; Navy lookouts will continue to serve as the primary reporting means within the Navy chain of command for marine mammal sightings. The only exception is that if an animal is observed within the shutdown zone that has not been observed by the lookout, the MMO will inform the lookout of the sighting for the lookout to take the appropriate action through the chain of command.

(vi) The MMOs will collect species identification, behavior, direction of travel relative to the Navy platform, and distance first observed. All MMO sightings will be conducted according to a standard operating procedure.

Report from Monitoring required in paragraph (d) above – The Navy will submit a report annually on September 1 describing the implementation and results (through June 1 of the same year) of the monitoring required. Standard marine species sighting forms would be provided by the Navy and data collection methods will be standardized across ranges to allow for comparison in different geographic locations.

VACAPES Range Complex Comprehensive Report The Navy will submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during explosive exercises. This report will be submitted at the end of the fourth year of the rule (November 2012), covering activities that have occurred through June 1, 2012.

The Navy will respond to NMFS comments on the draft comprehensive report if submitted within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or three months after the submittal of the draft if NMFS does not comment by then.

To implement the aforementioned mitigation measures, the Navy is developing an Integrated Comprehensive Monitoring Program (ICMP) for marine species in order to assess the effects of training activities on marine species and investigate population-level trends in marine species distribution, abundance, and habitat use in various range complexes and geographic locations where Navy training occurs. Although the ICMP is intended to apply to all Navy training, use of mid-frequency active (MFA) sonar in training, testing, and research, development, test, and evaluation (RDT&E) will comprise a major component of the overall program.

The ICMP will establish the overarching structure and coordination that will facilitate the collection and synthesis of monitoring data from Navy training and research and development projects. The Program will compile data from range-specific monitoring efforts as well as research and development (R&D) studies that are fully or partially Navy-funded. Monitoring methods across the ranges will include methods such as vessel and aerial surveys, tagging, and passive acoustic monitoring.

The Navy will coordinate with the local NMFS Stranding Coordinator for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that may occur at any time during or within 24 hours after completion of explosives training activities.

Estimated Take of Marine Mammals

As mentioned previously, for the purposes of MMPA authorizations, NMFS' effects assessments have two primary purposes (in the context of the VACAPES Range Complex Final Rule and subsequent LOA, if appropriate): (1) to describe the permissible methods of taking within the context of MMPA Level B Harassment (behavioral harassment), Level A Harassment (injury), and mortality (i.e., identify the number and types of take that will occur); and (2) to determine whether the specified activity will have a negligible impact on the affected species or stocks of marine mammals (based on the likelihood that the activity will adversely affect the species or stock through effects on annual rates of recruitment or survival). No subsistence uses will be affected by the proposed action because no subsistence communities are present within the action area.

In the *Assessment of Marine Mammal Response to Anthropogenic Sound* section, NMFS' analysis identified the lethal responses, physical trauma, sensory impairment (permanent and temporary threshold shifts and acoustic masking), physiological responses (particular stress responses), and behavioral responses that could

potentially result from exposures from explosive ordnance. In this section, we will relate the potential effects to marine mammals from underwater detonation of explosives to the MMPA regulatory definitions of Level A and Level B Harassment and attempt to quantify the effects that might occur from the specific training activities that the Navy is proposing in the VACAPES Range Complex.

Definition of Harassment

As mentioned previously, with respect to military readiness activities, Section 3(18)(B) of the MMPA defines ''harassment'' as: (i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Level B Harassment

Of the potential effects that were described in the *Assessment of Marine Mammal Response to Anthropogenic Sound* and the *Explosive Ordnance Exposure Analysis* sections, following are the types of effects that fall into the Level B Harassment category:

Behavioral Harassment – Behavioral disturbance that rises to the level described in the definition above, when resulting from exposures to underwater detonations, is considered Level B Harassment. Some of the lower level physiological stress responses discussed in the *Assessment of Marine Mammal Response to Anthropogenic Sound* section will also likely co-occur with the predicted harassments, although these responses are more difficult to detect and fewer data exist relating these responses to specific received levels of sound. When Level B Harassment is predicted based on estimated behavioral responses, those takes may have a stress-related physiological component as well.

Acoustic Masking and Communication Impairment – Acoustic masking is considered Level B Harassment as it can disrupt natural behavioral patterns by interrupting or limiting the marine mammal's receipt or transmittal of important information or environmental cues.

TTS As discussed previously, TTS can effect how an animal behaves in response to the environment, including conspecifics, predators, and prey. The following physiological mechanisms are thought to play a role in inducing auditory fatigue: effects to sensory hair cells in the inner ear that reduce their sensitivity, modification of the chemical environment within the sensory cells, residual muscular activity in the middle ear, displacement of certain inner ear membranes, increased blood flow, and post-stimulatory reduction in both efferent and sensory neural output. Ward (1997) suggested that when these effects result in TTS rather than PTS, they are within the normal bounds of physiological variability and tolerance and do not represent a physical injury. Additionally, Southall *et al.* (2007) indicate that although PTS is a tissue injury, TTS is not because the reduced hearing sensitivity following exposure to intense sound results primarily from fatigue, not loss, of cochlear hair cells and supporting structures and is reversible. Accordingly, NMFS classifies TTS (when resulting from exposure to underwater detonations) as Level B Harassment, not Level A Harassment (injury).

Level A Harassment

Of the potential effects that were described in the *Assessment of Marine Mammal Response to Anthropogenic Sound* section, following are the types of effects that fall into the Level A Harassment category:

PTS – PTS (resulting either from exposure to explosive detonations) is irreversible and considered to be an injury. PTS results from exposure to intense sounds that cause a permanent loss of inner or outer cochlear hair cells or exceed the elastic limits of certain tissues and membranes in the middle and inner ears and result in changes in the chemical composition of the inner ear fluids.

Physical Disruption of Tissues Resulting from Explosive Shock Wave – Physical damage of tissues resulting from a shock wave (from an explosive detonation) is classified as an injury. Blast effects are greatest at the gas-liquid interface (Landsberg, 2000) and gas-containing organs, particularly the lungs and gastrointestinal tract, are especially susceptible to damage (Goertner, 1982; Hill 1978; Yelverton *et al.*, 1973). Nasal sacs, larynx, pharynx, trachea, and lungs may be damaged by compression/expansion caused by the oscillations of the blast gas bubble (Reidenberg and Laitman, 2003). Severe damage (from the shock wave) to the ears can include tympanic membrane rupture, fracture of the ossicles, damage to the cochlea, hemorrhage, and cerebrospinal fluid leakage into the middle ear.

Acoustic Take Criteria

For the purposes of an MMPA incidental take authorization, three types of take are identified: Level B Harassment; Level A Harassment; and mortality (or serious injury leading to mortality). The categories of marine mammal responses (physiological and behavioral) that fall into the two harassment categories were described in the previous section.

Because the physiological and behavioral responses of the majority of the marine mammals exposed to underwater detonations cannot be detected or measured (not all responses visible external to animal, portion of exposed animals underwater (so not visible), many animals located many miles form observers and covering very large area, etc.) and because NMFS must authorize take prior to the impacts to marine mammals, a method is needed to estimate the number of individuals that will be taken, pursuant to the MMPA, based on the proposed action. To this end, NMFS developed acoustic criteria that estimate at what received level (when exposed to explosive detonations) Level B Harassment, Level A Harassment, and mortality (for explosives) of marine mammals would occur. The acoustic criteria for Underwater Detonations are discussed below.

Thresholds and Criteria for Impulsive Sound

Criteria and thresholds for estimating the exposures from a single explosive activity on marine mammals were established for the Seawolf Submarine Shock Test Final Environmental Impact Statement (FEIS) (''Seawolf'') and subsequently used in the USS Winston S. Churchill (DDG–81) Ship Shock FEIS (''Churchill'') (DoN, 1998 and 2001a). NMFS adopted these criteria and thresholds in its final rule on unintentional taking of marine animals occurring incidental to the shock testing (NMFS, 2001a). Since the ship-shock events involve only one large explosive at a time, additional assumptions were made to extend the approach to cover multiple explosions for FIREX (with IMPASS) and BOMBEX. In addition, this section reflects a revised acoustic criterion for small underwater explosions (i.e., 23 pounds per square inch [psi] instead of previous acoustic criteria of 12 psi for peak pressure over all exposures), which is based on the final rule issued to the Air Force by NMFS (NMFS, 2005c).

I.1. Thresholds and Criteria for Injurious Physiological Impacts

I.1.a. Single Explosion

For injury, the Navy uses dual criteria: eardrum rupture (i.e., tympanic-membrane injury. These criteria are considered indicative of the onset of injury. The threshold for TM rupture corresponds to a 50 percent rate of rupture (i.e., 50 percent of animals exposed to the level are expected to suffer TM rupture); this is stated in terms of an Energy Flux Density Level (EL) value of 1.17 inch pounds per square inch (in-lb/in2) (about 205 dB re 1 microPa^2–sec). This recognizes that TM rupture is not necessarily a serious or life-threatening injury, but is a useful index of possible injury that is well correlated with measures of permanent hearing impairment (Ketten [1998] indicates a 30 percent incidence of PTS at the same threshold).

The threshold for onset of slight lung injury is calculated for a small animal (a dolphin calf weighing 26.9 lbs), and is given in terms of the ''Goertner modified positive impulse,'' indexed to 13 psi-msec (DoN, 2001). This threshold is conservative since the positive impulse needed to cause injury is proportional to animal mass, and therefore, larger animals require a higher impulse to cause the onset of injury. This analysis assumed the marine species populations were 100 percent small animals. The criterion with the largest potential impact range (most conservative), either TM rupture (energy threshold) or onset of slight lung injury (peak pressure), will be used in the analysis to determine Level A exposures.

For mortality, the Navy uses the criterion corresponding to the onset of extensive lung injury. This is conservative in that it corresponds to a 1 percent chance of mortal injury, and yet any animal experiencing onset severe lung injury is counted as a lethal exposure. For small animals, the threshold is given in terms of the Goertner modified positive impulse, indexed to 30.5 psi-msec. Since the Goertner approach depends on propagation, source/animal depths, and animal mass in a complex way, the actual impulse value corresponding to the 30.5 psi-msec index is a complicated calculation. To be conservative, the analysis used the mass of a calf dolphin (at 26.9 lbs) for 100 percent of the populations.

I.1.b. Multiple Explosions

For this analysis, the use of multiple explosions only applies to FIREX (with IMPASS) and the MK–83 bombs used in BOMBEX. Since FIREX and portions of BOMBEX require multiple explosions, the Churchill approach had to be extended to cover multiple sound events at the same training site. For multiple exposures, accumulated energy over the entire training time is the natural extension for energy thresholds since energy accumulates with each subsequent shot (detonation); this is consistent with the treatment of multiple arrivals in Churchill. For positive impulse, it is consistent with Churchill to use the maximum value over all impulses received.

I.2. Thresholds and Criteria for Non-Injurious Physiological Effects

The Navy criterion for non-injurious harassment is TTS a slight, recoverable loss of hearing sensitivity (DoN, 2001). For this assessment, there are dual criteria for TTS, an energy threshold and a peak pressure threshold. The criterion with the largest potential impact range (most conservative) either the energy or peak pressure threshold, will be used in the analysis to determine Level B TTS exposures.

I.2.a. Single Explosion TTS-Energy Threshold

The first threshold is a 182 dB re 1 microPa^2–sec maximum energy flux density level in any 1/3–octave band at frequencies above 100 Hertz (Hz) for toothed whales and in any 1/3–octave band above 10 Hz for baleen whales. For large explosives, as in the case of the Churchill FEIS, frequency range cutoffs at 10 and 100 Hz make a difference in the range estimates. For small explosives (<1,500 lb NEW), as what was modeled for this analysis, the spectrum of the shot arrival is broad, and there is essentially no difference in impact ranges for toothed whales or baleen whales.

The TTS energy threshold for explosives is derived from the Space and Naval Warfare Systems Center (SSC) pure-tone tests for TTS (Schlundt *et al.*, 2000, Finneran and Schlundt 2004). The pure-tone threshold (192 dB as the lowest value) is modified for explosives by (a) interpreting it as an energy metric, (b) reducing it by 10 dB to account for the time constant of the mammal ear, and (c) measuring the energy in 1/3–octave bands, the natural filter band of the ear. The resulting threshold is 182 dB re 1 microPa^2–sec in any 1/3–octave band. The energy threshold usually dominates and is used in the analysis to determine potential Level B TTS exposures for single explosion ordnance.

I.2.b. Single Explosion – TTS-Peak Pressure Threshold

The second threshold applies to all species and is stated in terms of peak pressure at 23 psi (about 225 dB re 1 microPa). This criterion was adopted for Precision Strike Weapons (PSW) Testing and Training by Eglin Air Force Base in the Gulf of Mexico (NMFS, 2005b). It is important to note that for small shots near the surface (such as in this analysis), the 23–psi peak pressure threshold generally will produce longer impact ranges than the 182–dB energy metric. Furthermore, it is not unusual for the TTS impact range for the 23–psi pressure metric to actually exceed the behavioral (without TTS) impact range for the 177–dB energy metric.

I.2.c. Multiple Explosions – TTS

For multiple explosions, accumulated energy over the entire training time is the natural extension for energy thresholds since energy accumulates with each subsequent shot/detonation. This is consistent with the energy argument in Churchill. For peak pressure, it is consistent with Churchill to use the maximum value over all impulses received.

I.3. Thresholds and Criteria for Behavioral Effects

I.3.a. Single Explosion

For a single explosion, to be consistent with Churchill, TTS is the criterion for Level B. In other words, because behavioral disturbance for a single explosion is likely to be limited to a short-lived startle reaction, use of the TTS criterion is considered sufficient protection and therefore behavioral effects (without TTS, impacts would be limited to behavioral effects only) are not considered for single explosions.

I.3.b. Multiple Explosions – Without TTS

For this analysis, the use of multiple explosions only applies to FIREX (with IMPASS) and the MK–83 bombs used in BOMBEX. Because multiple explosions would occur within a discrete time period, a new acoustic criterion-behavioral disturbance (without TTS) is used to account for behavioral effects significant enough to be judged as harassment, but occurring at lower noise levels than those that may cause TTS.

The threshold is based on test results published in Schlundt *et al.* (2000), with derivation following the approach of the Churchill FEIS for the energy-based TTS threshold. The original Schlundt *et al.* (2000) data and the report of Finneran and Schlundt (2004) are the basis for thresholds for behavioral disturbance

(without TTS). As reported by Schlundt *et al.* (2000), instances of altered behavior generally began at lower exposures than those causing TTS; however, there were many instances when subjects exhibited no altered behavior at levels above the onset-TTS levels. Regardless of reactions at higher or lower levels, all instances of altered behavior were included in the statistical summary.

The behavioral disturbance (without TTS) threshold for tones is derived from the SSC tests, and is found to be 5 dB below the threshold for TTS, or 177 dB re 1 microPa^2–sec maximum energy flux density level in any 1/3–octave band at frequencies above 100 Hz for toothed whales and in any 1/3–octave band above 100 Hz for baleen whales. As stated previously for TTS, for small explosives (<1,500 lb NEW), as what was modeled for this analysis, the spectrum of the shot arrival is broad, and there is essentially no difference in impact ranges for whales. The behavioral disturbance (without TTS) impact range for FIREX with IMPASS can, especially in shallower water, be about twice the impact range for TTS. Based on modeling, for BOMBEX involving MK–83 bombs, behavioral disturbance (without TTS) (177 dB re 1 microPa^2–s) is the criteria that dominates in the analysis to determine potential Level B exposures due to the use of multiple explosions.

II. Summary of Thresholds and Criteria for Impulsive Sounds

Table 15 summarizes the effects, criteria, and thresholds used in the assessment for impulsive sounds. The criteria for behavioral effects without physiological effects used in this analysis are based on use of multiple explosives that only take place during a FIREX (w/IMPASS) event or a BOMBEX event involving MK–83 bombs.

TABLE 15. EFFECTS, CRITERIA, AND THRESHOLDS FOR IMPULSIVE SOUNDS

Effect	Criteria	Metric	Threshold	Effect
Mortality	Onset of Extensive Lung Injury	Goertner modified positive impulse	indexed to 30.5 psi-msec (assumes 100 percent small animal at 26.9 lbs)	Mortality
Injurious Physiological	50% Tympanic Membrane Rupture	Energy flux density	1.17 in-lb/in^2 (about 205 dB re 1 microPa^2-sec)	Level A
Injurious Physiological	Onset Slight Lung Injury	Goertner modified positive impulse	indexed to 13 psi-msec (assumes 100 percent small animal at 26.9 lbs)	Level A
Non-injurious Physiological	TTS	Greatest energy flux density level in any 1/3-octave band (> 100 Hz for toothed whales and > 10 Hz for baleen whales) - for total energy over all exposures	182 dB re 1 microPa^2-sec	Level B
Non-injurious Physiological	TTS	Peak pressure over all exposures	23 psi (for small explosives <2,000 lbs, else 12 psi)	Level B
Non-injurious Behavioral	Multiple Explosions Without TTS	Greatest energy flux density level in any 1/3-octave (> 100 Hz for toothed whales and > 10 Hz for baleen whales) - for total energy over all exposures (multiple explosions only)	177 dB re 1 microPa^2-sec	Level B

The criteria for mortality, Level A Harassment, and Level B Harassment resulting from explosive detonations were initially developed for the Navy's Sea Wolf and Churchill ship-shock trials and have not changed since other MMPA authorizations issued for explosive detonations. The criteria, which are applied to cetaceans and pinnipeds are summarized in Table 8. Additional information regarding the derivation of these criteria is available in the Navy's EIS for the VACAPES Range Complex and in the Navy's CHURCHILL FEIS (U.S. Department of the Navy, 2001c).

Take Calculations

In estimating the potential for marine mammals to be exposed to an acoustic source, the Navy completed the following actions:

(1) Evaluated potential effects within the context of existing and current regulations, thresholds, and criteria;

(2) Identified all acoustic sources that will be used during Navy training activities;

(3) Identified the location, season, and duration of the action to determine which marine mammal species are likely to be present;

(4) Determined the estimated number of marine mammals (i.e., density) of each species that will likely be present in the respective OPAREAs during the Navy training activities;

(5) Applied the applicable acoustic threshold criteria to the predicted sound exposures from the proposed activity. The results were then evaluated to determined whether the predicted sound exposures from the acoustic model might be considered harassment; and

(6) Considered potential harassment within the context of the affected marine mammal population, stock, and species to assess potential population viability. Particular focus on recruitment and survival are provided to analyze whether the effects of the action

can be considered to have negligible effects to marine mammal species or a population stock.

Starting with a sound source, the attenuation of an emitted sound due to propagation loss is determined. Uniform animal distribution is overlaid onto the calculated sound fields to assess if animals are physically present at sufficient received sound levels to be considered ''exposed'' to the sound. If the animal is determined to be exposed, two possible scenarios must be considered with respect to the animal's physiology - effects on the auditory system and effects on non-auditory system tissues. These are not independent pathways and both must be considered since the same sound could affect both auditory and non-auditory tissues. Note that the model does not account for any animal response; rather the animals are considered stationary, accumulating energy until the threshold is tripped.

Estimating the take that will result from the proposed activities entails the following four steps: propagation model estimates animals exposed to sources at different levels; further modeling determines the number of exposures to levels indicated in the criteria above (i.e., number of takes); post-modeling corrections refine estimates to make them more accurate; mitigation is taken into consideration. More information regarding the models used, the assumptions used in the models, and the process of estimating take is available in Appendix J of the Navy's EIS for the VACAPES Range Complex.

Modeling results from the analysis predict mortalities for 1 common dolphin from use of explosive ordnance in MISSILEX activities. These modeling results do not take into account the mitigation measures (detailed in the Proposed Mitigation Measure section above) that lower the potential for mortalities to occur given standard range clearance procedures and the likelihood that these species can be readily detected (e.g., small animals move quickly throughout the water column and are often seen riding the bow wave of large ships or in large groups). With the mitigation and monitoring measures implemented, NMFS does not believe that there would be mortality of any marine mammal resulting from the proposed training activities. Therefore, mortality of marine mammals would not be authorized.

Effects on Marine Mammal Habitat

Activities from Atlantic Fleet training activities in the VACAPES Range Complex that may affect marine mammal habitat include changes in water quality, the introduction of sound into the water column, and temporary changes to prey distribution and abundance. There is no critical habitat designated in the VACAPES Range Complex.

Analysis and Negligible Impact Determination

Pursuant to NMFS regulations implementing the MMPA, an applicant is required to estimate the number of animals that will be ''taken'' by the specified activities (i.e., takes by harassment only, or takes by harassment, injury, and/or death). This estimate informs the analysis that NMFS must perform to determine whether the activity will have a ''negligible impact'' on the species or stock. Level B (behavioral) harassment occurs at the level of the individual(s) and does not assume any resulting population-level consequences, though there are known avenues through which behavioral disturbance of individuals can result in population-level effects. A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (i.e., population-level effects). An estimate of the number of Level B harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), or any of the other variables mentioned in the first paragraph (if known), as well as the number and nature of estimated Level A takes, the number of estimated mortalities, and effects on habitat.

Based on the analysis contained herein, NMFS has preliminarily determined that Navy training exercises utilizing underwater detonations will have a negligible impact on the marine mammal species and stocks present in the VACAPES Range Complex.

Subsistence Harvest of Marine Mammals

NMFS has preliminarily determined that the issuance of 5–year regulations and subsequent LOAs (as warranted) for Navy training exercises in the VACAPES Range Complex would not have an unmitigable adverse impact on the availability of the affected species or stocks for subsistence use, since there are no such uses in the specified area.

ESA

There are four marine mammal species that are listed as endangered under the ESA with confirmed or possible occurrence in the VACAPES Range Complex: humpback whale, North Atlantic right whale, fin whale, and sperm whale. The Navy has begun consultation with NMFS pursuant to section 7 of the ESA, and NMFS will also consult internally on the issuance of an LOA under section 101(a)(5)(A) of the MMPA for training exercises in the VACAPES Range Complex. Consultation will be concluded prior to a determination on the issuance of the final rule and an LOA.

NEPA

The Navy is preparing an Environmental Impact Statement (EIS) for the proposed VACAPES Range Complex training activities. A draft EIS was released for public comment from June 27 - August 11, 2008 and it is available at *http://www.vacapesrangecomplexeis.com/*. NMFS is a cooperating agency (as defined by the Council on Environmental Quality (40 CFR 1501.6)) in the preparation of the EIS. NMFS has reviewed the Draft EIS and will be working with the Navy on the Final EIS (FEIS).

NMFS intends to adopt the Navy's FEIS, if adequate and appropriate, and we believe that the Navy's FEIS will allow NMFS to meet its responsibilities under NEPA for the issuance of the 5–year regulations and LOAs (as warranted) for training activities in the VACAPES Range Complex. If the Navy's FEIS is not adequate, NMFS would supplement the existing analysis and documents to ensure that we comply with NEPA prior to the issuance of the final rule or LOA.

Preliminary Determination

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat and dependent upon the implementation of the mitigation measures, NMFS preliminarily finds that the total taking from Navy training exercises utilizing underwater explosives in the VACAPES Range Complex will have a negligible impact on the affected marine mammal species or stocks. NMFS has proposed regulations for these exercises that prescribe the means of affecting the least practicable adverse impact on marine mammals and their habitat and set forth requirements pertaining to the monitoring and reporting of that taking.

Classification

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act

Pursuant to the procedures established to implement section 6 of Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Pursuant to the Regulatory Flexibility Act, the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act requires Federal agencies to prepare an analysis of a rule's impact on small entities whenever the agency is required to publish a notice of proposed rulemaking. However, a Federal agency may certify, pursuant to 5 U.S.C. section 605 (b), that the action will not have a significant economic impact on a substantial number of small entities. The Navy is the entity that will be affected by this rulemaking, not a small governmental jurisdiction, small organization or small business, as defined by the Regulatory Flexibility Act. Any requirements imposed by a Letter of Authorization issued pursuant to these regulations, and any monitoring or reporting requirements imposed by these regulations, will be applicable only to the Navy. Because this action, if adopted, would directly affect the Navy and not a small entity, NMFS concludes the action would not result in a significant economic impact on a substantial number of small entities.

List of Subjects in 50 CFR Part 216

Exports, Fish, Imports, Incidental take, Indians, Labeling, Marine mammals, Navy, Penalties, Reporting and recordkeeping requirements, Seafood, Sonar, Transportation.

Dated: December 5, 2008.

Samuel D. Rauch III,

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

For reasons set forth in the preamble, 50 CFR Chapter II is proposed to be amended by adding part 218 to read as follows:

2. Part 218 is added to read as follows:

PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

Subpart A—Taking Marine Mammals Incidental to U.S. Navy Training in the Virginia Capes Range Complex

Sec.

218.1 Specified activity and specified geographical region.
218.2 Permissible methods of taking.
218.3 Prohibitions.
218.4 Mitigation.
218.5 Requirements for monitoring and reporting.
218.6 Applications for Letters of Authorization.
218.7 Letters of Authorization.
218.8 Renewal of Letters of Authorization.
218.9 Modifications to Letters of Authorization.

Subpart A—Taking Marine Mammals Incidental to U.S. Navy Training in the Virginia Capes Range Complex (VACAPES Range Complex)

Authority: 16 U.S.C. 1361 *et seq.*

§ 218.1 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the VACAPES OPAREA, which is located in the coastal and offshore waters of the western North Atlantic Ocean adjacent to Delaware, Maryland, Virginia, and North Carolina. The northernmost boundary of the OPAREA is located 37 nautical miles (nm) off the entrance to Delaware Bay at latitude 38° 45' N, the farthest point of the eastern boundary is 184 nm east of Chesapeake Bay at longitude 72° 41' W, and the southernmost point is 105 nm southeast of Cape Hatteras, North Carolina, at latitude of 34° 19' N. The western boundary of the OPAREA lies 3 nm from the shoreline at the boundary separating state and Federal waters.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities within the designated amounts of use:

(1) The detonation of the underwater explosives indicated in this (c)(1)(i) conducted as part of the training exercises indicated in this (c)(1)(ii):

(i) Underwater Explosives:

(A) AGM–114 (Hellfire missile);

(B) AGM–65 E/F (Maverick missile);

(C) MK–83/GBU–32 (1,000 lb High Explosive bomb);

(D) Airgorne Mine Neutralization system (AMNS);

(E) 20 lb NEW charges;

(F) AGM–88 (HARM);

(G) 5'' Naval Gunfire.

(ii) Training Events:

(A) Mine Neutralization (AMNS) up to 150 exercises over the course of 5 years (an average of 30 per year);

(B) Mine Neutralization (20 lb NEW charges) - up to 120 exercises over the course of 5 years (an average of 24 per year);

(C) Bombing Exercise (BOMBEX) (Air-to-Surface) - up to 100 exercises over the course of 5 years (an average of 20 per year);

(D) Missile Exercise (MISSILEX) (Air-to-Surface; Hellfire missile) - up to 300 exercises over the course of 5 years (an average of 60 per year);

(E) Missile Exercise (MISSILEX) (Air-to-Surface; Maverick, HE) - up to 100 exercises over the course of 5 years (an average of 20 per year);

(F) HARM Missile Exercise (HARMEX) – up to 130 exercises over the course of 5 years (an average of 26 per year);

(G) FIREX with IMPASS - up to 110 exercises over the course of 5 years (an average of 22 per year).

(2) [Reserved]

§ 218.2 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 218.7, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals within the area described in § 218.1 (b), provided the activity is in compliance with all terms, conditions, and requirements of this subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 218.1 (c) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 218.1 (c) is limited to the following species, by the indicated method of take the indicated number of times:

(1) Level B Harassment:

(i) Mysticetes:

(A) Humpback whale (*Megaptera novaeangliae*) - 2;

(B) Fin whale (*Balaenoptera physalus*) - 2.

(ii) Odontocetes:

(A) Sperm whale (*Physeter macrocephalus*) - 2;

(B) Pygmy or dwarf sperm whales (*Kogia* sp.) - 3;

(C) Rough-toothed dolphin (*Steno bredanensis*) - 1;

(D) Bottlenose dolphin (*Tursiops truncatus*) - 29;

(E) Pantropical spotted dolphin (*Stenella attenuata*) - 70;

(F) Striped dolphin (*S. coeruleoalba*)- 68;

(F) Clymene dolphin (*S. clymene*) - 33;

(G) Atlantic spotted dolphin (*S. frontalis*) - 43;

(H) Common dolphin (*Delphinus delphis*) - 2,193;

(I) Risso's dolphin (*Grampus griseus*) - 16

(J) Pilot whales (*Globicephala* sp.) - 10.

(2) Level A Harassment (injury):

(i) Atlantic spotted dolphin - 1;

(ii) Common dolphin - 20;

(iii) Pantropical spotted dolphin - 1;

(iv) Striped dolphin - 3.

§ 218.3 Prohibitions.

Notwithstanding takings contemplated in § 218.2 and authorized by a Letter of Authorization issued under § 216.106 of this chapter and § 218.7. No person in connection with the activities described in § 218.1 may:

(a) Take any marine mammal not specified in § 218.2 (c);

(b) Take any marine mammal specified in § 218.2 (c) other than by incidental take as specified in § 218.2(c)(1) and (2);

(c) Take a marine mammal specified in § 218.2 (c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this Subpart or a Letter of Authorization issued under § 216.106 of this chapter and § 218.7.

§ 218.4 Mitigation.

(a) When conducting training activities identified in § 218.1(c), the mitigation measures contained in the Letter of Authorization issued under § 216.106 of this chapter and § 218.7 must be implemented. These mitigation measures include (but are not limited to):

(1) *General Maritime Measures:*

(i) Personnel Training – Lookouts

(A) All bridge personnel, Commanding Officers, Executive Officers, officers standing watch on the bridge, maritime patrol aircraft aircrews, and Mine Warfare (MIW) helicopter crews will complete Marine Species Awareness Training (MSAT).

(B) Navy lookouts will undertake extensive training to qualify as a watchstander in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(C) Lookout training will include on-the-job instruction under the supervision of a qualified, experienced watchstander. Following successful completion of this supervised training period, lookouts will complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects).

(D) Lookouts will be trained in the most effective means to ensure quick and effective communication within the command structure to facilitate implementation of protective measures if marine species are spotted.

(E) Surface lookouts would scan the water from the ship to the horizon and be responsible for all contacts in their sector. In searching the assigned sector, the lookout would always start at the forward part of the sector and search aft (toward the back). To search and scan, the lookout would hold the binoculars steady so the horizon is in the top third of the field of vision and direct the eyes just below the horizon. The lookout would scan for approximately five seconds in as many small steps as possible across the field seen through the binoculars. They would search the entire sector in approximately five-degree steps, pausing between steps for approximately five seconds to scan the field of view. At the end of the sector search, the glasses would be lowered to allow the eyes to rest for a few seconds, and then the lookout would search back across the sector with the naked eye.

(F) At night, lookouts would not sweep the horizon with their eyes, because eyes do not see well when they are moving. Lookouts would scan the horizon in a series of movements that would allow their eyes to come to periodic rests as they scan the sector. When visually searching at night, they would look a little to one side and out of the corners of their eyes, paying attention to the things on the outer edges of their field of vision. Lookouts will also have night vision devices available for use.

(ii) Operating Procedures & Collision Avoidance:

(A) Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order will be issued to further disseminate the personnel training requirement and general marine species mitigation measures.

(B) Commanding Officers will make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

(C) While underway, surface vessels will have at least two lookouts with binoculars; surfaced submarines will have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts will watch for and report to the OOD the presence of marine mammals and sea turtles.

(D) On surface vessels equipped with a mid-frequency active sonar, pedestal mounted ''Big Eye'' (20x110) binoculars will be properly installed and in good working order to assist in the detection of marine mammals and sea turtles in the vicinity of the vessel.

(E) Personnel on lookout will employ visual search procedures employing a scanning method in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(F) After sunset and prior to sunrise, lookouts will employ Night Lookouts Techniques in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(G) While in transit, naval vessels will be alert at all times, use extreme caution, and proceed at a ''safe speed'' so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions.

(H) When whales have been sighted in the area, Navy vessels will increase vigilance and implement measures to avoid collisions with marine mammals and avoid activities that might result in close interaction of naval assets and marine mammals. Such measures shall include changing speed and/or direction and would be dictated by environmental and other conditions (e.g., safety or weather).

(I) Naval vessels will maneuver to keep at least 500 yds (460 m) away from any observed whale and avoid approaching whales head-on. This requirement does not apply if a vessel's safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Restricted maneuverability includes, but is not limited to, situations when vessels are engaged in dredging, submerged operations, launching and recovering aircraft or landing craft, minesweeping operations, replenishment while underway and towing operations that severely restrict a vessel's ability to deviate course. Vessels will take reasonable steps to alert other vessels in the vicinity of the whale.

(J) Where feasible and consistent with mission and safety, vessels will avoid closing to within 200–yd (183 m) of marine mammals other than whales (whales addressed above).

(K) Floating weeds, algal mats, Sargassum rafts, clusters of seabirds, and jellyfish are good indicators of sea turtles and marine mammals. Therefore, increased vigilance in watching for sea turtles and marine mammals will be taken where these are present.

(L) Navy aircraft participating in exercises at sea will conduct and maintain, when operationally feasible and safe, surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties. Marine mammal detections will be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(M) All vessels will maintain logs and records documenting training operations should they be required for event reconstruction purposes. Logs and records will be kept for a period of 30 days following completion of a major training exercise.

(2) Coordination and Reporting Requirements:

(i) The Navy shall coordinate with the local NMFS Stranding Coordinator for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that may occur at any time during or within 24 hours after completion of training activities.

(ii) The Navy shall follow internal chain of command reporting procedures as promulgated through Navy instructions and orders.

(3) Mitigation Measures Applicable Vessel Transit in the Mid-Atlantic during North Atlantic Right Whale Migration:

(i) The mitigation measures apply to all Navy vessel transits, including those vessels that would transit to and from East Coast ports and OPAREAs.

(ii) Seasonal migration of right whales is described by NMFS as occurring from October 15th through April 30th, when right whales migrate between feeding grounds farther north and calving grounds farther south.

(A) Where vessel transits during the right whale migration season along certain identified ports including the Hampton Roads entrance to the Chesapeake Bay, Navy vessels shall use extreme caution and operate at a slow, safe speed consistent with mission and safety within a 20 nm (37 km) arc of the specified reference points listed on Table 14 of this document.

(B) During the indicated months, Navy vessels would practice increased vigilance with respect to avoidance of vessel-whale interactions along the mid-Atlantic coast, including transits to and from any mid-Atlantic ports not specifically identified above.

(4) Proposed Mitigation Measures for Specific At-sea Training Events:

(i) Firing Exercise (FIREX) Using the Integrated Maritime Portable Acoustic Scoring System (IMPASS) (5–in. Explosive Rounds);

(A) FIREX using IMPASS would only be conducted in the four designated areas in the VACAPES Range Complex.

(B) Pre-exercise monitoring of the target area will be conducted with ''Big Eyes'' prior to the event, during deployment of the IMPASS sonobuoy array, and during return to the firing position.

Ships will maintain a lookout dedicated to visually searching for marine mammals 180o along the ship track line and 360o at each buoy drop-off location.

(C) ''Big Eyes'' on the ship shall be used to monitor a 640 yd (585 m) buffer zone around the target area for marine mammals during naval-gunfire events.

(D) Ships shall not fire on the target if any marine mammals are detected within or approaching the 640 yd (585 m) until the area is cleared. If marine mammals are present, operations shall be suspended. Visual observation shall occur for approximately 45 minutes, or until the animal has been observed to have cleared the area and is heading away from the buffer zone.

(E) Post-exercise monitoring of the entire effect range shall take place with ''Big Eyes'' and the naked eye during the retrieval of the IMPASS sonobuoy array following each firing exercise.

(F) FIREX with IMPASS shall take place during daylight hours only.

(G) FIREX with IMPASS shall only be used in Beaufort Sea State three (3) or less.

(H) The visibility must be such that the fall of shot is visible from the firing ship during the exercise.

(I) No firing shall occur if marine mammals are detected within 70 yd (64 m) of the vessel.

(ii) Air-to-Surface At-Sea Bombing Exercises (250–lbs to 2,000–lbs explosive bombs);

(A) Aircraft shall visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area will be made by flying at 1,500 ft (457 m) altitude or lower, if safe to do so, and at the slowest safe speed.

(B) A buffer zone of 5,100–yd (4,663 m) radius shall be established around the intended target zone. The exercises shall be conducted only if the buffer zone is clear of sighted marine mammals.

(C) At-sea BOMBEXs using live ordnance shall occur during daylight hours only.

(iii) Air-to-Surface Missile Exercises (Explosive);

(A) Aircraft shall initially survey the intended ordnance impact area for marine mammals.

(B) During the actual firing of the weapon, the aircraft involved must be able to observe the intended ordnance impact area to ensure the area is free of range transients.

(C) Visual inspection of the target area shall be made by flying at 1,500 ft (457 m) altitude or lower, if safe to do so, and at slowest safe speed.

(D) Explosive ordnance shall not be targeted to impact within 1,800 yd (1,646 m) of sighted marine mammals.

(iv) Mine Neutralization Training Involving Underwater Detonations (up to 20–lb charges);

(A) This activity shall only occur in W–50 of the VACAPES Range Complex.

(B) Observers shall survey the Zone of Influence (ZOI), a 656 yd (600 m) radius from detonation location, for marine mammals from all participating vessels during the entire operation. A survey of the ZOI (minimum of 3 parallel tracklines 219 yd [200 m] apart) using support craft shall be conducted at the detonation location 30 minutes prior through 30 minutes post detonation. Aerial survey support shall be utilized whenever assets are available.

(C) Detonation operations shall be conducted during daylight hours.

(D) If a marine mammal is sighted within the ZOI, the animal shall be allowed to leave of its own volition. The Navy shall suspend detonation exercises and ensure the area is clear for a full 30 minutes prior to detonation.

(E) Divers placing the charges on mines and dive support vessel personnel shall survey the area for marine mammals and shall report any sightings to the surface observers. These animals shall be allowed to leave of their own volition and the ZOI shall be clear for 30 minutes prior to detonation.

(F) No detonations shall take place within 3.2 nm (6 km) of an estuarine inlet (Chesapeake Bay Inlets).

(G) No detonations shall take place within 1.6 nm (3 km) of shoreline.

(H) No detonations shall take place within 1,000 ft (305 m) of any artificial reef, shipwreck, or live hard-bottom community.

(I) Personnel shall record any protected species observations during the exercise as well as measures taken if species are detected within the ZOI.

(v) Adaptive management;

(A) The final regulations governing the take of marine mammals incidental to Navy training exercises in VACAPES shall contain an adaptive management component.

(B) The use of adaptive management shall give NMFS the ability to consider new data from different sources to determine (in coordination with the Navy), on an annual basis, if new or modified mitigation or monitoring measures are appropriate for subsequent annual LOAs.

§ 218.5 Requirements for monitoring and reporting.

(a) The Holder of the Letter of Authorization issued pursuant to § 216.106 of this chapter and § 218.7 for activities described in § 218.1(c) is required to cooperate with the NMFS, and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals.

(b) The Holder of the Authorization must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity identified in § 218.1(c) is thought to have resulted in the mortality or injury of any marine mammals, or in any take of marine mammals not identified in § 218.2 (c).

(c) The Holder of the Letter of Authorization must conduct all monitoring and/or research required under the Letter of Authorization.(d) The monitoring methods proposed for use during training events in VACAPES Range Complex include a combination of individual elements designed to allow a comprehensive assessment include:

(1) Vessel and aerial surveys:

(i) The Holder of this Authorization shall visually survey a minimum of 2 explosive events per year, one of which shall be a multiple detonation event.

(ii) For specified training events, aerial or vessel surveys shall be used 1–2 days prior to, during (if reasonably safe), and 1–5 days post detonation.

(iii) Surveys shall include any specified exclusion zone around a particular detonation point plus 2000 yards beyond the exclusion zone. For vessel based surveys a passive acoustic system (hydrophone or towed array) could be used to determine if marine mammals are in the area before and/or after a detonation event.

(iv) When conducting a particular survey, the survey team shall collect:

(A) Species identification and group size;

(B) Location and relative distance from the detonation site;

(C) The behavior of marine mammal(s) including standard environmental and oceanographic parameters;

(D) Date, time and visual conditions associated with each observation;

(E) Direction of travel relative to the detonation site; and

(F) duration of the observation.

(v) An aerial survey team shall conduct pre and post aerial surveys, taking local oceanographic currents into account, of the exercise area.

(2) Passive acoustic monitoring:

(i) Any time a towed hydrophone array is employed during shipboard surveys the towed array shall be deployed during daylight hours for each of the days the ship is at sea.

(ii) The towed hydrophone array shall be used to supplement the ship-based systematic line-transect surveys (particularly for species such as beaked whales that are rarely seen).

(3) Marine mammal observers on Navy platforms:

(i) Marine mammal observers (MMOs) shall be placed on a Navy platform during one of the exercises being monitored per year.

(ii) The MMO must possess expertise in species identification of regional marine mammal species and experience collecting behavioral data.

(iii) MMOs shall not be placed aboard Navy platforms for every Navy training event or major exercise, but during specifically identified opportunities deemed appropriate for data collection efforts. The events selected for MMO participation shall take into account safety, logistics, and operational concerns.

(iv) MMOs shall observe from the same height above water as the lookouts.

(v) The MMOs shall not be part of the Navy's formal reporting chain of command during their data collection efforts; Navy lookouts shall continue to serve as the primary reporting means within the Navy chain of command for marine mammal sightings. The only exception is that if an animal is observed within the shutdown zone that has not been observed by the lookout, the MMO shall inform the lookout of the sighting for the lookout to take the appropriate action through the chain of command.

(vi) The MMOs shall collect species identification, behavior, direction of travel relative to the Navy platform, and distance first observed. All MMO sightings shall be conducted according to a standard operating procedure.

(e) Report from Monitoring required in paragraph d of this section The Navy shall submit a report annually on September 1 describing the implementation and results (through June 1 of the same year) of the monitoring required in paragraph c of this section.

(f) VACAPES Range Complex Comprehensive Report The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during explosive exercises for which individual reports are required in § 218.5 (d through e). This report will be submitted at the end of the fourth year of the rule (November 2012), covering activities that have occurred through June 1, 2012.

(g) The Navy shall respond to NMFS comments on the draft comprehensive report if submitted within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or three months after the submittal of the draft if NMFS does not comment by then.

§ 218.6 Applications for Letters of Authorization.

To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103) conducting the activity identified in § 218.1(c) (the U.S. Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 218.7 or a renewal under § 218.8.

§ 218.7 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart, but must be renewed annually subject to annual renewal conditions in § 218.8.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (i.e., mitigation); and

(3) Requirements for mitigation, monitoring and reporting.(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

§ 218.8 Renewal of Letters of Authorization.

(a) A Letter of Authorization issued under § 216.106 of this chapter and § 218.7 for the activity identified in

§ 218.1(c) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.6 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Timely receipt of the monitoring reports required under § 218.5(b); and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under § 218.4 and the Letter of Authorization issued under § 216.106 of this chapter and § 218.7, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under § 216.106 of this chapter and § 218.8 indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register**.

§ 218.9 Modifications to Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to § 216.106 of this chapter and § 218.7 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 218.8, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 218.2(c), a Letter of Authorization issued pursuant to § 216.106 of this chapter and § 218.7 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

[FR Doc. E8–29498 Filed 12–11–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

RIN 0648–AX14

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Management Area and Gulf of Alaska License Limitation Program

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

ACTION: Notice of availability of fishery management plan amendment; request for comments.

SUMMARY: Amendment 92 to the Fishery Management Plans for Groundfish of the Bering Sea/Aleutian Islands Management Area and Amendment 82 to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMPs) would remove trawl gear endorsements on licenses issued under the license limitation program in specific management areas if those licenses have not been used on vessels that meet minimum recent landing requirements using trawl gear. This action would provide exemptions to this requirement for licenses that are used in trawl fisheries subject to quota–based management. This action would issue new area endorsements for trawl catcher vessels in the Aleutian Islands if minimum recent landing requirements in the Aleutian Islands were met. This action is intended to promote the goals and objectives of the Magnuson–Stevens Fishery Conservation and Management Act, the FMP, and other applicable laws.

DATES: Comments on the amendments must be submitted on or before February 10, 2009.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by ''RIN 0648–AX14,'' by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the FederaleRulemaking Portal website at *http://www.regulations.gov*.
- Mail: P. O. Box 21668, Juneau, AK 99802.
- Fax: (907) 586–7557.
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

Copies of Amendments 92 and 82, the Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), and the Environmental Assessment (EA) prepared for this action may be obtained from the NMFS Alaska Region at the address above or from the Alaska Region website at *http://www.fakr.noaa.gov/sustainablefisheries.htm*.

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

SUPPLEMENTARY INFORMATION: The Magnuson–Stevens Fishery Conservation and Management Act requires that each regional fishery management council submit any fishery management plan amendment it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary of Commerce (Secretary). The Magnuson–Stevens Act also requires that NMFS, upon receiving a fishery management plan amendment, immediately publish a notice in the **Federal Register** announcing that the amendment is available for public review and comment.

The license limitation program (LLP) for groundfish fisheries was recommended by the North Pacific Fishery Management Council (Council) in June 1995 as Amendments 39 and 41 to the Bering Sea/Aleutian Islands Management Area (BSAI) and the Gulf of Alaska (GOA) FMPs, respectively. NMFS published a final rule to implement the LLP on October 1, 1998 (63 FR 52642), and the LLP was implemented on January 1, 2000.

The LLP for groundfish established specific criteria that must be met to allow a person to use a vessel to continue to be eligible to fish in federally managed groundfish fisheries. Under the LLP, NMFS issued LLP licenses. These LLP licenses were issued to a vessel owner based on the catch history of their vessels in Federal groundfish fisheries during the mid 1990's. LLP licenses: (1) endorse fishing activities in specific regulatory areas in the BSAI and GOA; (2) restrict the length of the vessel on which the LLP license may be used; (3) designate the fishing gear that may be used on the vessel, trawl or non–trawl gear designations; (4) designate the type of vessel operation permitted, LLP licenses designate whether the vessel to which the LLP is assigned may operate as a catcher vessel or as a catcher/processor; and (5) are issued so that the endorsements for specific regulatory areas, gear designations, or vessel operational types are non–severable from the LLP license, once issued, the components of the LLP license cannot be transferred independently. By creating LLP licenses with these characteristics, the Council and NMFS limited the ability of a person to assign an LLP license that was derived from the historic fishing activity of a vessel to be transferred and used on another vessel in a manner that could expand fishing capacity.

In 2000, NMFS issued over 300 LLP licenses endorsed for trawl gear. A vessel owner received an LLP license endorsed for a specific regulatory area in the BSAI, either the Bering Sea subarea (BS) or Aleutian Islands subarea (AI); or a specific regulatory area in the GOA, Southeast Outside District (SEO), Central Gulf of Alaska (CG), or Western Gulf of Alaska (WG) if that vessel met specific landing requirements in that specific regulatory area. The minimum landing requirements differed depending on the regulatory area, size of the vessel, and the operational type of the vessel. Soon after LLP licenses were issued it became apparent that a substantial number of trawl–endorsed LLP licenses were not being used. Changes in the economic viability of some fishing operations, changes in fishery management regulations, and consolidation of fishery operations are likely factors affecting the number of LLP licenses that were actively assigned to vessels. LLP licenses that are valid but have not been used recently on a vessel are commonly known as latent LLP licenses.

Beginning in early 2007, the Council began reviewing the potential removal of latent trawl–endorsed LLP licenses. This review was initiated primarily at the request of active trawl fishery participants who were concerned that latent trawl–endorsed LLP licenses could become active in the future and adversely affect their fishing operations. During the process of this review, the Council also received input from the public requesting modification to the LLP to meet unique conditions in the AI area that limit the ability of catcher vessels and specific AI area communities to harvest and process federally managed groundfish. In April 2008, after more than a year of review, development of an analysis, and extensive public comment, the Council recommended modifications to the LLP to revise eligibility criteria for trawl endorsements on LLP licenses. Amendments 92 and 82 would implement two different actions.

First, Amendments 92 and 82 would remove latent trawl endorsements on LLP licenses. A trawl endorsement in a specific regulatory area would be removed from an LLP license if that LLP license has not been assigned to a vessel that has made a minimum of two landings using trawl gear in a specific regulatory area from 2000 through 2006. Two exemptions to the landing requirements would apply. One would allow a person to maintain their trawl endorsement in the CG and the WG even if that person did not meet the landing requirement in one of the regulatory areas, provided that LLP license had been used on a vessel that made at least 20 landings using trawl gear in one regulatory area in either the CG or WG from 2005 through 2007. The Council determined that an exemption to the landing requirement is warranted for these two areas in the GOA in order to qualify license holders that have established records of recent participation in GOA trawl fisheries. This provision would only apply to LLP licenses that are designated for catcher vessels. The second exemption would allow retention of a trawl endorsement in a specific regulatory area if that regulatory area endorsement is required to continue participation in one of three Limited Access Privilege Programs (LAPPs) currently in place: the American Fisheries Act (AFA); the Amendment 80 Program; and the CG Rockfish Program. Under this exemption, NMFS would not remove trawl endorsements with a BS or AI endorsement if that LLP license is assigned for use in the AFA or Amendment 80 LAPP, and NMFS would not remove trawl endorsements in with a CG endorsement if that LLP license is assigned for use in the CG Rockfish Program LAPP. The Council determined that exemptions for LAPPs are appropriate because the participants in these three LAPPs have already met participation requirements for these specific management areas to participate in these programs.

Second, Amendments 92 and 82 would issue new trawl AI LLP endorsements for catcher vessel operations for use in the AI. Under this proposed action, NMFS would issue AI trawl endorsements to (1) non–AFA catcher vessels less than 60 feet length overall (LOA) if those vessels have made at least 500 metric tons (mt) of landings of Pacific cod in State of Alaska waters adjacent to the AI during the Federal Pacific cod season during 2000 through 2006; or (2) non–AFA catcher vessels greater than 60 feet LOA if those vessels have made at least one landing in State of Alaska waters during the Federal groundfish season in the AI and have made at least 1,000 mt of landings in the BSAI Pacific cod fishery during 2000 through 2006. The Council determined that these provisions would provide additional harvest opportunities to owners of non–AFA trawl catcher vessels that have been used in State of Alaska waters in the Aleutian Islands in recent years, but who do not hold an LLP license with an AI area endorsement These endorsements are also likely to facilitate shore–based processing operations in the Aleutian Islands, primarily in the community of Adak, Alaska by providing greater harvesting opportunities to the catcher vessel fleet currently delivering to Adak. In addition, the Council recommended that the new AI area endorsements that would be issued based on the landings of vessels less than 60 feet LOA should be severable and transferable from the overall license. No other area endorsement in the existing LLP is allowed to be transferred separately from the LLP license to which it is attached. The proposed action would create a new type of independently transferrable area endorsement. However, the Council clarified that these AI area endorsements must be reassigned, or reattached, to an LLP license in order to be used. The Council recommended a transferrable AI area endorsement for vessels less than 60 feet LOA to ensure that these endorsements would be used on vessels in the Aleutian Islands.

Public comments are being solicited on proposed Amendments 92 and 82 through the end of the comment period (see **DATES**). NMFS intends to publish a proposed rule in the **Federal Register** for public comment that would implement Amendments 92 and 82,

following NMFS(evaluation under the Magnuson–Stevens Act procedures. Public comments on the proposed rule must be received by the close of the comment period on Amendments 92 and 82 to be considered in the approval/disapproval decision on Amendments 92 and 82. All comments received by the end of the comment period on Amendments 92/82, whether specifically directed to the FMP amendments or the proposed rule, will be considered in the approval/disapproval decision on Amendments 92 and 82. Comments received after the end of the public comment period for Amendments 92 and 82, even if received within the comment period for the proposed rule, will not be considered in the approval/disapproval decision on the amendment. To be considered, comments must be received(not just postmarked or otherwise transmitted(by the close of business on the last day of the comment period.

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

Dated: December 8, 2008.

Emily H. Menashes,

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

[FR Doc. E8–29497 Filed 12–11–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 680

[Docket No. 080630808–8814–01]

RIN 0648–AW97

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

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations implementing Amendment 28 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP). This proposed regulation would amend the Bering Sea/Aleutian Islands Crab Rationalization Program to allow post–delivery transfers of all types of individual fishing quota and individual processing quota to cover overages. This action is necessary to improve flexibility of the fleet, reduce the number of violations for overages, reduce enforcement costs, and allow more complete harvest of allocations. This action is intended to promote the goals and objectives of the Magnuson–Stevens Fishery Conservation and Management Act, the FMP, and other applicable law.

DATES: Comments must be received no later than January 26, 2009.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by ''RIN 0648–AW97,'' by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal website at *http://www.regulations.gov*.
- Mail: P.O. Box 21668, Juneau, AK 99802.
- Fax: 907–586–7557.
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

This proposed action was categorically excluded from the need to prepare an environmental assessment or environmental impact statement under the National Environmental Policy Act. Copies of Amendment 28, the categorical exclusion memorandum, and the Regulatory Impact Review/Initial Regulatory Flexibility Analysis (RIR/IRFA) prepared for this action, as well as the Environmental Impact Statement (EIS) prepared for the Crab Rationalization Program may be obtained from the NMFS Alaska Region at the address above or from the Alaska Region website at *http://alaskafisheries.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Glenn Merrill, 907–586–7228, or Julie Scheurer, 907–586–7356.

SUPPLEMENTARY INFORMATION: The king and Tanner crab fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands (BSAI) are managed under the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP). The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson–Stevens Fishery Conservation and Management Act (Magnuson–Stevens Act). Amendments 18 and 19 to the FMP implemented the BSAI Crab Rationalization Program (CR Program). Regulations implementing Amendments 18 and 19 were published on March 2, 2005 (70 FR 10174), and are located at 50 CFR part 680.

Background

Under the CR Program, NMFS issued quota share (QS) to persons based on their qualifying harvest histories in the BSAI crab fisheries during a specific time period. Each year, the QS issued to a person yields an amount of individual fishing quota (IFQ), which is a permit that provides an exclusive harvesting privilege for a specific amount of raw crab pounds, in a specific crab fishery, in a given season. The size of each annual IFQ allocation is based on the amount of QS held by a person in relation to the total QS pool in a crab fishery. For example, a person holding QS equaling 1 percent of the QS pool in a crab fishery would receive IFQ to harvest one percent of the annual total allowable catch (TAC) in that crab fishery. Catcher processor license holders were allocated catcher processor vessel owner (CPO) QS for their history as catcher processors; and catcher vessel license holders were issued catcher vessel owner (CVO) QS based on their catcher vessel history.

Under the CR Program, 97 percent of the initial allocation of QS was issued to vessel owners as CPO or CVO QS. The remaining 3 percent was issued to vessel captains and crew as ''C shares'' based on their harvest histories as crew members onboard crab fishing vessels. Of the CVO IFQ, 90 percent is issued as ''A shares,'' or ''Class A IFQ,'' which, in most fisheries, are subject to regional landing requirements and must be delivered to a processor holding unused individual processor quota (IPQ). This regional landing requirement is commonly referred to as ''regionalization.'' The remaining 10 percent of the annual vessel owner IFQ is issued as ''B shares,'' or ''Class B IFQ,'' which may be delivered to any processor and are not subject to regionalization. C shares also are not subject to regionalization.

Processor quota shares (PQS) are long term shares issued to processors. These

PQS yield annual IPQ, which represent a privilege to receive a certain amount of crab harvested with Class A IFQ. IPQ are issued for 90 percent of the CVO TAC, creating a one-to-one correspondence between Class A IFQ and IPQ.

NMFS can issue IFQ to the QS holder directly, or to a crab harvesting cooperative comprised of multiple QS holders. Crab harvesting cooperatives have been used extensively by QS holders to allow them to receive a larger IFQ pool and coordinate deliveries and price negotiations among numerous vessels. Most QS holders have joined cooperatives in the first three years of the CR Program, and are likely to continue to do so because of the economic and administrative benefits of consolidating their IFQs.

IFQ Overages Under Current System

Under existing regulations, harvesters are prohibited from exceeding the amount of IFQ that is issued to them, either individually, or to their cooperative (see § 680.7(e)(2)). If a harvester delivers more crab than the amount of IFQ that he holds, he has violated existing regulations, commonly known as an overage. Overages can occur either through deliberate actions, or more commonly through unintentional errors such as miscalculating the weight of catch to be delivered relative to the amount of IFQ available. Because harvesters do not know the precise weight of a delivery of crab, estimates made onboard the vessel using a sample of average weight may be lower than the actual delivery weight. If a harvester is making his or her last fishing trip for a season and no additional IFQ is available in his or her account, then an overage may occur. However, in most cases harvesters attempt to account for potential overages by maintaining catch below their IFQ holdings, slightly underharvesting the maximum amount of crab possible.

Similarly, existing regulations prohibit processors from receiving more Class A IFQ than the amount of unused IPQ that they hold (see regulations at § 680.7(a)(5)). Generally, processors have established relationships with specific harvesters before crab fishing begins and may not have unused IPQ available to receive crab from harvesters that do not have an established relationship with that processor. Under the provisions of the CR Program's Arbitration System, harvesters can choose to commit their Class A IFQ to match the IPQ held by processors (see regulations at § 680.20). Once IFQ shares are committed and matched with a specific amount of IPQ, that IPQ cannot be matched to another harvester without first removing the match from the harvester who committed delivery of Class A IFQ crab to the IPQ held by that processor. Removing a match of Class A IFQ and IPQ requires the consent of the harvester. Therefore, it is possible that a processor holding IPQ may not have any available unmatched IPQ if a harvester were to deliver more Class A IFQ than the amount specified on his IFQ permit. Typically, processors refuse to accept a delivery of Class A IFQ that is greater than the amount of available unmatched IPQ.

Although matching Class A IFQ and IPQ among the numerous harvesters and processors can be complicated, overages are uncommon. In the first two crab fishing years under the CR Program (2005–2006 and 2006–2007), most of the IFQs were harvested and few overages occurred. There were 16 overages in the first and 25 in the second year under the CR Program. These overages represented less than 0.1 percent (1/1000) of the TAC in each year.

Currently, catcher vessel crab landings are offloaded and processed by the facility receiving the delivery. Once final weights have been determined, IFQs and IPQs are assigned by the fisherman and processor. Any IFQ overage is noted and referred to NOAA Fisheries Office for Law Enforcement (OLE).

Need for Proposed Action

At the request of industry to facilitate operations in the fishery, the Council adopted the following purpose and need statement for this action:

> Under the crab rationalization program, harvesters receive annual allocations of individual fishing quota that provide an exclusive privilege to harvest a specific number of pounds of crab from a fishery. Any harvest in excess of an individual fishing quota allocation is a regulatory violation, punishable by confiscation of crab or other penalties. Precisely estimating catch at sea during the fishery is difficult and costly, due to variation in size of crab, and sorting and measurement requirements. Overages can result from mistakes, by participants attempting to accurately estimate catch. The inability to address overages also impedes flexibility in attempting to optimally harvest IFQ. A provision allowing for post–delivery transfer of individual fishing quota to cover overages could reduce the number of violations, allowing for more complete harvest of allocations, and reduce enforcement costs, without increasing the risk of overharvest of allocations.

Allowing post–delivery transfers in the crab fisheries is expected to mitigate potential overages, reduce enforcement costs, and allow more complete harvest of allocations. Post–delivery transfers would also increase flexibility to the fleet and allow more efficient use of resources. As an example, this provision could allow harvesters to make landings and settle up IFQ accounts after delivery. In turn, this flexibility would permit harvesters to use vessels already on the fishing grounds without the additional use of fuel to leave boats idle at sea while an IFQ transfer is processed.

The Proposed Action

The proposed action would allow post–delivery transfers to cover overages of IPQ as well as Class A IFQ, Class B IFQ, C shares, and CPO IFQ. There would be no limit on the size of a post–delivery transfer or on the number of post–delivery transfers a person could undertake. However, a person could not begin a new fishing trip if any of the IFQ accounts of the IFQ permits available to be used on a vessel were zero or negative, and no person could have a negative balance in an IFQ or IPQ account after June 30, the end of a crab fishing year.

For IFQ holders, no person would be permitted to begin a new fishing trip in a crab fishery until the overage was accounted for and the IFQ balances of the persons onboard that vessel for all crab fisheries were positive. NMFS proposes to define the term ''fishing trip'' for purposes of this requirement to provide a clear standard for fishery participants. NMFS proposes that a fishing trip would be defined as the period beginning when a vessel operator commences harvesting crab in a crab QS fishery and ending when the vessel operator offloads or transfers any crab from that crab QS fishery whether processed or unprocessed from that vessel.

The term ''crab QS fishery'' is defined under existing regulations at § 680.2 and means all nine crab QS fisheries, but does not include the Western Alaska Community Development Quota (CDQ) Program, and Western Aleutian Islands golden king crab issued to the Adak Community Entity (ACE). The Council specifically tailored this proposed action to address IFQ and IPQ in the crab QS fisheries, and did not indicate that CDQ or ACE fisheries would be modified by this action. CDQ and ACE crab allocations are not issued as IFQ and there is no corresponding IPQ. Furthermore, CDQ groups that are issued CDQ crab allocations are permitted to engage in post–delivery transfers under section 305(i)(1)(C) of the Magnuson–Stevens Act, and because the ACE crab allocation is issued to only

one entity, it cannot be transferred, and there is no need to establish a post–delivery transfer mechanism.

The proposed definition of a fishing trip would effectively extend from the first harvest in a crab QS crab fishery until the beginning of a delivery of crab from a catcher vessel, or the beginning of offloading or transferring of processed crab from a catcher/processor. This definition would ensure that a vessel operator could not commence fishing for a crab QS fishery on any vessel until all the IFQ accounts of all IFQ permits used onboard that vessel are positive. This provision is intended to discourage harvesters from continuing to debit crab against their IFQ account for numerous fishing trips and run an increasingly negative balance without ensuring that there is adequate available unused IFQ that can be transferred to cover that negative balance. This provision would allow a vessel operator to begin a fishing trip for one crab QS fishery (e.g., snow crab) provided the harvester had unused IFQ in that fishery, even if that harvester had a negative balance in another crab QS fishery (e.g., Bristol Bay red king crab). However, in this example, if a vessel operator harvested (i.e., caught and retained) any Bristol Bay red king crab while fishing for snow crab, the harvester would be in violation of the regulations. This proposed rule would not modify existing regulations that require that IFQ issued to a cooperative can be transferred only between cooperatives, and that IFQ held outside of cooperatives can be transferred only to another person who would hold that IFQ outside of a cooperative.

The proposed action would minimize the risk of negative IFQ or IPQ accounts by prohibiting an IFQ or IPQ holder from maintaining a negative balance in an IFQ or IPQ account after the end of the crab fishing year for which that IFQ or IPQ account was issued. This prohibition would effectively require that all post–delivery transfers of IFQ or IPQ must be completed by June 30 of each year, the end of the crab fishing year. Overages that are not covered by June 30 of each year could be subject to a penalty or other enforcement action.

Expected Effects of the Proposed Action

The RIR describes in detail the predicted effects of the proposed action on harvesters, processors, communities, management and enforcement, consumers, and the nation (see **ADDRESSES**). Only the effects of the proposed action on harvesters and processors are described here. Overall, the number of overages at the time of landing may increase slightly under the proposed action, but overages subject to penalty should decline.

Harvesters are likely to realize production efficiency gains under this alternative from allowing greater flexibility in harvesting. Under the status quo, harvesters may be required to wait in port or remain idle on the fishing grounds until a transfer can be processed and a positive IFQ balance is available. Under the proposed action, harvesters could finish their fishing trip and settle the balance when back in port. Some production efficiency gains should be realized by allowing harvesters to more precisely harvest the total IFQ allocation with fewer uncovered overages. Harvesters are also likely to benefit from a reduction in the number of overage violations, which should be reduced through post–delivery transfers. It is unlikely that harvesters will have excessive overages by unreasonable reliance on the provision for post–delivery transfers. This proposed action will most benefit Class A IFQ holders by allowing harvesters to continue operating without idling their operations and incurring additional costs.

This proposed action would have limited impacts on processors. Processors should have few overages, since overages can be avoided by simply refusing delivery of landings in excess of IPQ holdings. Only when a harvester has an IFQ overage that would be covered by a post–delivery transfer of Class A IFQ might a processor need to obtain IPQ to cover an overage.

This proposed action would require NMFS to debit IPQ accounts if a processor accepts delivery of Class A IFQ in excess of the amount of Class A IFQ that is matched with that processor. Typically, NMFS has not debited an IPQ account of a processor if an excess of Class A IFQ was delivered because NMFS did not wish to encourage waste by having processors refuse delivery of Class A IFQ, or debit an IPQ account of a processor and potentially cause the processor to exceed his IPQ account due to the actions of a harvester. However, with this proposed action, NMFS would debit the IPQ account of a processor who accepts Class A IFQ in excess of the amount in his IPQ account because that processor could subsequently balance his IPQ account through a post–delivery transfer of IPQ.

Recordkeeping and Reporting Requirements

No new recordkeeping or reporting requirements would be imposed by this action. NMFS Restricted Access Management Program (RAM) will continue to oversee share accounts and share use. At the time of landing, RAM will maintain a record of any overage, but instead of reporting overages to NOAA OLE immediately, RAM would defer reporting until June 30, the end of the crab fishing year. RAM would use the same process for post–delivery transfers as currently used under regulations at § 680.41.

Summary of Regulatory Changes

This action proposes the following changes to the existing regulatory text at 50 CFR part 680:

- Add a new definition for the term ''fishing trip'' at § 680.2;
- Modify the existing prohibition at § 680.7(a)(5) to clarify that a person may not receive Class A IFQ greater than the amount of unused IPQ that person holds in a crab QS fishery unless they subsequently receive unused IPQ before the end of the crab fishing year to ensure their IPQ balance is not negative;
- Modify the existing prohibition at § 680.7(e)(2) to clarify that a person cannot begin a fishing trip with a vessel in a crab QS fishery if the total amount of unharvested crab IFQ that is currently held in the IFQ accounts of all crab IFQ permit holders or Crab IFQ Hired Masters onboard that vessel for that crab QS fishery is zero or less; and
- Add a prohibition at § 680.7(e)(3) to prohibit a person from having a negative balance in an IFQ or IPQ account for a crab QS fishery after the end of the crab fishing year for which that IFQ or IPQ permit was issued.

Classification

The Assistant Administrator for Fisheries, NOAA, has determined that this proposed rule is consistent with Amendment 28, the Magnuson–Stevens Act, and other applicable laws, subject to further consideration after public comment.

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

An IRFA was prepared that describes the economic impact this proposed rule, if adopted, would have on small entities. Copies of the RIR/IRFA prepared for this proposed rule are available from NMFS (see **ADDRESSES**). The RIR/IRFA prepared for this proposed rule incorporates by reference an extensive RIR/IRFA prepared for Amendments 18 and 19 to the FMP that detailed the impacts of the CR Program on small entities.

The IRFA for this proposed action describes the action, why this action is being proposed, the objectives and legal basis for the proposed rule, the type and number of small entities to which the proposed rule would apply, and

projected reporting, recordkeeping, and other compliance requirements of the proposed rule. It also identifies any overlapping, duplicative, or conflicting federal rules and describes any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson–Stevens Act and other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities. The description of the proposed action, its purpose, and its legal basis are described in the preamble and are not repeated here.

This action directly regulates holders of IFQ and IPQ, who could engage in post–delivery transfers to cover overages if the action is adopted. Estimates of the number of small entities holding IFQ are based on estimates of gross revenues. Since many IFQs are held by cooperatives, landings data from the most recent season for which data are available in the crab fisheries (2006–2007) were used to estimate the number of small entities. Based on those data, 44 entities received IFQ allocations. Of these, 13 were large entities and 31 were considered small entities.

Estimates of small entities holding IPQ are based on the number of employees of IPQ holding entities. Currently, 24 entities receive IPQ allocations. Of these, 11 are estimated to be large entities and 13 are considered small entities.

Any person wishing to cover an overage would be required to engage in a transfer of IFQ (or IPQ, in the case of a processor). The required reporting and recordkeeping for a post–delivery transfer would be the same as for any other transfer of IFQ (or IPQ).

All of the directly regulated entities would be expected to benefit from this action relative to the status quo alternative because the proposed action would allow greater flexibility and a period of time in which to reconcile overages. Class A IFQ holders would be expected to benefit the most because Class A IFQ comprises the majority of all IFQ issued in crab QS fisheries, and the proposed action would provide Class A IFQ holders greater flexibility to maximize harvests of their allocations without risking overages. Persons holding IFQ outside of a cooperative would be expected to benefit the least from this action because only a small portion of the total IFQ issued is issued to persons who hold IFQ outside of cooperatives, and they would have a limited pool of persons with whom to negotiate transfers. Among the three alternatives considered, the proposed action would best minimize potential adverse economic impacts on the directly regulated entities. Under the status quo, no post–delivery transfers would be allowed and small entities would continue to be penalized for overages. Alternative 3 would have allowed post–delivery transfers, but with more limitations and restrictions than the preferred alternative. The preferred alternative gives small entities the most flexibility to cover overages.

Allowing post–delivery transfers should reduce the number of overages that result in forfeiture of catch and other penalties. Persons holding IFQ outside of a cooperative may have a limited ability to make post–delivery transfers because most IFQs are assigned to cooperatives.

List of Subjects in 50 CFR Part 680

Alaska, Fisheries.

Dated: December 8, 2008.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 680 is proposed to be amended as follows:

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

1. The authority citation for 50 CFR part 680 continues to read as follows:

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

2. In § 680.2, the term ''Fishing trip for purposes of § 680.7(e)(2)'' is added in alphabetical order to read as follows:

§ 680.2 Definitions.

* * * * *

Fishing trip for purposes of § 680.7(e)(2) means the period beginning when a vessel operator commences harvesting crab in a crab QS fishery and ending when the vessel operator offloads or transfers any crab in that crab QS fishery whether processed or unprocessed from that vessel.

* * * * *

3. In § 680.7, paragraphs (a)(5) and (e)(2) are revised, and paragraph (e)(3) is added to read as follows:

§ 680.7 Prohibitions.

* * * * *

(a) * * *

(5) Receive any crab harvested under a Class A IFQ permit in excess of the total amount of unused IPQ held by the RCR in a crab QS fishery unless that RCR subsequently receives unused IPQ by transfer as described under § 680.41 that is at least equal to the amount of all Class A IFQ received by that RCR in that crab QS fishery before the end of the crab fishing year for which an IPQ permit was issued.

* * * * *

(e) * * *

(2) Begin a fishing trip for crab in a crab QS fishery with a vessel if the total amount of unharvested crab IFQ that is currently held in the IFQ accounts of all crab IFQ permit holders or Crab IFQ Hired Masters aboard that vessel in that crab QS fishery is zero or less.

(3) Have a negative balance in an IFQ or IPQ account for a crab QS fishery after the end of the crab fishing year for which an IFQ or IPQ permit was issued.

* * * * *

[FR Doc. E8–29494 Filed 12–11–08; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 73, No. 240
Friday, December 12, 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

December 9, 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: Health Certificate for the Export of Live Crustaceans, Finfish, Mollusks, and Related Products.

OMB Control Number: 0579–0278.

Summary of Collection: The export of agricultural commodities, including animals and animal products, is a major business in the United States and contributes to a favorable balance of trade. The Animal and Plant Health Inspection Service (APHIS) maintains information regarding the import health requirements of other countries for animals and animal products exported from the United States. The regulations governing the export of animals and products from the United States are contained in 9 CFR parts 91, subchapter D. ''Exportation and Importation of Animals (including Poultry) and Animal Products,'' and apply to farm-raised aquatic animals and products, as well as other livestock and products. These regulations are authorized by the Animal Health Protection Act (7 U.S.C. 8301–8317). The National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce, and the Fish and Wildlife Service (FWS), U.S. Department of Interior, as well as APHIS, have legal authorities and responsibilities related to aquatic animal health in the United States. All three agencies have therefore entered into a Memorandum of Understanding delineating their respective responsibilities in the issuance of the health certificate for the export of live aquatic animals and animal products.

Need and Use of the Information: The health certificate will require the names of the species being exported from the U.S., their age and weights, and whether they are cultured stock or wild stock; their place of origin, their country of destination and the date and method of transport. The certificate will be completed by an accredited inspector with assistance from the producer and must be signed by both the accredited inspector as well as the appropriate Federal official from APHIS, NOAA, or FWS who certifies the health status of the shipment being exported. The use of the certificate will lend consistency to a public service delivered by three separate agencies, and should make the aquatic export certification process less confusing for those who require this important service. Failing to use this form could result in less efficient service to the exporting public.

Description of Respondents: Farms; Individuals or households.

Number of Respondents: 40.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 100.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–29457 Filed 12–11–08; 8:45 am]
BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

DEPARTMENT OF HOMELAND SECURITY

Science and Technology Directorate; Notice of Availability of the Final Environmental Impact Statement for the Proposed National Bio and Agro-Defense Facility

AGENCY: Science and Technology Directorate (Office of National Laboratories within the Office of Research), DHS; Department of Agriculture (USDA).

ACTION: Notice of availability.

SUMMARY: The U.S. Department of Homeland Security (DHS) announces the availability of its *National Bio and Agro-Defense Facility Final Environmental Impact Statement* (NBAF Final EIS). This announcement is pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended, and its implementing regulations at 40 CFR parts 1500–1508. The Proposed Action to site, construct, and operate the National Bio and Agro-Defense Facility (NBAF) would allow researchers to develop tests to detect foreign animal diseases and zoonotic diseases (transmitted from animals to humans) and develop vaccines (or other countermeasures such as antiviral therapies) to protect agriculture and food systems in the United States. The NBAF would enhance U.S. biodefense capabilities with modern and integrated high-security (biosafety levels 3 and 4) facilities that would ensure U.S.

vulnerabilities and risks from agro-terrorism are safely addressed. DHS anticipates that the proposed NBAF would focus biosafety level 3 agricultural (BSL–3Ag) research on African swine fever, classical swine fever, contagious bovine pleuropneumonia, foot and mouth disease, Japanese encephalitis, and Rift Valley fever; BSL–4 research would address Hendra and Nipah viruses.

DATES: DHS will consider comments on the NBAF Final EIS, received by January 12, 2009, to determine whether they identify new information relevant to environmental concerns bearing upon the Preferred Alternative.

ADDRESSES: The NBAF Final EIS, which includes the Executive Summary and the Comment Response Document, is available online at *http://www.dhs.gov/nbaf* and in designated reading rooms (see **SUPPLEMENTARY INFORMATION**). Compact disks and paper copies are available upon written request via e-mail or U.S. mail. Submit written comments on the NBAF Final EIS to *nbafprogrammanager@dhs.gov* or via mail: NBAF Program Manager; P.O. Box 2188; Germantown, MD 20875–2188. Individual names and addresses (including e-mail addresses) received as part of comment documents on the NBAF Final EIS will be part of the public record and subject to disclosure. Any person wishing to have his/her name, address, or other identifying information withheld from public release must state this request in the comment document. DHS will consider all comments received before the Record of Decision is signed.

FOR FURTHER INFORMATION CONTACT: Questions regarding the NBAF Final EIS should be directed to James V. Johnson DHS; Science and Technology Directorate; Mail Stop #2100; 245 Murray Lane, SW.; Building 410; Washington, DC 20528–0300 or e-mail to *nbafprogrammanager@dhs.gov*.

SUPPLEMENTARY INFORMATION: DHS is responsible for detecting, preventing, protecting against, and responding to terrorist attacks within the United States. These responsibilities, as applied to the defense of animal agriculture, are shared with the U.S. Department of Agriculture (USDA). In developing a coordinated strategy to adequately protect the nation against biological threats to animal agriculture, DHS and USDA identified a gap that must be filled by an integrated research, development, test, and evaluation infrastructure for combating threats to U.S. agriculture. To bridge this gap and comply with Homeland Security Presidential Directive 9, Defense of United States Agriculture and Food, DHS proposed to build the integrated research, development, test, and evaluation facility called the National Bio and Agro-Defense Facility (NBAF).

In June 2008, DHS published the NBAF Draft EIS, which analyzed the environmental impacts of the Proposed Action on six site alternatives, as well as the No Action Alternative. The site alternatives include: (1) South Milledge Avenue Site, Athens, Georgia; (2) Manhattan Campus Site, Manhattan, Kansas; (3) Flora Industrial Park Site, Flora, Mississippi; (4) Plum Island Site, Plum Island, New York; (5) Umstead Research Farm Site, Butner, North Carolina; and (6) Texas Research Park Site, San Antonio, Texas. Under the No Action Alternative, the NBAF would not be constructed and DHS would continue to use the Plum Island Animal Disease Center with necessary investments in facility upgrades, replacements, and repairs so that it could continue to operate at its current capability level.

The EPA published the Notice of Availability of the NBAF Draft EIS on June 27, 2008 (73 FR 36540). During the 60-day public comment period, which concluded on August 25, 2008, DHS held 13 public meetings in the vicinity of the site alternatives and in Washington, DC to facilitate information exchange and to solicit comments on the NBAF Draft EIS.

DHS gave equal consideration to the approximately 5,400 identified comments collected via e-mail, mail, public meetings, and toll-free fax and telephone numbers during the public comment period. DHS's responses to comments are presented in Appendix H of the Final EIS. The NBAF Final EIS reflects changes based on the comments received, availability of new data, and correction of errors and omissions.

DHS anticipates distributing approximately 2,600 copies of the NBAF Final EIS and/or the Executive Summary to congressional members and committees; federal, state, and local agency and governmental representatives and elected officials; Native American representatives; special interest groups and non-governmental organizations; and individuals.

The DHS Preferred Alternative identified in the NBAF Final EIS is to build and operate the NBAF at the Manhattan Campus Site in Kansas.

The NBAF Final EIS analyzes the potential impacts of the Proposed Action on the physical, biological, and human environments at each of the six site alternatives, as well as the potential impacts of the No Action Alternative. This Final EIS is not a decision document. DHS and USDA, a consulting agency on this EIS, will also consider information from associated support documentation including: Threat and Risk Assessment, Site Cost Analysis, Site Characterization Study, Plum Island Facility Closure and Transition Cost Study, as well as prior analysis of the site alternatives against DHS's site selection evaluation criteria.

DHS will announce its decision on the Proposed Action in the Record of Decision (ROD) that identifies the alternatives considered, the decisions made, the environmentally preferable alternative, and the factors balanced by the Department in making the decision. The NBAF ROD will include: (1) The decision whether or not to build the NBAF; (2) if the decision is made to build the NBAF, where it will be built; (3) the site alternatives considered in the EIS; (4) whether all practicable means to avoid or minimize environmental impacts from the alternative selected have been adopted and, if not, why; (5) any monitoring and enforcement that would be necessary to offset unavoidable environmental impacts; and (6) relevant comments on the NBAF Final EIS. DHS will issue a ROD on the proposed action no sooner than 30 days after the NOA of the NBAF Final EIS is published in the **Federal Register**.

The NBAF Final EIS is available for review at the following reading rooms:

Georgia

University of Georgia Main Library, 320 South Jackson Street, Athens, GA 30602;

Oconee County Library, 1080 Experiment Station Road, Watkinsville, GA 30677.

Kansas

Manhattan Public Library, 629 Poytnz Avenue, Manhattan, KS 66502;

Hale Library, Kansas State University, Manhattan, KS 66506.

Mississippi

City of Flora Library, 144 Clark Street, Flora, MS 39071.

New York Site

Acton Public Library, 60 Old Boston Post Road, Old Saybrook, CT 06475;

Southold Free Library, 53705 Main Road, Southold, NY 11971.

North Carolina

Richard H. Thornton Library, 210 Main Street, Oxford, NC 27565–0339;

South Branch Library, 1547 South Campus Drive, Creedmoor, NC 27522.

Texas

Central Library, 600 Soledad, San Antonio, TX 78205.

Authority: 42 U.S.C. 4321–4347 (National Environmental Policy Act).

Dated: December 3, 2008.

Bruce Knight,

Under Secretary, Marketing and Regulatory Programs, USDA.

Jay M. Cohen,

Under Secretary, Science & Technology, DHS.

[FR Doc. E8–29142 Filed 12–11–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF AGRICULTURE

Forest Service

Wallowa-Whitman National Forest, Baker County, OR; Snow Basin Vegetation Management Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The USDA Forest Service will prepare an environmental impact statement (EIS) to disclose environmental effects on a proposed action to manage fuels and vegetation and produce forest products in the Little Eagle Creek, and Eagle Creek Paddy subwatersheds. The Snow Basin Vegetation Management Project is located on the Wallowa-Whitman National Forest, Whitman Ranger District, Pine Office, Baker County, Oregon. The legal location is T.7S, R.44E, all sections, and T.8S, R44E, most sections. The project area encompasses two subwatersheds located north and northwest of Halfway and Richland, Oregon, consisting of approximately 27,680 acres of National Forest System (NFS) lands, 281 acres of Baker County inholdings, and 2,107 acres of private deeded inholdings. The proposed action would use commercial harvest of timber, noncommercial thinning, aspen restoration and prescribed fire on approximately 17,200 acres. No new permanent road construction would occur, but temporary roads would be constructed, existing permanent roads would be reconstructed as warranted, and one existing bridge would be reconstructed. No Inventoried Roadless Areas (IRAs) or potential wilderness areas are affected by this project. Additional details of the proposed action are noted below in the **SUPPLEMENTARY INFORMATION** Section.

DATES: Preliminary comments concerning the Snow Basin Vegetation Management Project would be most useful if received by January 30, 2009. A Draft EIS (DEIS) would be completed after reviewing the preliminary scoping comments for significant issues and the potential development of alternatives to the proposed action. The DEIS is expected to be filed with the Environmental Protection Agency (EPA) and be available to the public for review by May 2009. The Final EIS is scheduled to be completed by October 2009. If approved, the project would begin to be implemented sometime in 2010.

ADDRESSES: Send written comments to: Ken Anderson, Whitman District Ranger P.O. Box 947, 3285 11th Street, Baker City, OR 97814. Send electronic comments to: *comments-pacificnorthwest-wallowa-whitman-whitmanunit@fs.fed.us.* Send FAX comments to 541–742–6705. Please reference the project name (Snow Basin Vegetation Management Project) on your submissions.

FOR FURTHER INFORMATION CONTACT: Joe Sciarrino, Project Manager, Whitman Ranger District, Pine Office, 38470 Pine Town Lane, Halfway, Oregon 97834, telephone 541–742–6714, TDD (541) 523–1405, e-mail *jsciarrino@fs.fed.us*. An additional contact is Lynne Smith, telephone 541–742–6715, e-mail *lksmith@fs.fed.us*. Additional information and large-scale color maps will be posted on the Forest Web site at: *http://www.fs.fed.us/r6/w-w/projects/*.

SUPPLEMENTARY INFORMATION:

Background Information

The project area is located north and northwest of Richland, Oregon, in Townships 6, 7 and 8 South, Ranges 43, 44, and 45 East. The project area includes 26,730 acres of NFS (National Forest System) lands and 2,107 acres of private deeded in-holdings. A small amount of Baker County owned lands (281 acres) also occur within the project area. Elevations within the project area range from approximately 4,400 feet on the southern boundary near Sparta Butte and Forshey Meadow up to approximately 6,500 feet at its northern boundary near the Eagle Cap Wilderness. The Eagle Creek Wild and Scenic River Corridor averages 3,200 feet in elevation and roughly divides the project area in half. Other major streams within the project area include Little Eagle, Twin Bridges, Conundrum, Spring, Paddy, Gold, Packsaddle, Holcomb, Empire Gulch, and Dempsey.

The project area is characterized by a mixture of forest and natural openings of various sizes. The forested stands range from high elevation subalpine fir/lodgepole pine to low elevation pure ponderosa pine. Coniferous tree species are ponderosa pine, grand fir, Douglas-fir, western larch, Englemann spruce, subalpine fir, and lodgepole pine. Deciduous tree species include quaking aspen and black cottonwood. The majority of the forested stands have a dense multistory stand structure.

The project area has seen management activity in the past, with the most recent being connected to three large vegetation management projects: Little Eagle, EagleHolcomb and Eagle-Paddy projects. These past actions included timber harvest, noncommercial thinning and fuels treatments including hand and machine piling, aspen restoration and prescribed fire, and were completed in the late 1990s. While the focus of these most recent projects were stand prioritization based upon silvicultural need, including tree species composition, stand structure and stand density, earlier projects were much more focused on cutting larger, high value trees. The Snow Basin Vegetation Management Project would be focused on a landscape view with the analysis and treatments based on landscape ecological needs.

Purpose and Need for Action

The purpose and need for this proposal is to begin moving the project area landscape toward the historic range of variability for the various biophysical environments in the project area, and to substantially reduce the risk of uncharacteristic wildfire, and the wildfire threat to life and property; particularly in the vicinity of the deeded land in-holdings.

The NFS lands in the project area have been managed with timber harvest for many decades. The focus of historic treatments was to harvest the large, mature overstory trees, particularly those of high value like ponderosa pine. The focus of more recent projects was silvicultural needs, but the treatments were located in selected stands and scattered throughout the landscape. The assumption and expectation was that stands would be treated every 10 years, providing a management and maintenance regime supporting maximum tree growth. The 10-year follow-up treatments, however, were not initiated and stand conditions and landscape conditions have changed. In addition, the natural role of fire has been generally excluded from this landscape.

As a cumulative result, landscape conditions are now characterized by deviations from the historic range of variability for the various biophysical environments. More specifically, this has resulted in a large scale reduction in large diameter ponderosa pine trees, a

reduced LOS (late old structure), and domination of the faster growing shade tolerant grand fir and Douglas-fir. A very high risk of uncharacteristic wildfire exists, both because of stand structures and fire/fuels condition classes. Therefore, actions needed to meet the purpose and need involve:

1. Restoring characteristic and sustainable stand densities, tree species composition, and forest stand structure by:

• Managing stand density to improve diameter growth rates towards future LOS (late old structure), increasing stand resistance to wildfire and inherent ponderosa pine's resistance to bark beetles.

• Adjusting tree species composition and stand structure by selecting for removal tree species that serve as hosts for defoliating insects and root and stem disease, and species that are susceptible to fire.

• Converting multiple-story stands to single-story stands to increase landscape diversity, helping to reduce the extent and severity of disturbance and to restore HRV.

2. Moving Fire Regime Condition Classes 3 and 2 to Condition Class I by:

• Adjusting stand structures as in #1 above.

• Reducing natural fuel loadings commensurate to the standards established for the specific biophysical environments.

• Managing activity (vegetation management generated) fuels also to the standards established for the specific biophysical environments.

3. Placing priority on treating the NFS lands in and adjacent to Sparta and Surprise Springs WUI's and one stand in the Carson WUI. Treatments would emphasize a reduction in the risk of uncharacteristic wildfire over an improvement in HRV to reflect the emphasis on protection of life and property in the WUI areas. The priority treatments include:

• Treating the NFS lands identified in the CWPP (Community Wildfire Protection Plan) adopted by Baker County.

• Treating other adjacent NFS lands that would help decrease the potential for intense fire behavior adjacent to homes and private property.

4. Initiating treatments to restore quaking aspen across the landscape to better reflect historic conditions. Aspen historically occurred as dense even-aged stands or clones usually seral to one of the fir or other coniferous climax species. Today aspen exists as scattered individuals or small clumps many of which are overtopped by conifers (Eagle Creek Watershed Assessment, 1997). Estimates suggest that aspen trees historically covered 500 to 1,000 acres across the Pine and Eagle Creek watersheds. Actual current acreage is unknown but is estimated at 200 to 500 acres. Aspen stands not only provide habitat for many wildlife species, they also provide vegetative diversity and aesthetic beauty. More specifically, restoring quaking aspen involves removing all conifer competition with the exception of mature (orange bark) ponderosa pine greater than 21″ dbh and Douglas-fir greater than 32″.

5. In addition to the primary purposes of creating sustainability and improving forest health and decreasing risk of uncharacteristic wildfire, the project offers the opportunity to market and expand the availability of economically and socially important forest products, not only the traditional sawlog and pulp components, but also general biomass and fuel wood. While the purpose and need for treatments are ecological, the result is forest products. Demands for forest products continue to increase, and environmental impacts from the use of alternative materials or imported products can be significant. The project area is large and includes easy access from two rural communities, Halfway and Richland, Oregon, which provides an opportunity to offer substantial quantities of fuelwood. Since many local citizens rely on fuelwood as their primary source of heat, particularly now with the rising fossil fuel prices, the public is asking for increased fuelwood opportunities. To support this need, emphasis is being placed on, and consideration given to modifying the current Forest-wide policy for the project area to allow the removal as fuelwood any dead and down trees of any species and any size tree within 150 feet of an open road, as long as it is in compliance with all other existing permit requirements.

Proposed Action

The Proposed Action, on NFS lands only, is to:

1. Commercially harvest 13,887 acres using a combination of overstory removal, partial removal, sanitation, thinning, and regeneration cuts, with a potential yield of 60–70 MIMBF. This project would potentially generate 5 timber sales that would be offered one per year over a 5-year period starting in 2010, if the project is approved.

2. Remove conifer competition from 30 acres of quaking aspen.

3. Non-commercially thin approximately 12,200 acres (NCT only and NCT following harvest treatments).

4. Prescribed fire only on 3,300 acres.

5. Prescribed fire on 12,000–13,000 acres to reduce commercial harvest activity fuels following commercial treatments.

6. Grapple pile and burn on approximately 7,220 acres to reduce commercial harvest activity fuels following commercial treatments.

7. Remove Danger Trees from the open road system for public and forest worker safety. This would include their commercial removal for biomass. Danger trees are defined as as a standing tree that presents a safety hazard to people due to conditions such as deterioration or physical damage to the root system, trunk, stem, or limbs, and the direction (or lean) of the tree. Those removed would meet the definition as described in ''Field guide for danger trees identification and response'' 2008. Toupin. R., *et al.* USDA For. Ser. Pac. Northwest Region.

8. Within the project area, use an estimated 180 miles of existing National Forest System Road (NFS) for commercial log haul. No new permanent specified road construction is planned. Approximately 10.6 miles of temporary road construction is proposed. These temporary roads are in 46 segments ranging in length from less than 0.1 mile to 0.7 miles, and the average length is 0.2 miles. All NFS roads would be maintained in accordance with standard timber sale road maintenance specifications. Of the estimated 180 miles of haul roads, approximately 100 miles are currently closed roads (maintenance level 1) and would be re-closed when harvest and post-sale activities, including firewood gathering, are completed. Temporary roads would be closed and rehabilitated prior to the closure of the timber sale. Reconstruction is proposed on approximately 48 miles of NFS roads. Here, the term reconstruction refers to road work outside the scope of timber sale maintenance specifications and would be listed in the timber sale contract for specified road reconstruction and applicable to contract clause BT 5.2. Types of activity included under reconstruction include a bridge replacement (0.1 mi); repair of abutments on two bridges (0.2 mi.); realign road location which would create new ground disturbance (1.0 mi); restore roads to a serviceable standard by clearing heavily overgrown roads, removing slides and slough and repairing slumps greater than 10 cubic yards, repairing and improving drainage structures, drainage and subgrade reinforcement for seeps and springs, and rock surfacing (46.7 miles). Of the roads proposed for reconstruction, approximately 21 miles are currently

closed roads (maintenance level 1) and 27 miles are open roads maintained for high clearance vehicles (maintenance level 2). Reconstruction is also proposed (by agreement) for 2.4 miles of a Baker County road consisting of clearing, drainage, and rock surfacing. This project will consider the decommissioning of approximately 6 miles of NFS road. These roads are currently closed and will be analyzed for future need to the transportation system. If decommissioned, the roads would be removed from the NFS road system.

9. Preliminary analysis indicates that selecting the proposed action would require several amendments to the Forest Plan. All center around the harvest of live trees greater than or equal to 21″ dbh. In 1994, Forest Plan Amendment #2 imposed a 21 inch diameter limit for green tree harvest. In June 2003 the FS Region 6 Regional Forester issued a letter emphasizing the need for some flexibility in applying this standard. Examples provided where Forest Plan amendments may be appropriate are listed below. All were incorporated into the Proposed Action and include the following:

1. Moving multi-layered ponderosa pine stands towards LOS of a single layer where the pine are competing with grand fir or other shade-tolerant species historically held in check by wildfire.

2. Maintaining shade-intolerant desirable trees <21 inch d.b.h. where their recruitment into >21 inch class is reasonably foreseeable in the near future, and when giving preference better meets LOS objectives.

3. Harvesting >21 inch d.b.h. mistletoe-infected trees when doing so best meets longterm LOS objectives and does not eliminate currently important wildlife habitat.

4. Fuel reduction to protect older trees (e.g. removal of smaller ''ladder'' fuels).

5. Overstory removal of shade tolerant species to protect rare or declining understory elements, such as aspen or rare herbaceous plants.

Possible Alternatives

Alternatives will include the proposed action, no action, and any additional alternatives that would respond to any significant issues generated during the scoping process. The agency will give notice of the full environmental analysis and decision-making process to interested and affected people, agencies, Tribal governments and organizations.

Responsible Official and Nature of Decision To Be Made

The Responsible Official is Steven A. Ellis, Forest Supervisor of the Wallowa-Whitman National Forest, P.O. Box 907, 1550 Dewey Avenue, Baker City, Oregon 97814. The Responsible Official will decide if the proposed project will be implemented and will document the decision and reasons for the decision in a Record of Decision. That decision would be subject to Forest Service Appeal Regulations at 36 CFR 215.

Scoping Process

Public participation will be especially important at several points during the analysis, beginning with the scoping process (40 CFR 1501.7). The Snow Basin Vegetation Management Project has been listed in the Wallowa-Whitman National Forest's Schedule of Proposed Actions since July 2008, and can be accessed on the Web at: *http://www.fs.fed.us/sopa/forest-level.php?110616*. A scoping letter will be sent out to the Forest scoping mail list to correspond with the publication of this NOT in the **Federal Register**. Additional information and large-scale color maps will be posted on the Forest Web site at: *http://www.fs.fed.us/r6/w-w/projects/*. Tribal governments, government agencies, organizations and individuals who have indicated their interest will be contacted during the scoping period.

Preliminary Issues

Preliminary issues identified include commercial harvest in LOS stands and harvest of trees over 21 inches in diameter. Additional issues may include the potential effect of the proposed action on soils, water quality and fish habitat, snags and down wood, disturbance to cultural resources, potential for noxious weed expansion, and threatened, endangered and sensitive aquatic, terrestrial and plant species.

No Inventoried Roadless Areas (IRAs) or potential wilderness areas are affected by this proposed action.

Public Comment

Public comments about this proposal are requested to identify issues and alternatives to the proposed action and to focus the scope of the analysis. Comments received in response to this solicitation, including names and addresses of those who comment, will be considered part of the public record on this proposed action, and will be available for public inspection. Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments will not have standing to appeal the subsequent decisions under 36 CFR Parts 215 or 217. Additionally, pursuant to 7 CFR 1.27(d), any person may request the agency to withhold a submission from the public record by showing how the Freedom of Information Act (FOIA) permits such confidentiality. Persons requesting such confidentiality should be aware that under the FOIA, confidentiality may be granted in only very limited circumstances such as to protect trade secrets. The Forest Service will inform the requester of the agency's decision regarding the request for confidentiality, and where the request is denied; the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address within a specified number of days.

Early Notice of Importance of Public Participation in Subsequent Environmental Review:

A draft environmental impact statement will be prepared for comment and is expected in May of 2009. The formal comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**. The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

Comments received, including the names and addresses of those who comment, will be considered part of the

public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21).

Dated: December 3, 2008.

Steven A. Ellis,

Forest Supervisor, Wallowa-Whitman National Forest.

[FR Doc. E8–29131 Filed 12–11–08; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Proposed New Fee Sites; Federal Lands Recreation Enhancement Act, (Title VIII, Pub. L. 108–447)

AGENCY: Plumas National Forest, USDA Forest Service.

ACTION: Notice of Proposed New Fee Sites.

SUMMARY: The Plumas National Forest is planning to charge new fees at four recreation campgrounds within the Lakes Basin Recreation Area. All sites have had amenities added to improve services and experiences. Fees are assessed based on the level of amenities and services provided, cost of operation and maintenance, market assessment, and public comment. The fees listed are only proposed and will be determined upon further analysis and public comment. Funds from fees would be used for the continued operation and maintenance and improvement of these recreation sites. Gold Lake Campground (37 sites), Gold Lake 4x4 Campground (16 sites), Goose Lake Campground (13 sites) and Haven Lake Campground (4 sites), are currently fee free sites. The use at these popular campgrounds is historic and the sites are rustic. Improvements have been made including designating 70 campsites, installing fire rings, and adding garbage service. Three new toilets and picnic tables were installed at the Gold Lake 4x4 campground. One new toilet was installed at Goose Lake Campground. Improvements will address sanitation and safety concerns, and improve deteriorating resource conditions and recreation experiences. A financial analysis is being completed to determine fee rates. The proposed fee to help maintain this site would range between $8 and $10 a campsite and $3.00 per one additional vehicle per campsite.

DATES: New fees would begin after July 2009.

ADDRESSES: Alice B. Canton, Forest Supervisor, Plumas National Forest, 159 Lawrence Street, Quincy, California 95971.

FOR FURTHER INFORMATION CONTACT: Judy Schaber, Assistant Resource Officer, Recreation, 530–836–2575.

SUPPLEMENTARY INFORMATION: The Federal Recreation Lands Enhancement Act (Title VII, Pub. L. 108–447) directed the Secretary of Agriculture to publish a six month advance notice in the **Federal Register** whenever new recreation fee areas are established. Once public involvement is complete, these new fees will be reviewed by a Recreation Resource Advisory Committee prior to a final decision and implementation. Campsites will continue to be available on a first come, first served basis.

Dated: November 24, 2008.

Alice B. Carlton,

Forest Supervisor.

[FR Doc. E8–29129 Filed 12–11–08; 8:45 am]

BILLING CODE 3410–11–M

AMERICAN BATTLE MONUMENTS COMMISSION

No Fear Act

AGENCY: American Battle Monuments Commission.

ACTION: Notice.

SUMMARY: The American Battle Monuments Commission (ABMC) is providing notice to its employees, former employees, and applicants for federal employment about the rights and remedies available to them under the Federal antidiscrimination, whistleblower protection, and retaliation laws. This notice fulfills the ABMC's initial notification obligation under the Notification and Federal Employees Antidiscrimination and Retaliation Act (No FEAR Act), as implemented by the Office of Personnel Management (OPM) regulations at 5 CFR part 724.

FOR FURTHER INFORMATION CONTACT: Visit the ABMC Web site at *http://www.abmc.gov*, or contact Michael Conley, Director, Equal Employment Opportunity (EEO), by mail at American Battle Monuments Commission, 2300 Clarendon Boulevard, Suite 500, Arlington, VA 22201, or by phone at (703) 696–5177.

SUPPLEMENTARY INFORMATION: On May 15, 2002, Congress enacted the ''Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002,'' which is now known as the No FEAR Act. See Public Law 107–174, codified at 5 U.S.C. 2301 note. As stated in the full title of the Act, the Act is intended to ''require that Federal agencies be accountable for violations of antidiscrimination and whistleblower protection laws.'' In support of this purpose, Congress found that ''agencies cannot be run effectively if those agencies practice or tolerate discrimination.'' Public Law 107–174, § 101(1).

The Act also requires this agency to provide this notice to its Federal employees, former Federal employees and applicants for Federal employment to inform you of the rights and protections available to you under Federal antidiscrimination, whistleblower protection, and retaliation laws.

Antidiscrimination Laws

A Federal agency cannot discriminate against an employee or applicant with respect to the terms, conditions or privileges of employment on the basis of race, color, national origin, religion, sex, age, disability, sexual orientation, parental status or any other non-merit factor. Discrimination on these bases is prohibited by one or more of the following statutes: 5 U.S.C. 2302(b)(1), 29 U.S.C. 206(d), 29 U.S.C. 631, 29 U.S.C. 633a, 29 U.S.C. 791 and 42 U.S.C. 2000e–16.

If you believe that you have been the victim of unlawful discrimination on the basis of race, color, religion, sex, national origin or disability, you must contact an Equal Employment Opportunity (EEO) counselor within 45 calendar days of the alleged discriminatory action, or, in the case of a personnel action, within 45 calendar days of the effective date of the action, before you can file a formal complaint of discrimination with your agency. *See*, *e.g.*, 29 CFR part 1614. If you believe that you have been the victim of unlawful discrimination on the basis of age, you must either contact an EEO counselor as noted above or give notice of intent to sue to the Equal Employment Opportunity Commission (EEOC) within 180 calendar days of the alleged discriminatory action. If you are alleging discrimination based on marital status or political affiliation, you may file a written complaint with the U.S. Office of Special Counsel (OSC) (see contact information below). In the alternative (or in some cases, in addition), you may pursue a discrimination complaint by filing a grievance through the agency's administrative grievance procedures, if such procedures apply and are available.

Whistleblower Protection Laws

A Federal employee with authority to take, direct others to take, recommend or approve any personnel action must not use that authority to take or fail to take, or threaten to take or fail to take, a personnel action against an employee or applicant because of disclosure of information by that individual that is reasonably believed to evidence violations of law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, unless disclosure of such information is specifically prohibited by law and such information is specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

Retaliation against an employee or applicant for making a protected disclosure is prohibited by 5 U.S.C. 2302(b)(8). If you believe that you have been the victim of whistleblower retaliation, you may file a written complaint (Form OSC–11) with the U.S. Office of Special Counsel, 1730 M Street, NW., Suite 218, Washington, DC 20036–4505, or online through the OSC Web site at *http://www.osc.gov.*

Retaliation for Engaging in Protected Activity

A Federal agency cannot retaliate against an employee or applicant because that individual exercised his or her rights under any of the Federal antidiscrimination or whistleblower protection laws listed above. If you believe that you are the victim of retaliation for engaging in protected activity, you must follow, as appropriate, the procedures described in the Antidiscrimination Laws and Whistleblower Protection Laws sections or, if applicable, the administrative or negotiated grievance procedures in order to pursue any legal remedy.

Disciplinary Actions

Under the existing laws, each agency retains the right, where appropriate, to discipline a Federal employee for conduct that is inconsistent with Federal antidiscrimination and whistleblower protection laws up to and including removal. If OSC has initiated an investigation under 5 U.S.C. 1214, however, according to 5 U.S.C. 1214(f), agencies must seek approval from the Special Counsel to discipline employees for, among other activities, engaging in prohibited retaliation. Nothing in the No FEAR Act alters existing laws or permits an agency to take unfounded disciplinary action against a Federal employee or to violate the procedural rights of a Federal employee who has been accused of discrimination.

Additional Information

For further information regarding the No FEAR Act regulations, refer to 5 CFR part 724, as well as the appropriate offices within the ABMC (*e.g.*, EEO or Personnel and Administration). Additional information regarding Federal antidiscrimination, whistleblower protection and retaliation laws can be found on the EEOC Web site at *http://www.eeoc.gov* and on the OSC Web site at *http://www.osc.gov.*

Existing Rights Unchanged

Pursuant to section 205 of the No FEAR Act, neither the Act nor this notice creates, expands or reduces any rights otherwise available to any employee, former employee or applicant under the laws of the United States, including the provisions of law specified in 5 U.S.C. 2302(d).

Theodore Gloukhoff,

Director, Personnel and Administration.

[FR Doc. E8–29405 Filed 12–11–08; 8:45 am]

BILLING CODE 6120–01–M

ARCTIC RESEARCH COMMISSION

Meeting

Notice is hereby given that the U.S. Arctic Research Commission will hold its 88th meeting in San Francisco, CA on Dec 14–19, 2008. The Business Session, open to the public, will convene at 9:30 a.m. Tuesday, Dec 16, 2008 in San Francisco, CA. An Executive Session will follow adjournment of the Business Session.

The Agenda items include:

(1) Call to order and approval of the Agenda.

(2) Approval of the Minutes of the 87th Meeting.

(3) Commissioners and Staff Reports.

(4) Discussion of USARC Goals and Activities.

The focus of the meeting will be reports and updates on programs and research projects affecting the Arctic.

Any person planning to attend this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs.

Contact Person for More Information: John Farrell, Executive Director, U.S. Arctic Research Commission, 703–525–0111 or TDD 703–306–0090.

John Farrell,

Executive Director.

[FR Doc. E8–29546 Filed 12–11–08; 8:45 am]

BILLING CODE 7555–01–P

BROADCASTING BOARD OF GOVERNORS

Sunshine Act Meeting

DATE AND TIME: Tuesday, December 9, 2008; 1 p.m.–2:15 p.m.

PLACE: Cohen Building, Room 3360, 330 Independence Ave., SW., Washington, DC 20237.

CLOSED MEETING: The members of the Broadcasting Board of Governors (BBG) will meet in a special session to review and discuss budgetary issues relating to U.S. Government-funded non-military international broadcasting. This meeting is closed because if open it likely would either disclose matters that would be properly classified to be kept secret in the interest of foreign policy under the appropriate executive order (5 U.S.C. 552b.(c)(1)) or would disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action. (5 U.S.C. 552b.(c)(9)(B)) In addition, part of the discussion will relate solely to the internal personnel and organizational issues of the BBG or the International Broadcasting Bureau. (5 U.S.C. 552b.(c)(2) and (6))

CONTACT PERSON FOR MORE INFORMATION: Persons interested in obtaining more information should contact Timi Nickerson Kenealy at (202) 203–4545.

Dated: December 9, 2008.

Timi Nickerson Kenealy,

Acting Legal Counsel.

[FR Doc. E8–29551 Filed 12–10–08; 11:15 am]

BILLING CODE 8610–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

(A–475–818)

Certain Pasta from Italy: Notice of Extension of Final Results of Antidumping Duty Changed Circumstances Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 12, 2008.

FOR FURTHER INFORMATION CONTACT: Eric B. Greynolds, AD/CVD Operations,

Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, Room 4014, 14th Street and Constitution Ave., NW, Washington, DC 20230, telephone: (202) 482–6071.

SUPPLEMENTARY INFORMATION:

Background

On November 19, 2007, the Department of Commerce (the Department) published its notice of initiation of antidumping duty (AD) changed circumstances review (CCR). *See Certain Pasta from Italy: Notice of Initiation of Antidumping Duty Changed Circumstances Review*, 72 FR 65010 (November 19, 2007). On February 22, 2008, the Department published its notice of preliminary results of AD CCR and intent to reinstate the AD order. *See Certain Pasta from Italy: Notice of Preliminary Results of Antidumping Duty Changed Circumstances Review and Intent to Reinstate the Antidumping Duty Order*, 73 FR 9769 (February 22, 2008). On August 12, 2008, the Department extended the due date of the final results of the AD CCR until October 6, 2008. *See Certain Pasta from Italy: Notice of Extension of Final Results of Antidumping Duty Changed Circumstances Review*, 73 FR 46871 (August 12, 2008). On September 29, 2008, the Department placed on the record of the AD CCR press releases from the United States Attorney for the Western District of Missouri and the Securities and Exchange Commission (SEC) regarding the American Italian Pasta Company (AIPC). *See* the Memorandum to the File from Eric B. Greynolds, Program Manager, ''Press Release from Office of the United States Attorney for the Western District of Missouri and the Securities and Exchange Commission Regarding the American Italian Pasta Company'' (September 29, 2008), a public document on file in the Central Records Unit (CRU), room 1117 of the main Department building. On October 8, 2008, David M. Spooner, the Assistant Secretary for Import Administration, along with other officials from the Department met with an official from AIPC and counsel to Lensi/AIPC to discuss issues pertaining to the ongoing AD CCR. On October 10, 2008, the Department extended the due date of the final results of the AD CCR until December 5, 2008. *See Certain Pasta from Italy: Notice of Extension of Final Results of Antidumping Duty Changed Circumstances Review*, 73 FR 60239 (October 10, 2008). On October 17, 2008, Lensi/AIPC submitted comments regarding the press release issued by the SEC and the Office of the United States Attorney for the Western District of Missouri.

Extension of Time Limit for Final Results

Under 19 CFR 351.216(e), the Department will issue the final results of a CCR within 270 days after the date on which the Department initiates the changed circumstances review. Currently, the final results of the AD CCR, which cover Lensi, a producer/exporter of pasta from Italy, and AIPC, Lensi's corporate parent and importer of subject merchandise produced by Lensi, are due by December 5, 2008. As explained above, the Department has placed certain information regarding Lensi on the record of the AD CCR. In addition, in their October 17, 2008 submission, Lensi and AIPC placed new factual information and comments on the record of the AD CCR. In order to have sufficient time to review the new factual information placed on the record of the AD CCR, we are extending the due date of the final results of the AD CCR by 17 days in accordance with 19 CFR 351.302(b). Therefore, the final results of the AD CCR are now due no later than December 22, 2008.

This notice is issued and published in accordance with sections 751(b) and 777(i) of the Tariff Act of 1930, as amended.

Dated: December 5, 2008.

Gary Taverman,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E8–29490 Filed 12–11–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(C–533–825)

Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On August 7, 2008, the Department of Commerce (Department) published in the **Federal Register** the preliminary results of administrative review of the countervailing duty order on polyethylene terephthalate film, sheet, and strip (PET film) from India for the period January 1, 2006 through December 31, 2006. *See Polyethylene Terephthalate Film, Sheet, and Strip from India: Preliminary Results of Countervailing Duty Administrative Review*, 73 FR 45956 (August 7, 2008) (*Preliminary Results*). Based on the results of our analysis of the comments received, the Department has revised the subsidy rates for the respondent, MTZ Polyfilms, Ltd. (MTZ). The final subsidy rate for the reviewed company is listed below in the section entitled ''Final Results of Review.''

EFFECTIVE DATE: December 12, 2008.

FOR FURTHER INFORMATION CONTACT: Elfi Blum, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0197.

SUPPLEMENTARY INFORMATION:

Background

Since the publication of the *Preliminary Results*, the following events have occurred. The Department issued its fifth supplemental questionnaire to the Government of India (GOI) and to MTZ on August 15, 2008. The GOI and MTZ filed their fifth supplemental responses on August 29, 2008 and on September 9, 2008, respectively. On September 4, 2008, the Department extended the briefing schedule to include MTZ's fifth supplemental response, and on September 12, 2008, the Department extended the deadline for interested parties to request a hearing. MTZ filed a case brief on September 15, 2008, and the petitioners, Dupont Teijin Films, Mitsubishi Polyester Film of America, and Toray Plastics (America), Inc., filed a rebuttal brief on September 22, 2008.[1] Based on a request by MTZ, a hearing, including a closed session, was held on October 6, 2008.

Scope of the Order

For purposes of the order, the products covered are all gauges of raw, pretreated, or primed Polyethylene Terephthalate Film, Sheet and Strip, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance–enhancing resinous or inorganic layer of more than 0.00001 inches thick. Imports of PET film are classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number

[1] Certain information referred to in MTZ's case brief was untimely. This information was inadvertently discussed in the hearing. On October 15, 2008, MTZ and petitioners re-filed their respective briefs with the information redacted. A copy of the official hearing transcript with the information redacted was placed on the record on October 23, 2008.

3920.62.00.90. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the order is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the Issues and Decision Memorandum in the Final Results of the Countervailing Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India, from Stephen J. Claeys, Deputy Assistant Secretary to David M. Spooner, Assistant Secretary for Import Administration (December 5, 2008) (Issues and Decision Memorandum), which is hereby adopted by this notice. The Issues and Decision Memorandum also contains a complete analysis of the programs covered by this review and the methodologies used to calculate the subsidy rates. A list of the comments raised in the briefs and addressed in the Issues and Decision Memorandum is appended to this notice. The Issues and Decision Memorandum is on file in the Central Records Unit, Room 1117 of the main Department building, and can be accessed directly on the Web at *http://ia.ita.doc.gov/frn*.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made some adjustments in the methodology that was used in the *Preliminary Results* for calculating MTZ's subsidy rates under several programs. All changes are discussed in detail in the Issues and Decision Memorandum.

Final Results of Review

In accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (Act) and 19 CFR 351.221(b)(5), we calculated individual *ad valorem* subsidy rates for MTZ, the only producer/exporter subject to review for the calendar year 2006, the period of review for this administrative review.

Manufacturer/Exporter	Net Subsidy Rate
MTZ Polyfilms Ltd.	65.59 %

Assessment and Cash Deposit Instructions

The Department intends to issue assessment instructions to U.S. Customs and Border Protection (CBP) 15 days after the date of publication of these final results of review to liquidate shipments of subject merchandise by MTZ entered, or withdrawn from warehouse, for consumption on or after January 1, 2006 through December 31, 2006, at 65.59 percent *ad valorem* of the entered value. We will also instruct CBP to collect cash deposits of estimated countervailing duties, at this rate, on shipments of the subject merchandise by MTZ entered, or withdrawn from warehouse, for consumption on or after the date of publication of these final results of review. For all non–reviewed companies, the Department has instructed CBP to assess countervailing duties at the cash deposit rates in effect at the time of entry, for entries between January 1, 2006 and December 31, 2006. The cash deposit rates for all companies not covered by this review are not changed by the results of this review.

Return or Destruction of Proprietary Information

This notice serves as a reminder to parties subject to the administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 5, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

Appendix I

List of Issues Addressed in the Issues and Decision Memorandum

Pre–Shipment and Post–Shipment Export Financing Program

Comment 1: MTZ's Participation in the Pre–Shipment and Post–Shipment Export Financing Program

Benefit Calculation Under the Export Promotion Capital Goods Scheme (EPCGS)

Comment 2: Education Cess

Comment 3: Special Additional Duty

Comment 4: Unpaid Import Duty Liabilities (Benefit Earned and Denominator)

Comment 5: Partial Fulfillment of Export Obligation

Comment 6: Interest Rate Benchmark for Contingent Liabilities

Advanced License Program (ALP)

Comment 7: Countervailability of the ALP

Union Territories Central Sales Tax Programs (CST)

Comment 8: The Benefits Received Under the Program

Comment 9: Adjustments to Cash Deposit Rates to Account for Program–Wide Changes

Comity

Comment 10: Principle of Comity in the EPCGS and ALP

Due Process

Comment 11: Due Process Claims

[FR Doc. E8–29482 Filed 12–11–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

C–423–809

Stainless Steel Plate in Coils from Belgium: Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On June 6, 2008, the U.S. Department of Commerce (''the Department'') published in the **Federal Register** its preliminary results of the administrative review of the countervailing duty order on stainless steel plate in coils from Belgium for the period January 1, 2006, through December 31, 2006.

On November 6, 2008, the Department issued a post–preliminary interim analysis regarding certain additional information placed on the record of this administrative review shortly before and after the preliminary results were issued. The final results do not effectively differ from the preliminary results, where we found the net subsidy rate to be *de minimis. See* section below entitled ''Final Results of Review'' for further discussion.

EFFECTIVE DATE: December 12, 2008.

FOR FURTHER INFORMATION CONTACT: Alicia Winston or David Layton, AD/CVD Operations, Office 1, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–1785 and (202) 482–0371, respectively.

SUPPLEMENTARY INFORMATION:

Background

The following events have occurred since the publication of the preliminary results of this review. *See Stainless Steel Plate in Coils from Belgium: Preliminary Results of Countervailing Duty Administrative Review*, 73 FR 32303 (June 6, 2008) (''*Preliminary Results*'').

On June 12, 2008, the Department extended the briefing and hearing schedules in order to provide parties with additional time to consider supplemental questionnaire responses received after the Preliminary Results, as well as the Department's post–preliminary analysis.

As noted in the *Preliminary Results*, the Government of Belgium (''GOB'') failed to respond to the Department's April 3, 2008, supplemental questionnaire within the specified deadline. The GOB submitted its response to the Department's April 3, 2008, supplemental questionnaire, subsequent to the *Preliminary Results*, on July 7, 2008. On July 22, 2008, the Department rejected this response as untimely. However, on August 20, 2008, we informed the GOB that we would grant a final extension for the April 3, 2008, supplemental questionnaire response until September 2, 2008. The GOB refiled its response to the April 3, 2008, supplemental questionnaire on August 22, 2008.

We sent an additional supplemental questionnaire to U&A on June 12, 2008, and received U&A's response on July 9, 2008. On July 22, 2008, the Department rejected U&A's July 9, 2008, response on the grounds that it contained untimely factual information from the GOB. The Department requested that U&A resubmit its supplemental response without the untimely information. On July 28, 2008, counsel for U&A met with Departments officials to discuss this matter. U&A resubmitted its supplemental response on August 15, 2008, and September 8, 2008.

On September 29, 2008, we extended the time limit for the final results of this administrative review by 60 days (to December 3, 2008), pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''). *See Stainless Steel Plate in Coils from Belgium: Extension of Time Limit for the Final Results of the Eighth Countervailing Duty Administrative Review*, 73 FR 56554 (September 29, 2008).

The Department issued its post–preliminary analysis on November 6, 2008. *See* Memorandum to David M. Spooner from David Neubacher and Alicia Winston: Post Preliminary Findings (November 6, 2008) (Post–Prelim Analysis). The Department received case briefs from U&A and the GOB on November 14, 2008. No rebuttal briefs were filed. The Department did not conduct a hearing in this review because none was requested.

Period of Review

The period of review (''POR'') for which we are measuring subsidies is January 1, 2006, through December 31, 2006.

Scope of the Order

The products covered by this order are imports of certain stainless steel plate in coils.

Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat–rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (*e.g.*, cold–rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this order are the following: (1) plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

The merchandise subject to this order is currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.05, 7219.12.00.06, 7219.12.00.20, 7219.12.00.21, 7219.12.00.25, 7219.12.00.26, 7219.12.00.50, 7219.12.00.51, 7219.12.00.55, 7219.12.00.56, 7219.12.00.65, 7219.12.00.66, 7219.12.00.70, 7219.12.00.71, 7219.12.00.80, 7219.12.00.81, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the scope of this order remains dispositive.

This scope language reflects the March 11, 2003, amendment of the antidumping and countervailing duty orders and suspension of liquidation which the Department implemented in accordance with the Court of International Trade (CIT) decision in *Allegheny Ludlum v. United States, Slip Op. 02–147 (Dec. 12, 2002). See also Notice of Amended Antidumping Orders; Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 68 FR 11520 (March 11, 2003) and *Amended CVD Order*.

Period of Review

The period for which we are measuring subsidies, *i.e.*, the period of review (''POR''), is January 1, 2006, through December 31, 2006.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this review are addressed in the December 3, 2008, Issues and Decision Memorandum for the Eighth Countervailing Duty Administrative Review of Stainless Steel Plate in Coils from Belgium (''Decision Memorandum''), from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, which is hereby adopted by this notice. Attached to this notice as an appendix is a list of the issues which an interested party has raised and to which we have responded in the Decision Memorandum. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Department's Central Records Unit, Room 1117 of the main Department building (''CRU''). In addition, a complete version of the Decision Memorandum can be accessed directly on the Web at http://ia.ita.doc.gov/frn/index.html. The paper copy and electronic version of the Decision Memorandum are identical in content.

Final Results of Review

We adjusted the subsidy rate calculation by using the revised sales value reported by U&A. *See* the Decision Memorandum and *see* the revised rate calculations in the Memorandum to the File, ''2006 Final Results Calculation Memorandum for U&A,'' dated December 3, 2008. In the Preliminary Results, we calculated a *de minimis* rate for U&A, and the rate we have calculated in these final results is still *de minimis* even though we have revised the sales denominator used in our calculations. For a complete analysis of the programs found to be countervailable, and the basis for the Department's determination, *see* the Decision Memorandum.

We determine that the total net countervailing subsidy rate for U&A is 0.20 percent *ad valorem* for the period January 1, 2006, through December 31, 2006, which is *de minimis* pursuant to 19 CFR 351.106(c)(1). The calculations will be disclosed to the interested parties in accordance with 19 CFR 351.224(b).

Assessment Rates

Because the countervailing duty rate for U&A is *de minimis*, we will instruct U.S. Customs and Border Protection (''CBP'') to liquidate entries for U&A during the period January 1, 2006, through December 31, 2006, without regard to countervailing duties in accordance with 19 CFR 351.106(c). The Department will issue appropriate instructions directly to CBP 15 days after publication of these final results of this review.

Cash Deposits

Since the countervailable subsidy rate for U&A is zero, the Department will instruct CBP to continue to suspend liquidation of entries, but to collect no cash deposits of estimated countervailing duties for U&A on all shipments of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

For all non–reviewed firms, we will instruct CBP to collect cash deposits of estimated countervailing duties at the most recent company–specific or all–others rate applicable to the company. These rates shall apply to all non–reviewed companies until a review of a company assigned these rates is requested.

This notice serves as a reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 3, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

APPENDIX

List of Comments and Issues in the Decision Memorandum

Comment 1: Threshold Requirements
Comment 2: Use of Facts Otherwise Available

Comment 3: SidInvest Benefit Calculation

Comment 4: Ongoing Scope Inquiry

[FR Doc. E8–29528 Filed 12–11–08; 8:45 am]
BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–588–862

High and Ultra–High Voltage Ceramic Station Post Insulators from Japan: Final Results of Sunset Review and Revocation of Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On November 3, 2008, the Department of Commerce (Department) initiated the sunset review of the antidumping duty order on high and ultra–high voltage ceramic station post insulators from Japan. Because the domestic interested parties did not participate in this sunset review, the Department is revoking this antidumping duty order.

EFFECTIVE DATE: December 30, 2008

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3874.

SUPPLEMENTARY INFORMATION:

Background

On December 30, 2003, the Department issued an antidumping duty order on high and ultra–high voltage ceramic station post insulators from Japan. *See Notice of Antidumping Duty Order: High and Ultra–High Voltage Ceramic Station Post Insulators from Japan*, 68 FR 75211 (Dec. 30, 2003). On November 3, 2008, the Department initiated a sunset review of this order. *See Initiation of Five-year (''Sunset'') Review*, 73 FR 65292 (Nov. 3, 2008).

We did not receive a notice of intent to participate from domestic interested parties in this sunset review by the deadline date. As a result, in accordance with 19 CFR 351.218(d)(1)(iii)(A), the Department determined that no domestic interested party intends to participate in the sunset review, and on November 20, 2008, we notified the International Trade Commission, in writing, that we intended to issue a final determination revoking this antidumping duty order. *See* 19 CFR 351.218(d)(1)(iii)(B)(2).

Scope of the Order

The scope of this order covers station post insulators manufactured of porcelain, of standard strength, high strength, or extra–high strength,[1] solid core or cavity core, single unit or stacked unit, assembled or unassembled, and with or without hardware attached, rated at 115 kilovolts (kV) voltage class and above (550 kV Basic Impulse Insulation Level and above), including, but not limited to, those manufactured to meet the following American National Standards Institute, Inc. standard class specifications: T.R.-286, T.R.-287, T.R.-288, T.R.-289, T.R.-291, T.R.-295, T.R.-304, T.R.-308, T.R.-312, T.R.-316, T.R.-362 and T.R.-391.

Subject merchandise is classifiable under subheading 8546.20.0060 of the Harmonized Tariff Schedule of the United States (HTSUS). While the HTSUS subheading is provided for convenience and customs purposes, the written description above remains dispositive as to the scope of this order.

Determination to Revoke

Pursuant to section 751(c)(3)(A) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.218(d)(1)(iii)(B)(3), if no domestic interested party files a notice of intent to participate, the Department shall, within 90 days after the initiation of the review, issue a final determination revoking the order. Because the domestic interested parties did not file a notice of intent to participate in this sunset review, the Department finds that no domestic interested party is participating in this sunset review. Therefore, consistent with 19 CFR 351.222(i)(1)(i) and section 751(c)(3) of the Act, we are revoking this antidumping duty order. The effective date of revocation is December 30, 2008,

[1] Station post insulators are manufactured in various styles and sizes, and are classified primarily according to the voltage they are designed to withstand. Under the governing industry standard issued by the Institute of Electrical and Electronic Engineers, the voltage spectrum is ivided into three broad classes: ''medium'' voltage (*i.e.*, less than or equal to 69 kilovolts), ''high'' voltage (*i.e.*, from 115 to 230 kilovolts), and ≥extra- high≥ or ''ultra-high'' voltage (*i.e.*, greater than 230 kilovolts).

the fifth anniversary of the date the Department published this antidumping duty order. *See* 19 CFR 351.222(i)(2)(i).

Effective Date of Revocation

Pursuant to section 751(c)(3)(A) of the Act and 19 CFR 351.222(i)(2)(i), the Department will issue instructions to U.S. Customs and Border Protection, 15 days after publication of the notice, to terminate the suspension of liquidation of the merchandise subject to this order entered, or withdrawn from warehouse, on or after December 30, 2008. Entries of subject merchandise prior to the effective date of revocation will continue to be subject to suspension of liquidation and antidumping duty deposit requirements. The Department will complete any pending administrative reviews of this order and will conduct administrative reviews of subject merchandise entered prior to the effective date of revocation in response to appropriately filed requests for review.

This five-year (sunset) review and notice are in accordance with sections 751(c) and 777(i)(1) of the Act.

Dated: December 8, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E8–29487 Filed 12–11–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Quarterly Update to Annual Listing of Foreign Government Subsidies on Articles of Cheese Subject to an In–Quota Rate of Duty

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 12, 2008.

FOR FURTHER INFORMATION CONTACT: Gayle Longest, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW, Washington, DC 20230, telephone: (202) 482–3338.

SUPPLEMENTARY INFORMATION: Section 702 of the Trade Agreements Act of 1979 (as amended) (''the Act'') requires the Department of Commerce (''the Department'') to determine, in consultation with the Secretary of Agriculture, whether any foreign government is providing a subsidy with respect to any article of cheese subject to an in–quota rate of duty, as defined in section 702(h) of the Act, and to publish an annual list and quarterly updates to the type and amount of those subsidies. We hereby provide the Department's quarterly update of subsidies on articles of cheese that were imported during the period April 1, 2008 through June 30, 2008.

The Department has developed, in consultation with the Secretary of Agriculture, information on subsidies (as defined in section 702(h) of the Act) being provided either directly or indirectly by foreign governments on articles of cheese subject to an in–quota rate of duty.

The appendix to this notice lists the country, the subsidy program or programs, and the gross and net amounts of each subsidy for which information is currently available. The Department will incorporate additional programs which are found to constitute subsidies, and additional information on the subsidy programs listed, as the information is developed.

The Department encourages any person having information on foreign government subsidy programs which benefit articles of cheese subject to an in–quota rate of duty to submit such information in writing to the Assistant Secretary for Import Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW, Washington, DC 20230.

This determination and notice are in accordance with section 702(a) of the Act.

Dated: December 5, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

APPENDIX

SUBSIDY PROGRAMS ON CHEESE SUBJECT TO AN IN–QUOTA RATE OF DUTY

Country	Program(s)	Gross[1] Subsidy ($/lb)	Net[2] Subsidy ($/lb)
27 EuropeanUnion Member States[3]	European Union Restitution Payments	$ 0.00	$0.00
CanadaExport Assistance on Certain Types of Cheese		$ 0.34	$ 0.34
Norway	Indirect (Milk) Subsidy	$ 0.00	$ 0.00
	Consumer Subsidy	*$ 0.00*	*$ 0.00*
	Total	$ 0.00	$ 0.00
Switzerland	Deficiency Payments	$ 0.00	$ 0.00

[1] Defined in 19 U.S.C. 1677(5).
[2] Defined in 19 U.S.C. 1677(6).
[3] The 27 member states of the European Union are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom.

[FR Doc. E8–29527 Filed 12–11–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Quarterly Update to Annual Listing of Foreign Government Subsidies on Articles of Cheese Subject to an In–Quota Rate of Duty

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 12, 2008.

FOR FURTHER INFORMATION CONTACT: Gayle Longest, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW, Washington, DC 20230, telephone: (202) 482–3338.

SUPPLEMENTARY INFORMATION: Section 702 of the Trade Agreements Act of 1979 (as amended) (''the Act'') requires the Department of Commerce (''the

Department'') to determine, in consultation with the Secretary of Agriculture, whether any foreign government is providing a subsidy with respect to any article of cheese subject to an in–quota rate of duty, as defined in section 702(h) of the Act, and to publish an annual list and quarterly updates to the type and amount of those subsidies. We hereby provide the Department's quarterly update of subsidies on articles of cheese that were imported during the period July 1, 2008 through September 30, 2008.

The Department has developed, in consultation with the Secretary of Agriculture, information on subsidies (as defined in section 702(h) of the Act) being provided either directly or indirectly by foreign governments on articles of cheese subject to an in–quota rate of duty. The appendix to this notice lists the country, the subsidy program or programs, and the gross and net amounts of each subsidy for which information is currently available. The Department will incorporate additional programs which are found to constitute subsidies, and additional information on the subsidy programs listed, as the information is developed.

The Department encourages any person having information on foreign government subsidy programs which benefit articles of cheese subject to an in–quota rate of duty to submit such information in writing to the Assistant Secretary for Import Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW, Washington, DC 20230.

This determination and notice are in accordance with section 702(a) of the Act.

Dated: December 5, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

APPENDIX

SUBSIDY PROGRAMS ON CHEESE SUBJECT TO AN IN–QUOTA RATE OF DUTY

Country	Program(s)	Gross Subsidy ($/lb)	Net Subsidy ($/lb)
27 European Union Member States	European Union Restitution Payments	$ 0.00	$0.00
Canada	Export Assistance on Certain Types of Cheese	$ 0.33	$ 0.33
Norway	Indirect (Milk) Subsidy	$ 0.00	$ 0.00
	Consumer Subsidy	*$ 0.00*	*$ 0.00*
	Total	$ 0.00	$ 0.00
Switzerland	Deficiency Payments	$ 0.00	$ 0.00

[FR Doc. E8–29532 Filed 12–11–08; 8:45 am]
BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XM08

Magnuson–Stevens Act Provisions; General Provisions for Domestic Fisheries; Adjustment to Exempted Fishing Permit

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

ACTION: Notice; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator), has made a preliminary determination that an amendment to an Exempted Fishing Permit (EFP) application submitted by the University of Maryland Eastern Shore (UMES) contains all of the required information and warrants further consideration. The Assistant Regional Administrator has made a preliminary determination that the adjusted activities authorized under this amended EFP would be consistent with the goals and objectives of the Northeast (NE) Multispecies and Monkfish Fishery Management Plans (FMPs). However, further review and consultation may be necessary before a final determination is made to reissue the EFP. Therefore, NMFS announces that the Assistant Regional Administrator proposes to recommend that an EFP be reissued that would allow one commercial fishing vessel to conduct fishing operations that are otherwise restricted by the regulations governing the fisheries of the Northeastern United States. This EFP, which would continue to enable researchers to study the effects of climate on the distribution and catch rates of monkfish, would adjust the exemptions from the NE multispecies regulations as follows: Gulf of Maine (GOM) Rolling Closure Area (RCA) I, rather than RCA III. The exemption from NE multispecies effort control measures will remain the same as with the original EFP. Regulations under the Magnuson–Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

DATES: Comments must be received on or before December 29, 2008.

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

• Email: *DA8–272@noaa.gov*. Include in the subject line ''Comments on Revised UMES Monkfish EFP .''

• Mail: Patricia A. Kurkul, Regional Administrator, NMFS, NE Regional Office, 1 Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on UMES monkfish EFP, DA8–272.''

• Fax: (978) 281–9135.

FOR FURTHER INFORMATION CONTACT: Emily Bryant, Fishery Management Specialist, 978–281–9244.

SUPPLEMENTARY INFORMATION: An application for an EFP amendment was submitted on October 15, 2008, by Andrea K. Johnson, Ph.D., Research Assistant Professor at UMES, for a project funded under the New England and Mid–Atlantic Fishery Management Councils' Monkfish Research Set–Aside (RSA) Program. The primary goal of this study is to investigate the influence of temperature on monkfish distribution and abundance, as well as determine age and growth patterns, spawning frequency, feeding rates, and cannibalism. This information will provide information on the biology of monkfish that could be used to enhance the management of this species.

The original EFP granted an exemption for one vessel to fish for monkfish using gillnets inside the GOM RCA III during May 2008. The vessel originally issued the EFP later decided not to participate in this project and a new vessel was issued the EFP on October 14, 2008. With this change to a new vessel, the research area was revised to reflect the new vessel owner's familiarity with monkfish fishing grounds. This EFP revision would grant an exemption for the new vessel to fish in 30-minute square number 122, rather than 137, inside the GOM RCA I during

March 2009. Fishing activity is currently taking place through December 2008 and researchers would like to continue in March 2009, but will need this revised exemption to do so. It is expected that this location, within the RCA, would provide access to large monkfish and would avoid gear interactions between the research gillnet gear and trawl gear. The need to switch RCA exemptions is due to the change in location and vessel from the original research proposal. Allowing an exemption in RCA I rather than RCA III will provide consistency with the rest of the research that is being conducted in that area and will avoid further delays in the project.

The applicant may request minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate completion of the proposed research and have minimal impacts that do not change the scope or impact of the initially approved EFP request. Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

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

Dated: December 5, 2008.

Emily H. Menashes

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

[FR Doc. E8–29441 Filed 12–11–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XM13

U.S. Climate Change Science Program Draft Unified Synthesis Product: Global Climate Change Impacts in the United States

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of revision of the production schedule for the U.S. Climate Change Science Program Unified Synthesis Product.

SUMMARY: The National Oceanic and Atmospheric Administration publish this notice to announce plans to add a second public comment period for the U.S. Climate Change Science Program Unified Synthesis Product (USP). The peer review and first public comment period that ended on August 14, 2008 produced a large number of suggestions for improvements in the scientific completeness and readability of the USP. These comments have resulted in substantial revisions to the document, and a second draft is now being prepared for release in January 2009 for a 45-day public comment period. Another **Federal Register** Notice will be published announcing the start of the public comment period and will provide detailed instructions for accessing the revised document and submitting comments.

SUPPLEMENTARY INFORMATION: The CCSP was established by the President in 2002 to coordinate and integrate scientific research on global change and climate change sponsored by 13 participating departments and agencies of the U.S. Government. The CCSP is charged with preparing information resources that promote climate-related discussions and decisions, including scientific synthesis and assessment analyses that support evaluation of important policy issues.

Dated: December 8, 2008.

William J. Brennan,

Acting Under Secretary of Commerce for Oceans and Atmosphere, and Director, Climate Change Science Program.

[FR Doc. E8–29495 Filed 12–11–08; 8:45 am]

BILLING CODE 3510–12–S

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation''), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, the Corporation is soliciting comments concerning the proposed renewal of its Volunteer Service Hour Tracking Tool (Record of Service). The Record of Service was established in 2002 as a tool to help Americans answer President Bush's call to service and keep track of their volunteer service hours.

Copies of the information collection requests can be obtained by contacting the office listed in the address section of this notice.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by February 10, 2009.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) *By Mail sent to:* Corporation for National and Community Service; Attention Shannon Maynard, Executive Director President's Council on Service and Civic Participation; 1201 New York Avenue, NW., Washington, DC 20525.

(2) By hand delivery or by courier to the Corporation's mailroom at Room 8100 at the mail address given in paragraph (1) above, between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays.

(3) *By fax to:* (202) 606–3460, Attention Shannon Maynard, Executive Director President's Council on Service and Civic Participation.

(4) *Electronically through the Corporation's e-mail address system: smaynard@cns.gov*.

FOR FURTHER INFORMATION CONTACT: Shannon Maynard, (202) 606–6713, or by e-mail at *smaynard@cns.gov*.

SUPPLEMENTARY INFORMATION: The Corporation is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.*, permitting electronic submissions of responses).

Background

In January of 2002, in his State of the Union Address, President Bush called

on all Americans to dedicate 4,000 hours or two years of their lives to volunteer service. He created the USA Freedom Corps, a coordinating office at the White House to oversee these efforts and to bring increased attention to the ways in which the Administration could work together to enhance opportunities for all Americans to serve their neighbors and their nation.

In support of the President's call to service, the Corporation created an electronic Record of Service to provide citizens a way to track their service activities and individually record their volunteer service hours. Use of this tracking tool is 100 percent electronic in that users establish a user ID and password that automatically creates an account which is only accessible to that individual user. The Record of Service can only be updated by the user who established the account. The Record of Service has received heavy public use and is a primary way for individuals to track their eligibility for the President's Volunteer Service Award.

Individuals may link to this tracking tool through the USA Freedom Corps Web site at *http://www.usafreedomcorps.gov* or the President's Volunteer Service Award Web site at *http://www.presidentialserviceawards.gov*.

Current Action

The Corporation seeks to renew the current Record of Service. The Record of Service will be used in the same manner as the existing Record of Service.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Volunteer Service Hour Tracking Tool.

OMB Number: 3045–0077.

Agency Number: None.

Affected Public: Citizens of the United States.

Total Respondents: 100,000.

Frequency: On occasion.

Average Time Per Response: 3 minutes.

Estimated Total Burden Hours: 5,000 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 4, 2008.

Kristin McSwain,

Chief Program Officer.

[FR Doc. E8–29502 Filed 12–11–08; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Modification of Federal Advisory Committee Charter

AGENCY: Department of Defense.

ACTION: Modification of Federal Advisory Committee Charter.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C. Appendix, as amended), the Sunshine in the Government Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.65, the Department of Defense gives notice that it intends to revise the charter for the Department of Defense Audit Advisory Committee. Specifically, the Department is increasing the number of committee members from five to seven members.

This committee will provide the Secretary of Defense, through the Under Secretary of Defense (Comptroller)/Chief Financial Officer, independent advice on DoD's financial management, including the financial reporting process, systems of internal controls, audit process and processes for monitoring compliance with applicable laws and regulations. In accordance with DoD policy and procedures, the Under Secretary of Defense (Comptroller)/Chief Financial Officer is authorized to act upon the advice emanating from this advisory committee.

Members of the Department of Defense Audit Advisory Committee shall be eminent authorities in the fields of financial management and audit. Committee members appointed by the Secretary of Defense, who are not full-time Federal officers or employees, shall be appointed as experts and consultants under the authority of 5 U.S.C. 3109, and serve as Special Government Employees.

The Department of Defense Audit Advisory Committee, in keeping with DoD policy to make every effort to achieve a balanced membership, includes a cross section of experts directly affected, interested, and qualified to advise on financial and audit matters. Committee members shall be appointed on an annual basis by the Secretary of Defense, and with the exception of travel and per diem for official travel, shall serve without compensation. The Under Secretary of Defense (Comptroller)/Chief Financial Officer shall select the committee's chairperson from the committee's membership at large.

The Department of Defense Audit Advisory Committee shall meet at the call of the committee's Designated Federal Officer, in consultation with the Chairperson, and the estimated number of committee meetings is four per year. The Designated Federal Officer shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with established DoD policies and procedures. The Designated Federal Officer or duly appointed Alternate Designated Federal Officer shall attend all committee meetings and subcommittee meetings.

The Department of Defense Audit Advisory Committee shall be authorized to establish subcommittees, as necessary and consistent with its mission, and these subcommittees or working groups shall operate under the provisions of the Federal Advisory Committee Act of 1972, the Sunshine in the Government Act of 1976, and other appropriate Federal regulations.

Such subcommittees or workgroups shall not work independently of the chartered committee, and shall report all their recommendations and advice to the Department of Defense Audit Advisory Committee for full deliberation and discussion. Subcommittees or workgroups have no authority to make decisions on behalf of the chartered committee nor can they report directly to the Department of Defense or any Federal officers or employees who are not members of the Department of Defense Audit Advisory Committee.

FOR FURTHER INFORMATION CONTACT: Contact Jim Freeman, Deputy Committee Management Officer for the Department of Defense at 703–601–6128.

Dated: December 5, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–29401 Filed 12–11–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2008–OS–0153]

Privacy Act of 1974; Systems of Records

AGENCY: Defense Finance and Accounting Service, DoD.

ACTION: Notice to add a new system of records.

SUMMARY: The Defense Finance and Accounting Service (DFAS) is proposing to add a system of records notice to its inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This action will be effective without further notice on January 12, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the FOIA/PA Program Manager, Corporate Communications and Legislative Liaison, Defense Finance and Accounting Service, 8899 E. 56th Street, Indianapolis, IN 46249–0150.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Krabbenhoft at (303) 589–3510.

SUPPLEMENTARY INFORMATION: The Defense Finance and Accounting Service notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on December 4, 2008, to the House Committee on Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records about Individuals'', dated December 12, 2000, 65 FR 239.

Dated: December 8, 2008.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

T–7300a

SYSTEM NAME:

Voucher Processing System (VPS).

SYSTEM LOCATION:

Document Automation and Production Services (DAPS), 5450 Carlisle Pike, Building 410, Mechanicsburg, PA 17050–2411.

Document Automation and Production Services (DAPS), 8000 Jefferson Davis Highway, Richmond, Virginia 23237–4480.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Active duty, Reserve and National Guard, Army, Navy, Air Force, and Marine Corps military members, DoD civilians, vendors and private citizens.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, Social Security Number (SSN), addresses, payroll data, vendor name and address, accounting, commercial pay, travel and military pay disbursement and collection voucher data, voucher control logs, voucher numbers, deposit funds data, and end-of-day reports data.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 31 U.S.C. Sections 3325, 3511, 3512, 3513; Department of Defense Financial Management Regulation (DoDFMR) 7000.14R, Vol. 5, and E.O. 9397 (SSN).

PURPOSE(S):

Used as a centralized repository that receives and stores accounting, commercial pay, travel, and military pay disbursement and collection voucher data. It will produce voucher control logs and management reports, such as end-of-day report used by management to monitor disbursements and collections.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To the Internal Revenue Service to report taxable earnings and taxes withheld, accounting, and tax audits, and to compute or resolve tax liability or tax levies.

To the Social Security Administration to report earned wages by members for the Federal Insurance Contribution Act, accounting or tax audits, and death notices.

To Federal Reserve banks to distribute payments made through the direct deposit system to financial organizations or their processing agents authorized by individuals to receive and deposit payments in their accounts.

The DoD ''Blanket Routine Uses'' published at the beginning of the DFAS compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage media and paper records.

RETRIEVABILITY:

Name and Social Security Number (SSN).

SAFEGUARDS:

Records are stored in an office building protected by guards, controlled screening, use of visitor registers, electronic access, and/or locks. Access to records is limited to individuals who are properly screened and cleared on a need to know basis in the performance of their duties. Passwords and digital signatures are used to control access to the system data, and procedures are in place to deter and detect browsing and unauthorized access. Physical and electronic access are limited to persons responsible for servicing and authorized to use the system.

RETENTION AND DISPOSAL:

Records are cut off at the end of the month and destroyed 6 years and 3 months after cutoff. Records are destroyed by degaussing, burning, and shredding.

SYSTEM MANAGER(S) AND ADDRESS:

Voucher Processing System (VPS) Program Manager, Defense Finance and Accounting Service, Information and Technology Services, 1931 S. Bell Street, Arlington, VA 22240–0001.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about them is contained in this record system should address written inquiries to the Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 E. 56th Street, Indianapolis, IN 46249–0150.

Individuals should furnish full name, Social Security Number (SSN), current address, and telephone number.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about them contained in this system should address written inquiries to Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 E. 56th Street, Indianapolis, IN 46249–0150.

Individuals should furnish full name, Social Security Number (SSN), current address, and telephone number.

CONTESTING RECORD PROCEDURES:

The DFAS rules for accessing records, for contesting contents and appealing initial agency determinations are published in DFAS Regulation 5400.11–R; 32 CFR part 324; or may be obtained from Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications

and Legislative Liaison, 8899 E. 56th Street, Indianapolis, IN 46249–0150.

RECORD SOURCE CATEGORIES:

Individuals concerned, Department of Defense Components, such as Army, Navy, Air Force, and Marine Corps.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8–29381 Filed 12–11–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2008–OS–0154]

Privacy Act of 1974; Systems of Records

AGENCY: Defense Finance and Accounting Service, DoD.

ACTION: Notice to add a new system of records.

SUMMARY: The Defense Finance and Accounting Service (DFAS) is proposing to add a system of records notice to its inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This action will be effective without further notice on January 12, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the FOIA/PA Program Manager, Corporate Communications and Legislative Liaison, Defense Finance and Accounting Service, 8899 E. 56th Street, Indianapolis, IN 46249–0150.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Krabbenhoft at (303) 589–3510.

SUPPLEMENTARY INFORMATION: The Defense Finance and Accounting Service systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on December 4, 2008, to the House Committee on Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals'', dated December 12, 2000, 65 FR 239.

Dated: December 8, 2008.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

T7300c

SYSTEM NAME:

Corporate Electronic Document Management System (CEDMS).

SYSTEM LOCATION:

Document Automation and Production Services (DAPS), 5450 Carlisle Pike, Building 410, Mechanicsburg, PA 17050–2411.

Document Automation and Production Services (DAPS), 8000 Jefferson Davis Highway, Richmond, VA 23237–4480.

Defense Finance and Accounting Service, 1931 S. Bell Street, Arlington, VA 22240–0001.

Defense Finance and Accounting Service, 8899 E. 56th Street, Indianapolis, IN 46249–6700.

Defense Finance and Accounting Service, 3990 East Broad Street, Columbus, OH 43213–2317.

Defense Finance and Accounting Service, 1240 E. Ninth Street, Cleveland, OH 44199–2055.

Defense Finance and Accounting Service, 325 Brooks Road, Rome, NY 13441–4527.

Defense Finance and Accounting Service, 27 Arkansas Road, Limestone, ME 04751–6216.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Active duty, Reserve, National Guard, retired and separated Army, Air Force, Navy and Marine Corps, military members and their dependents. Department of Defense civilian employees and other civilian employees who are paid by the Defense Finance and Accounting Service consolidated civilian payroll offices such as, Department of Energy, Department of Veterans Affairs, Environmental Protection Agency, Health and Human Services, Broadcasting Board of Governors and Executive Office of the President. Non-government civilians who have been issued invitational travel orders.

CATEGORIES OF RECORDS IN THE SYSTEM:

The following areas within the Defense Finance and Accounting Service will utilize the Corporate Electronic Document Management System (CEDMS) for storage of source documents: garnishments, military pay, debt and claims, allotments, travel, and the source documents may include the following documents:

Individual state court wage withholding notices or court order garnishment orders, interrogatories, correspondence between DFAS Office of General Counsel and parties to the case, DFAS pay units, United States Attorneys, United States District Courts and other State and Government agencies relevant to the processing of child support and commercial debt garnishment, applications under the Uniformed Services Former Spouses' Protection Act and applications for military involuntary allotments for commercial debt. Also bankruptcy trustee information for those who receive payments pursuant to Chapter 13 of the Bankruptcy Code.

Individual's pay and leave records; source documents for posting of time and leave attendance; individual retirement deduction records, source documents, and control files; wage and separation information files; health benefit records; income tax withholding records; allowance and differential eligibility files, such as, but not limited to clothing allowances and night rate differentials; withholding and deduction authorization files, such as, but not limited to federal income tax withholding, insurance and retirement deductions; accounting documents files, input data posting media, including personnel actions affecting pay; accounting and statistical reports and computer edit listings; claims and waivers affecting pay; control logs and collection/disbursement vouchers; listings for administrative purposes, such as, but not limited to health insurance, life insurance, bonds, locator files, and checks to financial institutions; correspondence with the civilian personnel office, dependents, attorneys, survivors, insurance companies, financial institutions, and other governmental agencies; leave and earnings statements; separation documents; official correspondence; federal, state, and city tax reports, forms covering pay changes and deductions; and documentation pertaining to garnishment of wages.

Individual's name, pay grade, Social Security Number (SSN), date of birth, gender, pay dates, leave account information, rank, enlistment contract or officer acceptance form identification, duty information (duty station, personnel assignment, and unit), security investigation, combat tours, temporary active duty data, years in service, promotional data, master military pay account (MMPA) records, leave and earnings statements (LESs), substantiating pay and allowance entitlements, deductions, or collection actions.

Pay entitlements and allowances: Base pay, allowances (such as basic

allowance for subsistence, basic allowance for quarters, family separation, clothing maintenance and monetary allowances), special compensation for positions such as medical, dental, veterinary, and optometry, special pay and bonus, such as foreign duty, proficiency, hostile fire, incentive pay such as parachute duty, and other entitlements in accordance with the DoD Financial Management Regulations, Volume 7A, 7000.14–R. Deductions from pay: Indebtedness and collection information.

Duty Status: Status adjustments relating to leave, entrance on active duty, absent without leave, confinement, desertion, sick or injured, mentally incompetent, missing, interned, promotions and demotions, and separation document code.

Supporting Documentation: Includes, but is not limited to, travel orders and requests; payroll attendance lists and rosters; document records establishing, supporting, reducing, or canceling entitlement; certificates and statements changing address, name, military assignment, and other individual data necessary to identify and provide accurate and timely military pay and performance credit; allotment start, stop, or change records; declarations of benefits and waivers; military pay and personnel orders; medical certifications and determinations; death and disability documents; check issuing and cancellation records and schedules; payroll vouchers; money lists and accounting records; pay adjustment authorization records; system input certifications; member indebtedness and tax levy documentation; earnings statements; employees' wage and tax reports and statements; casual payment authorization and control logs; and other documentation authorizing or substantiating Active and Reserve/Guard Component military pay and allowances, entitlement, deductions, or collections. Also inquiry files, sundry lists, reports, letters, correspondence, and rosters including, but not limited to, Congressional inquiries, Internal Revenue Service notices and reports, state tax and insurance reports, Social Security Administration reports, Department of Veterans Affairs reports, inter-DoD requests, Treasury Department reports, and health education and institution inquiries.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 31 U.S.C. Sections 3325, 3511, 3512, 3513; Department of Defense Financial Management Regulation (DoDFMR) 7000.14R, and E.O. 9397 (SSN).

PURPOSE(S):

To accommodate the administrative requirements to include document management, recordkeeping, record retrieval, record staging, and document security for scanning, indexing and managing various types of DFAS hard copy source documents to include garnishments, military pay, debts and claims, allotments, and travel.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To the Social Security Administration and Office of Personnel Management to credit the employee's account for Federal Insurance Contributions Act or Civil Service Retirement withheld;

To the National Finance Center, Office of Thrift Savings Plan for participating employees;

To any agency or component thereof, that needs the information for proper accounting of funds, such as, but not limited to the Office of Personnel Management to assist in resolving complaints, grievances, etc., and to compute Civil Service Retirement annuity;

To the Department of Energy for payroll, debt, claims, or garnishment inquires for those employees paid by DFAS.

To the Department of Veterans Affairs for payroll, debt, claims, or garnishment inquiries for those employees paid by DFAS.

To Health and Human Services for payroll, debt, claims, or garnishment inquiries for those employees paid by DFAS.

To the Environmental Protection Agency for payroll, debt, claims, or garnishment inquiries for those employees paid by DFAS.

To the Broadcasting Board of Governors for payroll, debt, claims, or garnishment inquiries for those employees paid by DFAS.

To the Executive Office of the President for payroll, debt, or garnishment inquiries for those employees paid by DFAS.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and on electronic storage media.

RETRIEVABILITY:

Name and Social Security Number (SSN).

SAFEGUARDS:

Records are stored in an office building protected by guards, controlled screening, use of visitor registers, electronic access, and/or locks. Access to records is limited to individuals who are properly screened and cleared on a need to know basis in the performance of their duties. Passwords and digital signatures are used to control access to the system data, and procedures are in place to deter and detect browsing and unauthorized access. Physical and electronic access are limited to persons responsible for servicing and authorized to use the system.

RETENTION AND DISPOSAL:

Hard copy source records are cut off when information has been converted to electronic medium and verified, or when no longer needed to support the reconstruction of, or serve as the backup to the master file, whichever is later. Hardcopy records are destroyed by burning, or shredding. Electronic records are destroyed by degaussing.

SYSTEM MANAGER(S) AND ADDRESS:

Corporate Electronic Document Management System Program Manager, Defense Finance and Accounting Service, Information and Technology Services, 1931 S. Bell Street, Arlington, VA 22240–0001.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate communications and Legislative Liaison, 8899 56th Street, Indianapolis, IN 46249–0150.

Requests should contain individual's name, Social Security Number (SSN), current address, and telephone number.

RECORD ACCESS PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 E. 56th Street, Indianapolis, IN 46249–0150.

Requests should contain individual's name, Social Security Number (SSN), current address, and telephone number.

CONTESTING RECORD PROCEDURES:

The DFAS rules for accessing records, for contesting contents and appealing initial agency determinations are published in DFAS Regulation 5400.11–R; 32 CFR part 324; or may be obtained from Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 E. 56th St., Indianapolis, IN 46249–0150.

RECORD SOURCE CATEGORIES:

From the individual, DoD Components such as, Army, Navy, Air Force and Marine Corps, Office of Personnel Management, and other government agencies whose civilian employees are paid by the Defense Finance and Accounting Service such as the Department of Energy, Department of Veterans Affairs, Health and Human Services, Environmental Protection Agency.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8–29383 Filed 12–11–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2008–OS–0150]

Privacy Act of 1974; Systems of Records

AGENCY: Defense Finance and Accounting Service, DoD.

ACTION: Notice to Alter an Existing System of Records.

SUMMARY: The Defense Finance and Accounting Service (DFAS) is proposing to alter a system of records notice subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This Action will be effective without further notice on January 12, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the FOIA/PA Program Manager, Corporate Communications and Legislative Liaison, Defense Finance and Accounting Service, 8899 E. 56th St., Indianapolis, IN 46249–0150.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Krabbenhoft at (303) 589–3510.

SUPPLEMENTARY INFORMATION: The Defense Finance and Accounting Service systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on December 4, 2008, to the House Committee on Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated December 12, 2000, 65 FR 239.

Dated: December 8, 2008.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

T7335

SYSTEM NAME:

Defense Civilian Pay System (DCPS) (September 19, 2005, 70 FR 54902).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with ''Defense Finance and Accounting Service, Civilian Pay Payroll Office, 8899 E. 56th St., Indianapolis, IN 46249–0002.

Defense Finance and Accounting Service, Civilian Pay Payroll Office, 1240 E 9th St., Cleveland, OH 44199–2055.

Defense Finance and Accounting Service Pensacola, 250 Raby Avenue, Building 801, Pensacola, FL 32509–5128.

Defense Information Systems Agency, Defense Enterprise Computing Center (DISA/DECC), 5450 Carlisle Pike, Building 309, Mechanicsburg, PA 17055–0975.''

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with ''All DoD civilian employees paid by appropriated funds and employees of the Executive Office of the President and non-DoD agencies to include Department of Energy, Department of Health and Human Services, Broadcast Board of Governors, Department of Veteran's Affairs and the Environmental Protection Agency who are paid by the Defense Finance and Accounting Service's consolidated civilian payroll offices.''

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''Individual's full name, Social Security Number (SSN), address, telephone number and pay and leave records; source documents for posting of time and leave attendance; individual retirement deduction records, source documents, and control files; wage and separation information files; health benefit records; income tax withholding records; allowance and differential eligibility files, such as, but not limited to clothing allowances and night rate differentials; withholding and deduction authorization files, such as, but not limited to federal income tax withholding, insurance and retirement deductions; accounting documents files, input data posting media, including personnel actions affecting pay; accounting and statistical reports and computer edit listings; claims and waivers affecting pay; control logs and collection/disbursement vouchers; listings for administrative purposes, such as, but not limited to health insurance, life insurance, bonds, locator files, and checks to financial institutions; correspondence with the civilian personnel office, system access request forms, dependents, attorneys, survivors, insurance companies, financial institutions, and other governmental agencies; leave and earnings statements; separation documents; official correspondence; federal, state, and city tax reports and tapes; forms covering pay changes and deductions; and documentation pertaining to garnishment of wages.''

* * * * *

PURPOSE(S):

Delete and replace with ''The records are used to accurately compute individual employees pay entitlements, withhold required and authorized deductions, and issue payments for amounts due. Output products are forwarded as required to the subject matter areas to ensure accurate accounting and recording of pay to civilian employees.

These records and related products are also used to verify and balance all payments, deductions, and contributions with the DD Form 592 (Payroll for Personal Services Certification and Summary) in the DFAS civilian pay office and other applicable subject matter areas, and to report this information to the recipients and other government and nongovernment agencies.

Records and system access request forms are also used for records input/modifications, and extraction or compilation of data and reports for management studies and statistical analyses for use internally or externally as required by DoD or other government agencies.

All records in this system are subject to use in authorized computer matching programs within the Department of Defense and with other Federal agencies or non-Federal agencies as regulated by the Privacy Act of 1974, as amended, (5 U.S.C. 552a).''

* * * * *

STORAGE:

Delete entry and replace with ''Paper records and on electronic storage media.''

RETRIEVABILITY:

Delete entry and replace with ''Retrieved by name and/or Social Security Number (SSN).''

SAFEGUARDS:

Delete entry and replace with ''Records are stored in an office building protected by guards, controlled screening, use of visitor registers, electronic access, and/or locks. Access to records is limited to individuals who are properly screened and cleared on a need to know basis in the performance of their duties. Passwords and digital signatures are used to control access to the system data, and procedures are in place to deter and detect browsing and unauthorized access. Physical and electronic access are limited to persons responsible for servicing and authorized to use the system.''

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Program Manager, Defense Finance and Accounting Service—Headquarters, ATTN: DFAS–HTSBA, 250 Raby Avenue, Building 801, Pensacola, FL 32509–5128.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquires to the Defense Finance and Accounting Services, Freedom of Information/Privacy Act Program Manager, Corporate Communication and Legislative Liaison, 8889 E. 56th Street, Indianapolis, IN 46249–0150.

Individual should furnish full name, Social Security Number (SSN), current address, and telephone number.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the Defense Finance and Accounting Services, Freedom of Information/Privacy Act Program Manager, Corporate Communication and Legislative Liaison, 8889 E. 56th Street, Indianapolis, IN 46249–0150.

Individuals should provide full name, Social Security Number (SSN), or other information verifiable from the record itself.''

CONTESTING RECORD PROCEDURES:

Delete entry and replace with ''The DFAS rules for accessing records, for contesting contents and appealing initial agency determinations are published in DFAS Regulation 5400.11–R; 32 CFR part 324; or may be obtained from the Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8889 E. 56th Street, Indianapolis, IN 46249–0150.''

RECORD SOURCE CATEGORIES:

Delete entry and replace with ''Information is obtained from the individual, previous employers, financial institutions, medical institutions, automated systems interfaces, state or local governments, and from other DoD components and other Federal agencies such as, but not limited to, Social Security Administration, Internal Revenue Service, state revenue departments, State Department, and Department of Defense components (including the Department of the Air Force, Army, or Navy, or Defense agencies); correspondence with attorneys, dependents, survivors, or guardians may also furnish data for the system.''

* * * * *

T7335

SYSTEM NAME:

Defense Civilian Pay System (DCPS).

SYSTEM LOCATION:

Defense Finance and Accounting Service, Civilian Pay Payroll Office, 8899 E. 56th St., Indianapolis, IN 46249–0002.

Defense Finance and Accounting Service, Civilian Pay Payroll Office, 1240 E 9th St., Cleveland, OH 44199–2055.

Defense Finance and Accounting Service Pensacola, 250 Raby Avenue, Building 801, Pensacola, FL 32509–5128.

Defense Information Systems Agency, Defense Enterprise Computing Center (DISA/DECC), 5450 Carlisle Pike, Building 309, Mechanicsburg, PA 17055–0975.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All DoD civilian employees paid by appropriated funds and employees of the Executive Office of the President and non-DoD agencies to include Department of Energy, Department of Health and Human Services, Broadcast Board of Governors, Department of Veteran's Affairs and the Environmental Protection Agency who are paid by the Defense Finance and Accounting Service's consolidated civilian payroll offices.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's full name, Social Security Number, address, telephone number and pay and leave records; source documents for posting of time and leave attendance; individual retirement deduction records, source documents, and control files; wage and separation information files; health benefit records; income tax withholding records; allowance and differential eligibility files, such as, but not limited to clothing allowances and night rate differentials; withholding and deduction authorization files, such as, but not limited to federal income tax withholding, insurance and retirement deductions; accounting documents files, input data posting media, including personnel actions affecting pay; accounting and statistical reports and computer edit listings; claims and waivers affecting pay; control logs and collection/disbursement vouchers; listings for administrative purposes, such as, but not limited to health insurance, life insurance, bonds, locator files, and checks to financial institutions; correspondence with the civilian personnel office, system access request forms, dependents, attorneys, survivors, insurance companies, financial institutions, and other governmental agencies; leave and earnings statements; separation documents; official correspondence; federal, state, and city tax reports and tapes; forms covering pay changes and deductions; and documentation pertaining to garnishment of wages.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 5 U.S.C. Chapter 53, 55, and 81; and E.O. 9397 (SSN).

PURPOSE(S):

The records are used to accurately compute individual employees pay entitlements, withhold required and authorized deductions, and issue payments for amounts due. Output products are forwarded as required to the subject matter areas to ensure accurate accounting and recording of pay to civilian employees.

These records and related products are also used to verify and balance all

payments, deductions, and contributions with the DD Form 592 (Payroll for Personal Services Certification and Summary) in the DFAS civilian pay office and other applicable subject matter areas, and to report this information to the recipients and other government and non-government agencies.

Records and system access request forms are also used for record input/modifications, and extraction or compilation of data and reports for management studies and statistical analyses for use internally or externally as required by DoD or other government agencies.

All records in this system are subject to use in authorized computer matching programs within the Department of Defense and with other Federal agencies or non-Federal agencies as regulated by the Privacy Act of 1974, as amended, (5 U.S.C. 552a).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To Federal Reserve Banks under procedures specified in 31 CFR part 210 for health benefit carriers to ensure proper credit for employee-authorized health benefit deductions;

To officials of labor organizations recognized under E.O. 11491 and E.O. 11636, as amended, when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions (including disclosure of reasons for non-deduction of dues, if applicable);

To the U.S. Treasury Department to maintain cash accountability;

To the Internal Revenue Service to record withholding and social security information;

To the Bureau of Employment Compensation to process disability claims;

To the Social Security Administration and Office of Personnel Management to credit the employee's account for Federal Insurance Contributions Act or Civil Service Retirement withheld;

To the National Finance Center, Office of Thrift Savings Plan for participating employees;

To state revenue departments to credit employee's state tax withholding;

To state employment agencies which require wage information to determine eligibility for unemployment compensation benefits of former employees;

To city revenue departments of appropriate cities to credit employees for city tax withheld;

To any agency or component thereof that needs the information for proper accounting of funds, such as, but not limited to the Office of Personnel Management to assist in resolving complaints, grievances, etc. and to compute Civil Service Retirement annuity.

To Federal, State, and local agencies for the purpose of conducting computer matching programs as regulated by the Privacy Act of 1974, as amended (5 U.S.C. 552a).

The 'Blanket Routine Uses' published at the beginning of the DFAS compilation of systems of records notices also apply to this system.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Disclosures pursuant to 5 U.S.C. 552a(b)(12) may be made from this system to 'consumer reporting agencies' as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701(a)(3)). The purpose of this disclosure is to aid in the collection of outstanding debts owed to the Federal government; typically to provide an incentive for debtors to repay delinquent Federal government debts by making these debts part of their credit records.

The disclosure is limited to information necessary to establish the identity of the individual, including name, address, and taxpayer identification number (Social Security Number); the amount, status, and history of the claim; and the agency or program under which the claim arose for the sole purpose of allowing the consumer reporting agency to prepare a commercial credit report.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and on electronic storage media.

RETRIEVABILITY:

Retrieved by name and/or Social Security Number (SSN)

SAFEGUARDS:

Records are stored in an office building protected by guards, controlled screening, use of visitor registers, electronic access, and/or locks. Access to records is limited to individuals who are properly screened and cleared on a need to know basis in the performance of their duties. Passwords and digital signatures are used to control access to the system data, and procedures are in place to deter and detect browsing and unauthorized access. Physical and electronic access are limited to persons responsible for servicing and authorized to use the system.

RETENTION AND DISPOSAL:

Records may be temporary in nature and destroyed when actions are completed, they are superseded, obsolete, or no longer needed. Other records may be cut off at the end of the payroll year and destroyed up to 6 years after cutoff or cutoff at the end of the payroll year and then sent to the National Personnel Records Center after 3 payroll years where they are retained for 56 years. Individual retirement records are cut off upon separation, transfer, retirement or death, and forwarded to the Office of Personnel Management.

SYSTEM MANAGER(S) AND ADDRESS:

Program Manager, Defense Finance and Accounting Service, ATTN: DFAS–HTSBA, 250 Raby Avenue, Building 801, Pensacola, FL 32509–5128.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 E. 56th Street, Indianapolis, IN 46249–0150.

Individual should furnish full name, Social Security Number, current address, and telephone number.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 E. 56th Street, Indianapolis, IN 46249–0150.

Individuals should provide full name, Social Security Number, or other information verifiable from the record itself.

CONTESTING RECORD PROCEDURES:

The DFAS rules for accessing records, for contesting contents and appealing initial agency determinations are published in DFAS Regulation 5400.11–R; 32 CFR part 324; or may be obtained

from the Freedom of Information/Privacy Act Program Manager, Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 E. 56th Street, Indianapolis, IN 46249–0150.

RECORD SOURCE CATEGORIES:

Information is obtained from the individual, previous employers, financial institutions, medical institutions, automated systems interfaces, state or local governments, and from other DoD components and other Federal agencies such as, but not limited to, Social Security Administration, Internal Revenue Service, state revenue departments, State Department, and Department of Defense components (including the Department of the Air Force, Army, or Navy, or Defense agencies); correspondence with attorneys, dependents, survivors, or guardians may also furnish data for the system.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8–29404 Filed 12–11–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

US Air Force Scientific Advisory Board, Notice of Meeting

AGENCY: Department of the Air Force, U.S. Air Force Scientific Advisory Board.

ACTION: Meeting notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the United States Air Force Scientific Advisory Board meeting will take place on Tuesday, January 13th, 2009, at the SAF/AQ Conference and Innovation Center, 1560 Wilson Blvd, Rosslyn, VA 22209. The meeting will be from 8 a.m.–4 p.m. The purpose of the meeting is to hold the United States Air Force Scientific Advisory Board quarterly meeting to discuss the FY09 Scientific Advisory Board study topics tasked by the Secretary of the Air Force and the results of the Air Force Research Laboratory review.

Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155, the Administrative Assistant of the Air Force, in consultation with the Office of the Air Force General Counsel, has determined in writing that the public interest requires that all sessions of the United States Air Force Scientific Advisory Board meeting be closed to the public because they will be concerned with classified information and matters covered by sections 5 U.S.C. 552b(c)(1) and (4).

Any member of the public wishing to provide input to the United States Air Force Scientific Advisory Board should submit a written statement in accordance with 41 CFR 102–3.140(c) and section 10(a)(3) of the Federal Advisory Committee Act and the procedures described in this paragraph. Written statements can be submitted to the Designated Federal Officer at the address detailed below at any time. Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the address listed below at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after this date may not be provided to or considered by the United States Air Force Scientific Advisory Board until its next meeting. The Designated Federal Officer will review all timely submissions with the United States Air Force Scientific Advisory Board Chairperson and ensure they are provided to members of the United States Air Force Scientific Advisory Board before the meeting that is the subject of this notice.

FOR FURTHER INFORMATION CONTACT: The United States Air Force Scientific Advisory Board Executive Director and Designated Federal Officer, Lt Col David J. Lucia, 703–697–8288, United States Air Force Scientific Advisory Board, 1080 Air Force Pentagon, Room 4C759, Washington, DC 20330–1080, *david.lucia@pentagon.af.mil.*

Bao-Anh Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. E8–29433 Filed 12–11–08; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2008–0044]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice To Amend a System of Records.

SUMMARY: The Department of the Air Force proposes to amend a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on January 12, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCISI, 1800 Air Force Pentagon, Suite 220, Washington, DC 20330–1800.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Brodie at (703) 696–7557.

SUPPLEMENTARY INFORMATION: The Department of the Air Force systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: December 8, 2008.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F051 AF JA I

SYSTEM NAME:

Commander Directed Inquiries (September 29, 2003, 68 FR 55945).

CHANGES:

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 8037, Judge Advocate General; 10 U.S.C. 164, Commanders of Combatant Commands; Air Force Instruction 51–904, Complaints of Wrongs under Article 138, Uniform Code of Military Justice and E.O. 9397 (SSN).''

PURPOSE(S):

Delete entry and replace with ''Used for thorough and timely resolution and response to complaints, allegations, or queries. May also be used for personnel actions involving civilian or military employees.

Documents received or prepared in anticipation of litigation are used by attorneys for the government to prepare

for trials and hearings; to analyze evidence; to prepare for examination of witnesses; to prepare for argument before courts, magistrates, and investigating officers; and to advise commanders.''

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

Delete entry and replace with ''To governmental boards or agencies or health care professional societies or organizations, or other professional organizations, if such record or document is needed to perform licensing or professional standards monitoring.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Air Force's compilation of systems of records notices apply to this system.''

STORAGE:

Delete entry and replace with ''Paper records in file folders and electronic storage media.''

RETRIEVABILITY:

Delete entry and replace with ''Retrieved by subject's name and/or Social Security Number (SSN).''

SAFEGUARDS:

Delete entry and replace with ''Records are accessed by person(s) responsible for servicing the record system in performance of their official duties and by authorized personnel who are properly screened and cleared for need-to-know. Records are stored in locked rooms and cabinets. Those in computer storage devices are protected by computer system software. Computers are only accessible with a password.''

RETENTION AND DISPOSAL:

Delete entry and replace with ''Disposed of 2 years after the case is closed. Paper records are disposed of by tearing into pieces, shredding, pulping, macerating or burning. Computer records are destroyed by deleting, erasing, degaussing, or by overwriting.''

* * * * *

F051 AF JA I

SYSTEM NAME:

Commander Directed Inquiries.

SYSTEM LOCATION:

Commander Directed Inquiries are maintained at the installation where the Commander's office is located.

Information copies of a report are kept at the individual's organization and at other organizations which have an interest in a particular incident or problem involving that individual that is addressed in the report. Official Air Force mailing addresses are published as an appendix to the Air Force's compilation of record systems notices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All persons who are the subject of reviews, inquiries, or investigations conducted under the inherent authority of a commander or director. All persons who are the subject of administrative command actions for which another system of records is not applicable.

CATEGORIES OF RECORDS IN THE SYSTEM:

Commander directed investigations; letters/transcriptions of complaints, allegations and queries; letters of appointment; reports of reviews, inquiries and investigations with supporting attachments, exhibits and photographs, record of interviews; witness statements; reports of legal review of case files, congressional responses; memoranda; letters and reports of findings and actions taken; letters to complainants and subjects of investigations; letters of rebuttal from subjects of investigations; finance, personnel; administration; adverse information, and technical reports; documentation of command action.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 8037, Judge Advocate General; 10 U.S.C. 164, Commanders of Combatant Commands; Air Force Instruction 51–904, Complaints of Wrongs under Article 138, Uniform Code of Military Justice and E.O. 9397 (SSN).

PURPOSE(S):

Used for thorough and timely resolution and response to complaints, allegations, or queries. May also be used for personnel actions involving civilian or military employees.

Documents received or prepared in anticipation of litigation are used by attorneys for the government to prepare for trials and hearings; to analyze evidence; to prepare for examination of witnesses; to prepare for argument before courts, magistrates, and investigating officers; and to advise commanders.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records, or information contained therein, may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To governmental boards or agencies or health care professional societies or organizations, or other professional organizations, if such record or document is needed to perform licensing or professional standards monitoring.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Air Force's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

Retrieved by subject's name and/or Social Security Number (SSN).

SAFEGUARDS:

Records are accessed by person(s) responsible for servicing the record system in performance of their official duties and by authorized personnel who are properly screened and cleared for need-to-know. Records are stored in locked rooms and cabinets. Those in computer storage devices are protected by computer system software. Computers are only accessible with a password.

RETENTION AND DISPOSAL:

Disposed of 2 years after the case is closed. Paper records are disposed of by tearing into pieces, shredding, pulping, macerating or burning. Computer records are destroyed by deleting, erasing, degaussing, or by overwriting.

SYSTEM MANAGER(S) AND ADDRESS:

The Commander who initiated an investigation or that Commander's successor in command, at that Commander's installation office. Official Air Force mailing addresses are published as an appendix to the Air Force's compilation of record systems notices.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Commander who initiated the investigation, or that Commander's successor, at the Commander's installation office.

Requests should provide their full name, mailing address, and proof of identity.

RECORD ACCESS PROCEDURES:

Individuals seeking to access records about themselves contained in this system should address requests to the Commander who initiated the investigation, or that Commander's successor in command, at the Commander's installation office.

Requests should provide their full name, mailing address, and proof of identity.

CONTESTING RECORD PROCEDURES:

The Air Force rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 33–332; 32 CFR part 806b; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Complainants, subjects, reports of investigations, witnesses, third parties, state and local governments and agencies, other Federal agencies, Members of Congress, and civilian police reports. Information from almost any source can be included if it is relevant and material to the investigation, inquiry, or subsequent command action.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identify of a confidential source.

Note: When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

An exemption rule for this system has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) published in 32 CFR part 806b. For additional information contact the system manager.

[FR Doc. E8–29403 Filed 12–11–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2008–0046]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to Alter a System of Records.

SUMMARY: The Department of the Air Force is proposing to alter a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The proposed action will be effective on January 12, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCPPI, 1800 Air Force Pentagon, Washington, DC 20330–1800.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Brodie at (703) 696–7557.

SUPPLEMENTARY INFORMATION: The Department of the Air Force systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on December 4, 2008, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: December 8, 2008.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F051 AFJA A

SYSTEM NAME:

Freedom of Information Act Appeals (June 11, 1997, 62 FR 31793).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with ''The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.''

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with ''Individuals who have appealed Freedom of Information Act (FOIA) denials to the Secretary of the Air Force under The Freedom of Information Act and applicable Air Force Instructions.''

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''Individual's name, Social Security Number (SSN) and grade; letters; memoranda; legal opinions; reports; e-mail messages; forms; and other documents necessary to process Freedom of Information Act (FOIA) appeals.''

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 8037, Judge Advocate General, Deputy Judge Advocate General: Appointment and duties; 5 U.S.C. 552, The Freedom of Information Act, as amended; DoD Regulation 5400.7–R/Air Force Supplement and E.O. 9397 (SSN).''

PURPOSE(S):

Delete entry and replace with ''To evaluate appeals to the Secretary of the Air Force from denials of requests for documents sought pursuant to the FOIA; used by the Air Force Audit Agency to conduct audits; used by other DoD and Air Force agencies to provide guidelines and precedents and in litigation involving the United States.''

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Delete entry ''Records from this system of records may be disclosed to the Department of Justice for litigation.''

* * * * *

STORAGE:

Delete entry and replace with ''Maintained in hard copy file folders and on electronic storage media.''

RETRIEVABILITY:

Delete entry and replace with ''Retrieved by name or Social Security Number (SSN).''

SAFEGUARDS:

Delete entry and replace with ''Records are accessed by authorized personnel as necessary to accomplish their official duties. Paper records are stored in locked containers and/or secure facilities. Computer records have

access controls and are password protected and encrypted.''

RETENTION AND DISPOSAL:

Delete entry and replace with ''Retained in office files for two years, then transferred to the General Services Administration where they will be disposed of after four additional years. Paper records are disposed of by tearing into pieces, shredding, pulping, macerating, or burning. Computer records are destroyed by deleting, erasing, degaussing, or by overwriting.''

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420, or designee.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

Requesters must submit their name, grade, and personal identification. Individuals may be required to provide the name of the installation where documents are suspected to be along with the general dates of the documents, if known.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system should address written inquiries to The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

Requesters must submit their name, grade, and personal identification. Individuals may be required to provide the name of the installation where documents are suspected to be along with the general dates of the documents, if known.''

CONTESTING RECORD PROCEDURES:

Delete entry and replace with ''The Air Force rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 33–332; 32 CFR part 806b; or may be obtained from the system manager.''

RECORD SOURCE CATEGORIES:

Delete entry and replace with ''From the requestors for their appeal and all Air Force records compiled to respond and process initial FOIA request.''

EXEMPTIONS CLAIMED FOR THIS SYSTEM:

Delete entry and replace with ''During the course of a FOIA action, exempt materials from 'other' systems of records may in turn become part of the case records in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this FOIA case record, the Department of the Air Force hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary systems of records which they are a part.

An exemption rule for this system has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 505. For additional information contact the system manager.''

F051 AFJA A

SYSTEM NAME:

Freedom of Information Act Appeal Records.

SYSTEM LOCATION:

The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have appealed Freedom of Information Act (FOIA) denials to the Secretary of the Air Force under 5 U.S.C. 552 and applicable Air Force Instructions.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's name, Social Security Number (SSN) and grade; letters; memoranda; legal opinions; reports; e-mail messages; forms; and other documents necessary to process Freedom of Information Act (FOIA) appeals.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 8037, Judge Advocate General, Deputy Judge Advocate General: Appointment and duties; 5 U.S.C. 552, The Freedom of Information Act, as amended; DoD Regulation 5400.7–R/Air Force Supplement and E.O. 9397 (SSN).

PURPOSE(S):

To evaluate appeals to the Secretary of the Air Force from denials of requests for documents sought pursuant to the Freedom of Information Act (FOIA); used by the Air Force Audit Agency to conduct audits; used by other DoD and Air Force agencies to provide guidelines and precedents; and in litigation involving the United States.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The 'Blanket Routine Uses' published at the beginning of the Air Force's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Maintained in hard copy file folders and on electronic storage media.

RETRIEVABILITY:

Retrieved by name or Social Security Number (SSN).

SAFEGUARDS:

Records are accessed by authorized personnel as necessary to accomplish their official duties. Paper records are stored in locked containers and/or secure facilities. Computer records have access controls and are password protected and encrypted.

RETENTION AND DISPOSAL:

Retained in office files for two years, then transferred to the General Services Administration where they will be disposed of after four additional years. Paper records are disposed of by tearing into pieces, shredding, pulping, macerating, or burning. Computer records are destroyed by deleting, erasing, degaussing, or by overwriting.

SYSTEM MANAGER(S) AND ADDRESS:

The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420, or designee.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

Requesters must submit their name, grade, and personal identification. Individuals may be required to provide the name of the installation where documents are suspected to be along with the general dates of the documents, if known.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to The Judge Advocate General, Headquarters United States Air Force, 1420 Air Force Pentagon, Washington, DC 20330–1420.

Requesters must submit their name, grade, and personal identification. Individuals may be required to provide the name of the installation where documents are suspected to be along with the general dates of the documents, if known.

CONTESTING RECORD PROCEDURES:

The Air Force rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 33–332; 32 CFR part 806b; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

From the requestors for their appeal and all Air Force records compiled to respond and process initial FOIA request.

EXEMPTIONS CLAIMED FOR THIS SYSTEM:

During the course of a FOIA action, exempt materials from 'other' systems of records may in turn become part of the case records in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this FOIA case record, the Department of the Air Force hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary systems of records which they are a part.

An exemption rule for this system has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 806b. For additional information contact the system manager.

[FR Doc. E8–29408 Filed 12–11–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2008–0045]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to Add a System of Records.

SUMMARY: The Department of the Air Force is proposing to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on January 12, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCISI, 1800 Air Force Pentagon, Suite 220, Washington, DC 20330–1800.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Brodie at (703) 696–7557.

SUPPLEMENTARY INFORMATION: The Department of the Air Force notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, will be submitted on December 4, 2008, to the House Committee on Government Oversight and Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: December 8, 2008.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F031 AFMC B

SYSTEM NAME:

Air Force Information System Records.

SYSTEM LOCATION:

Department of the Air Force, Joint Strike Fighter (JSF) Integrated Test Force, 225 North Wolfe Avenue, Edwards Air Force Base, CA 93524–6035.

Department of the Air Force, Airborne Laser (ABL) Integrated Test Force, 116 East Jones Road, Edwards Air Force Base, CA 93524–8293.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Military and civilian personnel, foreign nationals and contractors.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information includes name; Social Security Number (SSN); date/state/country of birth; passport number; citizenship information; roster identification number; physical characteristics; home address; phone number; and e-mail address; emergency contact information; training records; equipment accountability records; documentation pertaining to requesting, granting, and terminating access to secure facilities and various special access programs; foreign travel, and badge numbers.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 8013, Secretary of the Air Force; DoD 5200.2–R, DoD Personnel Security Program; AFI 33–129, Web Management and Internet Use; AFI 33–202, Network and Computer Security and E.O. 9397 (SSN).

PURPOSES:

Automates the administrative/management activities associated with the day-to-day operations of an organization. These include but are not limited to: administering/managing required training, unit calendars, information sharing, personnel listings/rosters, facility work requests and security functions. Information may be used by management for system efficiency, workload calculation, or reporting purposes.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' published at the beginning of the Air Force's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

Individual's name and Social Security Number (SSN), roster identification number and/or passport number.

SAFEGUARDS:

Servers are housed in a secure facility at Edwards Air Force Base, California. Information is restricted to supervisors and reviewing officials with the appropriate profiles or roles and by persons responsible for servicing the record system in performance of their official duties. Information is not shared with other organizations.

Administrative account access is restricted by an administration account Common Access Card (CAC) which is over and above the individual CAC. Access is limited to Joint Strike Fighter and Airborne Laser personnel.

RETENTION AND DISPOSAL:

Data stored digitally within the system is retained until reassignment, separation, or access is no longer required. Backup files are maintained only for system restoration and are not to be used to retrieve individual records. Computer records are destroyed by erasing, deleting or overwriting. Paper records are destroyed by tearing into pieces, shredding, pulping, macerating, or burning. System manager(s) and address:

Department of the Air Force, Joint Strike Force Integrator, 225 North Wolfe Avenue, Edwards Air Force Base, CA 93523–6035.

Airborne Laser Program Manager, 116 East Jones Road, Edwards Air Force Base, CA 93524–8293.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to or visit the systems manager at Department of the Air Force, JSF Integrator, 225 North Wolfe Avenue, Edwards Air Force Base, CA 93523–6035.

The request should be signed and include, name and Social Security Number (SSN), passport number or roster identification number and a complete mailing address.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the systems manager at Department of the Air Force, JSF Integrator, 225 North Wolfe Avenue, Edwards Air Force Base, CA 93523–6035.

The request should be signed and include, name and Social Security Number (SSN), passport number or roster identification number, and a complete mailing address.

CONTESTING RECORD PROCEDURES:

The Air Force rules for accessing records and for contesting contents and appealing initial agency determinations are published in 32 CFR part 806b, Air Force Instruction 33–332, Air Force Privacy Program and may be obtained from the systems manager.

RECORD SOURCE CATEGORIES:

Information is obtained from individual, individual's supervisor, automated system interfaces, security personnel, or from other source documents.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8–29411 Filed 12–11–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Availability of the Draft Environmental Impact Statement (DEIS) for the Maneuver Center of Excellence (MCOE) Actions at Fort Benning, GA

AGENCY: Department of the Army, DoD.

ACTION: Notice of Availability (NOA).

SUMMARY: The U.S. Army announces the availability of the DEIS, which evaluates the potential environmental and socioeconomic impacts of the construction, operation, and maintenance of facilities and training areas at Fort Benning. The DEIS also re-evaluates projects that have moved or changed extensively from those evaluated in the Base Realignment and Closure (BRAC) and Transformation EIS (2007). The proposed action is designed to accommodate newly identified requirements for Armor School training, accommodate Army growth, and support the MCOE standup. The MCOE proposed actions include the construction, operation, and maintenance of facilities and training areas (including assets such as ranges and maneuver areas) to (1) accommodate newly identified requirements for Armor School training, (2) support the increased throughput of military personnel and students associated with Grow the Army missions, and (3) support the MCOE requirements at Fort Benning.

DATES:

1. *Public comment period for the DEIS:* Ends 45 days after publication of the notice announcing the DEIS availability in the **Federal Register** by the U.S. Environmental Protection Agency.

2. *Public Meeting:* Tuesday, January 13, 2009, from 3 p.m. to 5 p.m. and 6 p.m. to 9 p.m. at the Elizabeth Bradley Turner Center, Founders Hall, Columbus State University, Columbus, Georgia.

ADDRESSES: Please send written comments on the DEIS to: Mr. John Brent, Fort Benning Directorate of Public Works, Environmental Management Division, Building #6 (Meloy Hall), Room 310, Fort Benning, GA 31905. E-mail comments should be sent to: *john.brent@us.army.mil*.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony O'Bryant, Fort Benning Public Affairs Office at (706) 545–4591, or Mr. Brandon Cockrell at (706) 545–3210 during normal business hours.

SUPPLEMENTARY INFORMATION: The Proposed Action and subject of the DEIS covers the construction and development activities in the cantonment, range and training areas to meet the requirements of the MCOE actions at Fort Benning.

The proposed action would provide the facilities, infrastructure, and equipment needed to support the MCOE activities at Fort Benning. All construction activities associated with the proposed action would occur on Fort Benning within the Georgia boundaries. The proposed community services, personnel support, classroom, barracks, and dining facilities would be constructed in three of the four cantonment areas at Fort Benning: Main Post, Sand Hill, and Harmony Church; no new construction is proposed in the fourth cantonment area at Kelley Hill. Throughout the cantonment areas, new facility construction will be sited to coincide with and/or be a complement to existing missions, facility operations, and functions. In order to minimize potential impacts to the environment (*e.g.*, avoiding sensitive species habitat), existing infrastructure would be used to the greatest extent possible. Training assets, in the form of ranges and maneuver areas, currently are found throughout the installation. The proposed improvements/upgrades to existing ranges and maneuver areas and proposed new ranges were selected to align with these existing assets.

In the development of the DEIS, three alternatives were carried forward for analysis. Alternative A (the Army's Preferred Alternative) entails construction, operation, and maintenance of facilities and training areas, including assets such as small- and large-caliber weapons ranges, heavy maneuver areas and corridors, an off-road driver training area, and a vehicle recovery area to support the training range requirements. Also included are additional supporting projects and previously evaluated projects that have moved or changed extensively in order to support the increased throughput of military personnel and students associated with Grow the Army missions and MCOE standup activities. Alternative B is similar to Alternative A, but differs from Alternative A in the location of One Station Unit (OSUT)

Training. The Multi-Purpose Machine Gun Range 1 and the Automated Combat Pistol Qualification course are only included in Alternative B. The No Action Alternative, which reflects the status quo and incorporates all FY09 through FY13 projects that were analyzed in the BRAC/Transformation EIS, was also evaluated. These projects were approved in the 2007 BRAC/Transformation Record of Decision (ROD).

The DEIS analyses indicate that implementation of Alternative A (Preferred Alternative) would have significant impacts on biological resources and cultural resources. Significant impacts would be reduced or minimized to no significant impacts by implementation of mitigation measures identified for certain biological resources and cultural resources. Implementation of the preferred alternative would have no significant impacts to visual and aesthetic resources; socioeconomics; transportation; noise; air quality; hazardous and toxic materials and waste; water resources; geology and soils; Unique Ecological Areas; safety; land use; or utilities. Noise contour data for all alternatives indicate no significant impacts would occur either on post or off post. Alternative locations for some of the projects as presented in Alternative B would provide similar impacts and benefits as Alternative A in all resources except for special status species where the impacts to the Red-cockaded Woodpecker would be greater, and cultural resources where impacts would be slightly less. The No Action alternative includes the BRAC/Transformation projects and environmental baseline conditions for comparison to the impacts associated with the action alternatives. Impacts for the No Action alternative would be similar to Alternative A, except cultural resources where impacts would be less.

In a 2007 EIS and ROD, the Army announced its decision to implement the BRAC 2005 and Transformation Actions at Fort Benning. Under this action, the Armor Center and School is relocating from Fort Knox, Kentucky, to Fort Benning and will eventually consolidate with the Infantry Center and School. The 2007 EIS and ROD also addressed the Army Modular Force transformation actions, Global Defense Posture Realignments, and other Army stationing activities. This EIS is prepared in part to re-evaluate projects that have moved or changed extensively from those evaluated in the 2007 EIS.

The Army invites the public, local governments, federally-recognized American Indian Tribes, and state and other Federal agencies to submit written comments or suggestions concerning the alternatives and analyses addressed in the DEIS. The public and government agencies also are invited to participate in a public meeting where oral and written comments and suggestions will be received.

Copies of the DEIS will be available for review at several local libraries prior to the public meeting. The DEIS may also be reviewed electronically at: *http://www.hqda.army.mil/acsim/brac/nepa_eis_docs.htm*.

Dated: December 5, 2008.

Addison D. Davis, IV,

Deputy Assistant Secretary of the Army (Environment, Safety and Occupational Health).

[FR Doc. E8–29319 Filed 12–11–08; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2008–0065]

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy, DoD.

ACTION: Notice To Add a System of Records.

SUMMARY: The Department of the Navy proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on January 12, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to Mrs. Miriam Brown-Lam, HEAD, FOIA/Privacy Act Policy Branch, the Department of the Navy, 2000 Navy Pentagon, Washington, DC 20350–2000.

FOR FURTHER INFORMATION CONTACT: Mrs. Miriam Brown-Lam (202) 685–6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy systems of records notice subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, has been published in the **Federal Register** and is available from the address above.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, were submitted on December 4, 2008, to the House Committee on Government Report, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: December 8, 2008.

Morgan E. Frazier,

Alternate OSD, Federal Register Liaison Officer, Department of Defense.

NM–05724–1

SYSTEM NAME:

Fleet Hometown News System (FHNS) Records.

SYSTEM LOCATION:

Fleet Hometown News Center, 9420 Third Ave., Norfolk, VA 23511–2125.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Active-duty Navy, Marine Corps and Coast Guard personnel.

CATEGORIES OF RECORDS IN THE SYSTEM:

Biographical information submitted includes full name, Social Security Number (SSN), rank, gender, marital status, date entered service, branch of service, duty status, Command mailing address, spouse's first name, father's name and address, mother's name and address, father-in-law's name and address, mother-in-law's name and address, high school and college/university complete names, graduation dates, city, state, and zip codes, and duty to which assigned/job title.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; SECNAVINST 5724.3A, Fleet Hometown News Program Policy and Procedures; and E.O. 9397 (SSN).

PURPOSE(S):

Information is collected and maintained to generate public awareness of the accomplishments of Navy, Marine Corps, and Coast Guard personnel by distributing news releases and photographs to the hometown news media of individual service members. Hometown news media include, but are not limited to, newspapers, radio and television stations, and college/university alumni publications throughout the United States and its territories and their respective Web sites. Release of this information is done with the individual's full cooperation and written consent.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The DoD 'Blanket Routine Uses' that appear at the beginning of the Navy's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and electronic storage media.

RETRIEVABILITY:

By individual's name and Social Security Number (SSN).

SAFEGUARDS:

Records are maintained in a controlled facility. Physical entry is restricted by the use of locks, guards, and is accessible only to authorized personnel. Access to computerized data is restricted by passwords, which are changed periodically. Data sent by Public Affairs Officers Hometown News Service is over a secure connection. Access to records is limited to person(s) responsible for servicing the record in performance of their official duties and who are properly screened and cleared for need-to-know.

RETENTION AND DISPOSAL:

Records are destroyed one year after submission. Paper records are destroyed by shredding, burning or pulping. Electronic records are destroyed by erasing, deleting or overwriting.

SYSTEM MANAGER(S) AND ADDRESS:

SPAWAR Systems Center Atlantic, Code 54550, FORCEnet Engineering and Technology Support Branch—IT Umbrella Program Support—Tidewater Node of the FORCEnet Composeable Environment, 9456 Fourth Ave., Bldg. V53, Room 340, Norfolk, VA 23511–2125.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Fleet Hometown News System Manager, 9420 Third Ave., Norfolk, VA 23511–2125.

Written and signed requests must contain name and Social Security Number (SSN).

RECORDS ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the Fleet Hometown News System Manager, 9420 Third Ave., Norfolk, VA 23511–2125.

Written and signed requests must contain name and Social Security Number (SSN).

CONTESTING RECORD PROCEDURES:

The Navy's rules for accessing records, for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CDR part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

From the individual.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8–29400 Filed 12–11–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Office of Innovation and Improvement; Overview Information; Credit Enhancement for Charter School Facilities Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2009 Catalog of Federal Domestic Assistance (CFDA) Number: 84.354A.

Dates:

Applications Available: December 12, 2008.

Date of Pre-Application Meeting: January 12, 2009.

Deadline for Transmittal of Applications: February 10, 2009.

Deadline for Intergovernmental Review: April 13, 2009.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: This program provides grants to eligible entities to permit them to enhance the credit of charter schools so that they can access private-sector and other non-Federal capital in order to acquire, construct, and renovate facilities at a reasonable cost. Grant projects awarded under this program will be of sufficient size, scope, and quality to enable the grantees to implement effective strategies for reaching that objective.

Priorities: This competition includes one competitive preference priority and two invitational priorities that are explained in the following paragraphs.

Competitive Preference Priority: In accordance with 34 CFR 75.105(b)(2)(ii), this priority is from the regulations for this program (34 CFR 225.12). For FY 2009 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i), we award up to an additional 15 points to an application, depending on how well the application meets this priority.

This priority is:

The capacity of charter schools to offer public school choice in those communities with the greatest need for school choice based on—

(1) The extent to which the applicant would target services to geographic areas in which a large proportion or number of public schools have been identified for improvement, corrective action, or restructuring under Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001;

(2) The extent to which the applicant would target services to geographic areas in which a large proportion of students perform below proficient on State academic assessments; and

(3) The extent to which the applicant would target services to communities with large proportions of students from low-income families.

Invitational Priorities: Under this competition we are particularly interested in applications that address the following two priorities. For FY 2009 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are invitational priorities. Under 34 CFR 75.105(c)(1), we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

Invitational Priority 1—The applicant proposes a grant project that uses competitive market forces to obtain the best rates and terms on financing for charter schools in order to acquire, construct, and renovate facilities while using the least amount of grant funds.

Invitational Priority 2—The applicant proposes to replicate a model, or aspects of a model, for credit-enhancing charter schools that it or others have successfully used in the past. The model should ideally have a history of both (1) serving charter schools and (2) leveraging financing for charter schools in a timely manner.

Program Authority: 20 U.S.C. 7223–7223j.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99. (b) The regulations for this program in 34 CFR part 225.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $36,611,000 for new awards for this program for FY 2009. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2010 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $2,000,000–$15,000,000.

Estimated Average Size of Awards: $9,134,000.

Estimated Number of Awards: 4.

Note: The Department is not bound by any estimates in this notice.

Project Period: From the start date indicated on the grant award document until the Federal funds and earnings on those funds have been expended for the grant purposes or until financing facilitated by the grant has been retired, whichever is later.

III. Eligibility Information

1. *Eligible Applicants:* (a) A public entity, such as a State or local governmental entity; (b) A private, nonprofit entity; or (c) A consortium of entities described in (a) and (b).

Note: The Secretary will make, if possible, at least one award in each of the three categories of eligible applicants.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Other:* The charter schools that a grantee selects to benefit from this program must meet the definition of a charter school, in section 5210(1) of the ESEA, as amended.

IV. Application and Submission Information

1. *Address to Request Application Package:* Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. Fax: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.354A.

Individuals with disabilities can obtain a copy of the application package in an alternative format (e.g., braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Alternative Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Each Credit Enhancement for Charter School Facilities program application must include the following specific elements:

(a) A statement identifying the activities proposed to be undertaken with grant funds (the ''grant project''), including a description of how the applicant will determine which charter schools will receive assistance and how much and what types of assistance these schools will receive.

(b) A description of the involvement of charter schools in the application's development and in the design of the proposed grant project.

(c) A description of the applicant's expertise in capital markets financing. (Consortium applicants must provide this information for each of the participating organizations.)

(d) A description of how the proposed grant project will leverage the maximum amount of private-sector and other non-Federal capital relative to the amount of Credit Enhancement for Charter School Facilities program funding used and how the proposed grant project will otherwise enhance credit available to charter schools.

(e) A description of how the eligible entity possesses sufficient expertise in education to evaluate the likelihood of success of a charter school program for which facilities financing is sought.

(f) In the case of an application submitted by a State governmental entity, a description of current and planned State funding actions, including other forms of financial assistance that ensure that charter schools within the State receive the funding they need to have adequate facilities.

Additional requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: We have found that reviewers are able to conduct the highest-quality review when applications are concise and easy to read. Applicants are encouraged to limit their applications to no more than 40 double-spaced pages (not including the required forms and tables), to use a 12-point or larger-size font with one-inch margins at the top, bottom, and both sides, and to number pages consecutively. Furthermore, applicants are strongly encouraged to include a table of contents that specifies where each required part of the application is located.

3. *Submission Dates and Times:*

Applications Available: December 12, 2008.

Date of Pre-Application Meeting: January 12, 2009.

Deadline for Transmittal of Applications: February 10, 2009.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: April 13, 2009.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* (a) *Reserve accounts.* Grant recipients, in accordance with State and local law, must deposit the grant funds they receive under this program (other than funds used for administrative costs) in a reserve account established and maintained by the grantee for this purpose. Amounts deposited in such account shall be used by the grantee for one or more of the following purposes in order to assist charter schools in accessing private-sector and other non-Federal capital:

(1) Guaranteeing, insuring, and reinsuring bonds, notes, evidences of debt, loans, and interests therein.

(2) Guaranteeing and insuring leases of personal and real property.

(3) Facilitating financing by identifying potential lending sources, encouraging private lending, and other similar activities that directly promote lending to, or for the benefit of, charter schools.

(4) Facilitating the issuance of bonds by charter schools or by other public entities for the benefit of charter schools, by providing technical, administrative, and other appropriate assistance (such as the recruitment of bond counsel, underwriters, and potential investors and the consolidation of multiple charter school projects within a single bond issue).

Funds received under this program and deposited in the reserve account must be invested in obligations issued or guaranteed by the United States or a State, or in other similarly low-risk securities. Any earnings on funds, including fees, received under this program must be deposited in the reserve account and be used in accordance with the requirements of this program.

(b) *Charter school objectives.* An eligible entity receiving a grant under this program must use the funds deposited in the reserve account to assist charter schools in accessing capital to accomplish one or both of the following objectives:

(1) The acquisition (by purchase, lease, donation, or otherwise) of an interest (which may be an interest held by a third party for the benefit of a charter school) in improved or unimproved real property that is necessary to commence or continue the operation of a charter school.

(2) The construction of new facilities, or the renovation, repair, or alteration of existing facilities, necessary to commence or continue the operation of a charter school.

(c) *Other.* Grantees must ensure that all costs incurred using funds from the reserve account are reasonable. The full faith and credit of the United States are not pledged to the payment of funds under such obligation. In the event of a default on any debt or other obligation, the United States has no liability to cover the cost of the default.

Applicants that are selected to receive an award must enter into a written Performance Agreement with the Department prior to drawing down funds, unless the grantee receives written permission from the Department in the interim to draw down a specific limited amount of funds. Grantees must maintain and enforce standards of conduct governing the performance of their employees, officers, directors, trustees, and agents engaged in the selection, award, and administration of contracts or agreements related to this grant. The standards of conduct must mandate disinterested decision-making.

A grantee may use not more than 0.25 percent (one quarter of one percent) of the grant funds for the administrative costs of the grant.

The Secretary, in accordance with chapter 37 of title 31, United States Code, will collect all or a portion of the funds in the reserve account established with grant funds (including any earnings on those funds) if the Secretary determines that the grantee has permanently ceased to use all or a portion of the funds in such account to accomplish the purposes described in the authorizing statute and the Performance Agreement or, if not earlier than two years after the date on which the entity first receives these funds, the entity has failed to make substantial progress in undertaking the grant project.

The charter schools that a grantee selects to benefit from this program must meet the definition of a charter school, as defined in section 5210(1) of the ESEA, as amended.

(d) We specify some unallowable costs in 34 CFR 225.21. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section in this notice.

6. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Credit Enhancement for Charter School Facilities Program, CFDA Number 84.354A, must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov*. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement*.

You may access the electronic grant application for Credit Enhancement for Charter School Facilities Program at *http://www.Grants.gov*. You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.*, search for 84.354, not 84.354A).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf*.
- To submit your application via Grants.gov, you must complete all steps in the Grants.gov registration process (see *http://www.grants.gov/applicants/get_registered.jsp*). These steps include (1) registering your organization, a multi-part process that includes

registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (see *http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*). You also must provide on your application the same D–U–N–S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via Grants.gov. In addition you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. Please note that two of these forms—the SF 424 and the Department of Education Supplemental Information for SF 424—have replaced the ED 424 (Application for Federal Education Assistance).
- You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system;

and

- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Valarie Perkins, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W258, Washington, DC 20202–6140.

Fax: (202) 205–5630.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.354A), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before

relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.354A), 550 12th Street, SW., Room 7041, Pyotomac Center Plaza, Washington, DC 20202–4260. The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are in 34 CFR 225.11 and are listed in this section. The maximum score for all of the selection criteria is 100 points. The maximum score for each criterion is indicated in parentheses. Each criterion also includes the factors that the reviewers will consider to determine how well an application meets the criterion. We encourage applicants to make explicit connections to the selection criteria and factors in their applications.

A. *Quality of project design and significance.* (35 points)

In determining the quality of project design and significance, the Secretary considers—

(1) The extent to which the grant proposal would provide financing to charter schools at better rates and terms than they can receive absent assistance through the program;

(2) The extent to which the project goals, objectives, and timeline are clearly specified, measurable, and appropriate for the purpose of the program;

(3) The extent to which the project implementation plan and activities, including the partnerships established, are likely to achieve measurable objectives that further the purposes of the program;

(4) The extent to which the project is likely to produce results that are replicable;

(5) The extent to which the project will use appropriate criteria for selecting charter schools for assistance and for determining the type and amount of assistance to be given;

(6) The extent to which the proposed activities will leverage private or public-sector funding and increase the number and variety of charter schools assisted in meeting their facilities needs more than would be accomplished absent the program;

(7) The extent to which the project will serve charter schools in States with strong charter laws, consistent with the criteria for such laws in section 5202(e)(3) of the Elementary and Secondary Education Act of 1965; and

(8) The extent to which the requested grant amount and the project costs are reasonable in relation to the objectives, design, and potential significance of the project.

B. *Quality of project services.* (15 points)

In determining the quality of the project services, the Secretary considers—

(1) The extent to which the services to be provided by the project reflect the identified needs of the charter schools to be served;

(2) The extent to which charter schools and chartering agencies were involved in the design of, and demonstrate support for, the project;

(3) The extent to which the technical assistance and other services to be provided by the proposed grant project involve the use of cost-effective strategies for increasing charter schools' access to facilities financing, including the reasonableness of fees and lending terms; and

(4) The extent to which the services to be provided by the proposed grant project are focused on assisting charter schools with a likelihood of success and the greatest demonstrated need for assistance under the program.

C. *Capacity.* (35 points)

In determining an applicant's business and organizational capacity to carry out the project, the Secretary considers—

(1) The amount and quality of experience of the applicant in carrying out the activities it proposes to undertake in its application, such as enhancing the credit on debt issuances, guaranteeing leases, and facilitating financing;

(2) The applicant's financial stability;

(3) The ability of the applicant to protect against unwarranted risk in its loan underwriting, portfolio monitoring, and financial management;

(4) The applicant's expertise in education to evaluate the likelihood of success of a charter school;

(5) The ability of the applicant to prevent conflicts of interest, including conflicts of interest by employees and members of the board of directors in a decision-making role;

(6) If the applicant has co-applicants (consortium members), partners, or other grant project participants, the specific resources to be contributed by each co-applicant (consortium member), partner, or other grant project participant to the implementation and success of the grant project;

(7) For State governmental entities, the extent to which steps have been or will be taken to ensure that charter schools within the State receive the funding needed to obtain adequate facilities; and

(8) For previous grantees under the charter school facilities programs, their performance in implementing these grants.

D. *Quality of project personnel.* (15 points)

In determining the quality of project personnel, the Secretary considers—

(1) The qualifications of project personnel, including relevant training and experience, of the project manager and other members of the project team, including consultants or subcontractors; and

(2) The staffing plan for the grant project.

2. *Review and Selection Process:* Additional factors we consider in selecting an application for an award are in 34 CFR 225.12.

Note: In the event we receive an application from a past grantee under the program that is not making full use of the grant(s) it has previously received, we may, consistent with appropriate grant administration authorities including 34 CFR 75.217(d)(3) and 34 CFR 75.232, (1) not award a new grant to that applicant under this competition or (2) adjust the size of the new grant award.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notice (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section in this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section in this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* Applicants selected for funding will be required to submit to the Department an annual report that includes the information from section 5227(b) of the ESEA and any other information the Secretary may require.

Grantees must also cooperate and assist the Department with any periodic financial and compliance audits of the grantee, as determined necessary by the Department. The specific Performance Agreement between the grantee and the Department may contain additional reporting requirements.

At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c).

4. *Performance Measures:* The performance measures for this program are: (1) The amount of funding grantees leverage for charter schools to acquire, construct, and renovate school facilities and (2) the number of charter schools served. Grantees must provide this information as part of their annual performance reports.

VII. Agency Contacts

FOR FURTHER INFORMATION CONTACT: Valarie Perkins or Jim Houser, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W258, Washington, DC 20202–6140. Telephone: (202) 260–1924 or by e-mail: *charter.facilities@ed.gov*.

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Alternative Format: Individuals with disabilities can obtain this document and a copy of the application package in an alternative format (*e.g.*, braille, large print, audiotape, or computer diskette) on request to the program contact persons listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister*.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

Dated: December 9, 2008.

Amanda L. Farris,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. E8–29501 Filed 12–11–08; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

Notice: Request for Public Comment on Proposed Advisory 09–001 Maintenance of Effort Funding

AGENCY: United States Election Assistance Commission.

ACTION: Notice: request for public comment.

SUMMARY: The EAC seeks public comment on the proposed policy ''Advisory 09–001 Maintenance of Effort Funding.'' This advisory supersedes Advisories 07–003 and 07–003A and fulfills the Election Assistance Commission's (EAC) ongoing responsibility to provide information on the management of Federal funds provided under the Help America Vote Act (HAVA). EAC issues this notice according to a policy adopted on September 18, 2008 that requires EAC to provide notice and an opportunity for public comment on, among other things, advisories being considered for adoption by the U.S. Election Assistance Commission.

DATES: Comments must be received by 5 p.m. EST on January 6, 2009.

ADDRESSES: Comments may be submitted: Via e-mail at *havafunding@eac.gov*, Via mail addressed to the U.S. Election Assistance Commission 1225 New York Ave, NW., Suite 1100, Washington, DC 20005, or by fax at 202/566–3127. Commenters are encouraged to submit comments electronically and include ''MOE Advisory 09–001'' in the subject line, to ensure timely receipt and consideration.

SUPPLEMENTARY INFORMATION: The following is the complete text of the proposed Advisory 09–001 Maintenance of Effort Funding the EAC is seeking public comment on.

Proposed Advisory 09–001 Maintenance of Effort Funding

EAC ADVISORY 09–001 MAINTENANCE OF EFFORT FUNDING

Date Issued: DRAFT.

I. General

This advisory supersedes Advisories 07–003 and 07–003A and fulfills the Election Assistance Commission's (EAC) ongoing responsibility to provide information on the management of Federal funds provided under the Help America Vote Act (HAVA). For recipients of HAVA Title II Requirements Payments, this advisory specifies the entities to which the Maintenance of Effort (MOE) requirement applies, explains how to calculate the MOE base level amount, and describes how to satisfy the continuing requirement for MOE.

MOE is a means by which Congress, and thereby the Federal Government, requires a recipient to share in the funding of a particular endeavor by requiring that the Federal funding actually increases the amount of financial support to a particular program or task. Specifically, MOE requirements are used to ensure that the recipient is not replacing or supplanting its prior level of spending on a particular program or task with Federal dollars.

II. Applicability to HAVA

Section 254(a)(7) of HAVA establishes the requirement for MOE, as follows:

> How the State, in using the requirements payment, will maintain the expenditures of the State for activities funded by the payment at a level that is not less than the level of such expenditures maintained by the State for the fiscal year ending prior to November 2000 (hereinafter referred to as state fiscal year 2000).

The MOE requirement is defined by a pre-determined ''base level of expenditure'' expended in state fiscal year 2000 for election administration

costs funded by HAVA Requirements Payments.[1] Recipients of HAVA Requirements Payments are required to maintain this expenditure level, in addition to spending of HAVA dollars, as a condition of receipt of funds.

III. Applicability to Recipients of Title II, Section 251 Requirements Payments

Per HAVA Sections 253 and 254(a)(7), MOE is applicable to recipients of HAVA Requirements Payments. State election offices in each of the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, and American Samoa (''States'') are the grant recipients of Requirements Payments. As the grant recipients, State election offices are required to meet the MOE requirements and maintain appropriate supporting documentation.

IV. Calculation of Base Level of Expenditure

Per HAVA Section 254(a)(7), each State's State Plan must include a description of how the State intends to meet the MOE requirements. Although not required, the EAC encourages that State Plans specify whether the State had expenditures in state fiscal year 2000 that triggered MOE, identify the amount expended in state fiscal year 2000, and explain how the State intends to meet the MOE requirements. That notwithstanding, if a State had expenditures that triggered MOE, it must maintain documentation to support the determination of the base level of expenditure for state fiscal year 2000 for audit purposes. States may calculate the base level of expenditure for state fiscal year 2000 in either of two manners:

1. Identify the total expended by the State on all election administration activities in state fiscal year 2000.[2]

Or

2. Identify the total expended by the State for each Title III-related activity in state fiscal year 2000.[3]

Note: If no funds were expended by the State in state fiscal year 2000 for activities related to Title III, the State shall maintain a record of such determination.

V. Satisfaction of MOE

Per HAVA Section 254(a)(7), a State must meet the MOE requirement in each applicable fiscal year in which it expended Title II Requirements Payments. If no Requirements Payments are used in a fiscal year, there is no applicable MOE requirement for that year.

A State may determine that it has met the MOE requirement in an applicable Federal fiscal year by expending the same or greater amount of State funds[4] than the base year level of expenditure on either:

1. All election administration activities.[5]

Or

2. Each HAVA activity (or activities) on which the state expends funds as the corresponding base year activity (or activities).[6]

VI. Sub-Award of HAVA Title II Requirements Payments and MOE

State election offices may sub-award HAVA funds to counties or local units of government per HAVA Section 254(a)(2). However, if a State sub-awards Requirements Payments to counties or local units of government, then the county or local unit of government is also subject to the requirements of MOE. In accordance with the ''Common Rule,'' which requires States to ensure sub-recipients comply with the requirements of Federal statutes, the State election office is responsible for ensuring that a sub-recipient is not replacing or supplanting its prior level of spending on a particular program or task with Federal dollars.

The State Plan must include a description of the distribution and monitoring of these sub-awards, including MOE requirements. Although not required, the EAC encourages States to provide detailed and specific information in the State Plan on the manner in which the State intends to account for MOE by sub-recipient. In any event, if a State sub-awards Requirements Payments, it must maintain documentation to support its monitoring methods, including determinations of MOE base levels of sub-recipients, for audit purposes.

VII. Calculation of Base Level of Expenditure for Sub-Recipients

If a State sub-awards grants to county or local units of government for a specific activity (or activities), then the county's or local unit government's base level of expenditure for state fiscal year 2000 may be calculated in either of two manners:

1. Identify the total expended by the sub-recipient on all election administration activities.[7]

Or

2. Identify the total expended by the sub-recipient on the specific activity (activities) for which Federal funds were provided.[8]

Note: If no funds were expended by the sub-recipient in state fiscal year 2000 for the activity (activities) related to Title III, the State shall maintain a record of such determination.

If a State sub-awards grants to a sub-recipient for a non-specific activity, other than all activities allowed by HAVA, then the sub-recipient's base level of expenditure for state fiscal year 2000 may be calculated in either of two manners:

1. Identify the total expended by the sub-recipient on all election administration activities in the state fiscal year 2000.[9]

[1] Activities funded by HAVA Title II Requirements Payments include: (1) Procuring voting systems that comply with the requirements of HAVA Title III, Section 301, (2) developing, operating, and/or maintaining a computerized statewide voter registration list, (3) providing required information to voters at the polling place for Federal elections, (4) implementing and/or operating a system of provisional voting during Federal elections; (5) implementing identification requirements for first-time voters who register to vote by mail, and (6) improving the administration of elections for Federal office. Therefore, if a State was spending money on any of these types of activities in the state fiscal year 2000, it will be subject to the MOE requirement.

[2] With this method, a State may use its entire budget for election-related activity in state fiscal year 2000 to establish the base level of expenditure. It is not necessary to break out activities related to Title III.

[3] With this method, a State needs to identify separately the amount spent on any of the following activities in state fiscal year 2000: voting equipment, voter registration database, ID requirements, provisional voting, and voter information.

[4] State funds used to meet an MOE requirement may not include funds provided as the State's 5 percent match.

[5] If the total State dollars expended on election-related activities for a given fiscal year is the same or greater than the total base level for state fiscal year 2000, the State will have met the MOE requirement for that year.

[6] The State, for example, would need to document that the State expended in a given fiscal year the same or more on each activity on which Requirements Payments are expended than the amount spent in each allowable area in state fiscal year 2000: Voting equipment, voter registration database, ID requirements, provisional voting, and voter information. If the State does not spend any Requirements Payments on an activity (say, voting equipment) in a particular fiscal year, then the MOE requirement for that activity (voting equipment) would not apply.

[7] With this method, a sub-recipient may use its entire budget for election-related activity in state fiscal year 2000 to establish the base level of expenditure. It is not necessary to break out activities related to Title III.

[8] For example, if a State provides a sub-grant for the purchase of voting equipment, the base level calculation does not need to include all expenditures toward activities allowed by HAVA, but rather the calculation includes only the expenditures on voting equipment by the recipient county or local unit of government in state fiscal year 2000.

[9] With this method, a sub-recipient may use its entire budget for election-related activity in state

Continued

Or

2. Identify the total expended by sub-recipient for each Title III-related activity in state fiscal year.[10]

Note: If no funds were expended by the sub-recipient in state fiscal year 2000 for the activities related to Title III, the State shall maintain a record of such determination.

VIII. Satisfaction of MOE by Sub-Recipients

As the grant recipient, the State is ultimately responsible for ensuring compliance with the MOE, including compliance by sub-recipients. The MOE requirement is applicable to sub-recipients in each fiscal year in which the sub-recipient expends Title II Requirements Payments. If no Requirements Payments are used in a fiscal year, there is no applicable MOE requirement for that year. The State may determine compliance with the MOE requirements by its sub-recipients in either of two manners:

1. The State may hold each sub-recipient individually responsible for meeting an applicable MOE requirement by determining the sub-recipient expends the same or greater local funds than the sub-recipient's base level of expenditure [11] on either:

a. All election administration activities.[12]

Or

b. Each HAVA activity (or activities) on which the sub-recipient expends funds as the corresponding base year activity (or activities).[13]

Or

2. The State may assume responsibility for meeting the MOE requirements of its sub-recipients by expending State dollars in an amount equal or greater than the sub-recipient's base level of expenditure, in addition to any MOE applicable to the State, in each Federal fiscal year that HAVA funds are used by the sub-recipient [14] on either:

a. All election administration activities.[15]

Or

b. Each HAVA activity (or activities) on which the sub-recipient expends funds as the corresponding base year activity (or activities).[16]

Donetta L. Davidson,

Vice-Chair, U.S. Election Assistance Commission.

[FR Doc. E8–29442 Filed 12–11–08; 8:45 am]

BILLING CODE 6820–KF–P

fiscal year 2000 to establish the base level of expenditure. It is not necessary to break out activities related to Title III.

[10] With this method, a sub-recipient needs to identify separately the amount spent on any of the following activities in state fiscal year 2000: Voting equipment, voter registration database, ID requirements, provisional voting, and voter information.

[11] In this method, the sub-recipient county or local unit of government would be responsible for the applicable MOE for any Requirements Payments expended in a given fiscal year.

[12] If the total local dollars expended by the sub-recipient on election-related activities for a given fiscal year are the same or greater than the total base level, the sub-recipient will have met the MOE requirement for that year.

[13] The sub-recipient, for example, would need to document that the sub-recipient expended in a given fiscal year the same or more on each activity on which Requirements Payments are expended than the amount spent in each allowable area in state fiscal year 2000: Voting equipment, voter registration database, ID requirements, provisional voting, and voter information. If the sub-recipient does not spend any Requirements Payments on an activity (say, voting equipment) in a particular fiscal year, then the MOE requirement for that activity (voting equipment) would not apply.

[14] In this method, the State will absorb responsibility by expending State dollars, in excess of the State's MOE requirement, to account for a sub-recipient's MOE.

[15] The State, for example, must expend the same or more State dollars in each applicable fiscal year than the sub-recipient's total base level.

[16] The State in each applicable fiscal year, for example, must expend the same or more in each allowable area than the amount spent by the sub-recipient in each allowable area in state fiscal year 2000: Voting equipment, voter registration database, ID requirements, provisional voting, and voter information. If the sub-recipient does not spend any Requirements Payments on an activity (say, voting equipment) in a particular fiscal year, then the MOE requirement for that activity (voting equipment) would not apply.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 785–018]

Consumers Energy Company; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

December 8, 2008.

Take notice that the following hydroelectric license application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New License.

b. *Project No.:* P–785–018.

c. *Date Filed:* April 4, 2008.

d. *Applicant:* Consumers Energy Company.

e. *Name of Project:* Calkins Bridge Hydroelectric Project.

f. *Location:* On the Kalamazoo River in Allegan County, Michigan. The project does not occupy federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* James R. Coddington, Consumers Energy Company, One Energy Plaza, Jackson, MI 49201, (517) 788–2455.

i. *FERC Contact:* Tim Konnert, (202) 502–6359 or *timothy.konnert@ferc.gov.*

j. *Deadline for filing comments, recommendations, terms and conditions, and prescriptions:* 60 days from the issuance date of this notice; reply comments are 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 whose name appears 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 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''eFiling'' link.

k. This application has been accepted, and is ready for environmental analysis at this time.

l. The existing Calkins Bridge Project consists of: (1) A 42-foot-high, 1,330-foot-long dam, consisting of a 1,100-foot-long earth embankment section and a 230-foot-long concrete integral powerhouse-spillway section; (2) an 8.5-mile-long, 1,550-acre reservoir with a normal water surface elevation of 615.0 feet above mean sea level; (3) a powerhouse containing three generating units with a total installed capacity of 2,550 kilowatts; (4) three 64-foot-long, 24-kilovolt buried transmission cables connected to the regional grid; and (5) appurtenant facilities. The estimated average annual generation of the project is 13,041 megawatt-hours.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available

for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. All filings must (1) Bear in all capital letters the title ''COMMENTS,'' ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''FISHWAY PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

o. *Procedural Schedule:*

The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Commission issues EA.	May 2009
Comments on EA	June 2009

p. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–29470 Filed 12–11–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13288–000]

Riverbank Ogdensburg, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

December 8, 2008.

On September 23, 2008, Riverbank Ogdensburg, LLC filed an application, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Ogdensburg Pumped Storage Project to be located on the St. Lawrence River in St. Lawrence County, New York.

The proposed project would consist of: (1) The St. Lawrence River as an upper reservoir; (2) an underground lower reservoir with an elevation of 1,800 feet below MSL and a storage capacity of 3,775 acre-feet; (3) four 13 foot diameter, 2,000 foot long, concrete and steel penstocks; (4) an underground powerhouse containing four pump/turbine units with a total installed capacity of 1,000 MW; (5) a 345 kV, 18.6 mile long transmission line; and (6) appurtenant facilities. The annual production would be 2,190 GWh which would be sold to a local utility.

Applicant Contact: William S. Helmer, Esq., 194 Washington Ave., Suite 315, Albany, New York 12210 (518) 689–3570.

FERC Contact: Kelly Houff (202) 502–6393.

Deadline for filing comments, motions to intervene: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent and competing applications 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–13288) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–29472 Filed 12–11–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13302–000]

Scott's Mill Hydropower, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

December 8, 2008.

On October 14, 2008, Scott's Mill Hydropower, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Scott's Mill Hydropower Project to be located in Amherst and Bedford Counties, Virginia.

The proposed project consists of: (1) An existing 15-foot-high, 925-foot-long masonry dam, (2) an existing reservoir having a surface area of 316 acres, a storage capacity of 3,790 acre-feet, and normal maximum water surface elevation of 511 feet msl, (3) a proposed powerhouse with 4 generating units having a total capacity of 3.6 MW; (4) a proposed 250-foot-long transmission line; and (5) appurtenant facilities. The project would have an annual generation of 14.9 GWh, and would be sold to a local utility.

Applicant Contact: Mr. Kevin Edwards, P.O. Box 143, Mayodan, NC 27027, Phone: 336–589–6138. FERC Contact: Henry Woo, 202–502–8872.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications 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 ''eFiling'' 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–13302) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–29473 Filed 12–11–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–27–000]

Southern Natural Gas Company; Notice of Application

December 8, 2008.

Take notice that on November 26, 2008, Southern Natural Gas Company (Southern), 569 Brookwood Village, Suite 501, Birmingham, Alabama 35209, filed in the above referenced docket an application pursuant to section 7(b) of the Natural Gas Act (NGA) and part 157 of the Commission's regulations, for an order approving the abandonment of approximately 97 miles of pipe in various segments and appurtenant facilities located on Southern's North Main Loop Pipeline in Sharkey, Yazoo, Winston, Noxubee, and Lowndes Counties, Mississippi, and Pickens and Tuscaloosa Counties, Alabama, and abandonment of three small compressor units at Southern's Onward Compressor Station in Sharkey County, Mississippi. Southern also proposes to make certain modifications that will allow Southern to continue meeting its firm capacity requirements on the North Main Line and the North Main 2nd Loop Line, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

Any questions concerning this application may be directed to Patrick B. Pope, Vice President and General Counsel, Southern Natural Gas Company, 569 Brookwood Village, Suite 501, Birmingham, Alabama 35209 at (205) 325–7126, or Patricia S. Francis, Senior Counsel, Southern Natural Gas Company, 569 Brookwood Village, Suite 501, Birmingham, Alabama 35209 at (205) 325–7696.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: December 29, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–29471 Filed 12–11–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–19–000]

Port Barre Investments, L.L.C. (d/b/a Bobcat Gas Storage); Notice of Intent To Prepare an Environmental Assessment for the Proposed Bobcat Gas Storage Project Expansion and Request for Comments on Environmental Issues

December 8, 2008.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the proposed Bobcat Gas Storage Project Expansion (Bobcat Expansion) involving construction and operation of additional natural gas storage caverns and pipeline facilities by Port Barre Investments, L.L.C. (d/b/a Bobcat Gas Storage (Bobcat)) in St. Landry Parish, Louisiana.[1] The EA will be used by the

[1] The Bobcat Gas Storage Project was authorized by the Commission on July 20, 2006 in Docket No. CP06–66–000, and amended on April 19, 2007 and March 4, 2008 in Docket Nos. CP06–66–001 and

Commission in its decision-making process to determine whether or not to authorize the project under section 7 of the Natural Gas Act.

This notice explains the scoping process we [2] will use to gather environmental input from the public and interested agencies, and summarizes the project review process for the FERC. Your input will help determine which issues need to be evaluated in the EA. Details on how to submit comments during the scoping period are provided in the Public Participation section of this notice. Please note that the scoping period will close on January 7, 2009.

This notice is being sent to potentially affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. State and local government representatives are asked to notify their constituents of this planned project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, you may be contacted by a Bobcat representative about survey permission and/or the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the natural gas company could initiate condemnation proceedings in accordance with state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' is available for viewing on the FERC Web site (*http://www.ferc.gov*). This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings.

Summary of the Proposed Project

The Bobcat Gas Storage Site currently has an overall natural gas storage capacity of 20.4 billion cubic feet (Bcf), with 15.6 Bcf of working gas capacity in two solution-mined salt storage caverns; Bobcat Cavern No. 1 which was placed into service November 1, 2008, and Bobcat Cavern No. 2 which is currently under construction. Bobcat has proposed to expand its storage and deliverability capabilities to satisfy its customers growing demand for natural gas storage. The proposed Bobcat Expansion would involve construction of three additional storage caverns at the existing Bobcat Gas Storage Site to increase the overall storage capacity by about 31.5 Bcf (24 Bcf working gas, 7.5 Bcf cushion gas).[3] Bobcat would also expand its compressor station by installing additional gas-fired engine compressors, resulting in a station total of 64,575 horsepower (hp). In addition, Bobcat would construct new pipeline facilities and modify four meter stations to accommodate the increased deliverability.

Specifically, the Expansion Project would include construction and operation of:

- Three new salt cavern storage wells (Bobcat Nos. 3, 4, and 5) and ancillary facilities to connect the caverns to Bobcat's existing facilities;
- 26,695 hp of additional compression and two dehydration units totaling 600 million cubic feet per day (MMcfd) at the existing Bobcat Compressor Station;
- A 9.96-mile-long, 20-inch-diameter natural gas pipeline loop [4] constructed in the existing North Pipeline Corridor;
- A 2.68-mile-long, 16-inch-diameter natural gas pipeline loop constructed in the existing West Pipeline Corridor;
- Modification of the existing metering facilities at pipeline interconnects with Gulf South Pipeline, Texas Eastern Transmission, L.P., ANR Pipeline, and Transcontinental Gas Pipe Line Company; and
- Expansion of the existing West Pipeline Tie-Over Site to include a new pig [5] launcher and pipeline tie-in.

The general location of the Expansion Project facilities is shown in Appendix 1.[6]

If approved, Bobcat proposes to construct the Bobcat Expansion facilities during the first quarter of 2009, and place the new facilities into service by the third quarter of 2012.

Land Requirements for Construction

Construction of the Bobcat Expansion would affect a total of approximately 119.6 acres of land. Following construction, a total of about 114.0 acres of land would be allowed to revert to previous conditions. The remaining 5.6 acres of land would be retained for operation of aboveground facilities and access roads. Permanent rights-of-way in agricultural lands would be restored to agricultural uses following construction.

With the exception of 0.04 acre required for expanding the West Pipeline Tie-Over Site, all construction activity would be located on property owned or leased by Bobcat, or within previously disturbed construction rights-of-way and workspaces. The proposed storage caverns and compressor station expansion would be located within the existing 83-acre Gas Storage Site. The pipeline loops would be located within existing Bobcat rights-of-way. Bobcat has not proposed to acquire additional permanent rights-of-way to operate the proposed pipelines. Modifications to the meter stations would occur entirely within the existing fencelines for each station. The West Pipeline Tie-Over Site would be expanded (40 feet by 40 feet), permanently impacting 0.04 acre of agricultural land.

Bobcat would use previously authorized public and private roads to access the construction rights-of-way and aboveground facilities. Bobcat would construct two new access roads and relocate an existing permanent access road within the previously authorized 83-acre Gas Storage Site to provide permanent access to the proposed Bobcat cavern wells Nos. 4 and 5.

The EA Process

We are preparing an EA to comply with the National Environmental Policy Act of 1969 (NEPA) which requires the Commission to take into account the environmental impact that could result if it authorizes Bobcat's proposal. NEPA also requires us to discover and address the public's concerns about proposals that require federal authorizations. This process is referred to as ''scoping.'' The main goal of the scoping process is to

CP06–66–002, respectively. Construction of the Bobcat Gas Storage Project began in December 2006 and is ongoing.

[2] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the FERC's Office of Energy Projects.

[3] ''Cushion gas'' (also referred to as base gas) is the volume of gas that is intended as permanent inventory in a storage reservoir to maintain adequate pressure and deliverability rates. ''Working gas'' is the total gas in storage minus the base gas. Working gas is the volume of gas available to the market place at a particular time.

[4] A pipeline loop is constructed parallel to an existing pipeline to increase capacity.

[5] A pig is a device used to clean or inspect the internal surface of a pipeline. They are inserted into the pipeline by means of a device called a pig launcher and pushed through the pipeline by pressure of the flowing fluid, usually gas.

[6] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices are available on the Commission's Web site at the ''eLibrary'' link or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary refer to the last page of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

focus the analysis in the EA on the important environmental issues.

By this notice, we are requesting public comments on the scope of the issues to be addressed in the EA. All comments received will be considered during preparation of the EA. We are also asking federal, state, and local agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EA. Agencies that would like to request cooperating status should follow the instructions for filing comments provided below.

The EA will discuss impacts that could occur as a result of the construction and operation of the proposed project, under the general headings of geology and soils; land use; water resources, fisheries, and wetlands; cultural resources; vegetation and wildlife; threatened and endangered species; air quality and noise; safety and reliability; and cumulative impacts. The EA will also evaluate reasonable alternatives to the proposed project, and make recommendations on how to lessen or avoid impacts on affected resources.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to federal, state, and local agencies; newspapers; libraries; interested individuals; and the Commission's official service list for this proceeding. An additional comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission.

Currently Identified Environmental Issues

We have already identified several issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Bobcat. This preliminary list of issues may be changed based on your comments and our analysis.

- Construction impacts to wetlands located in the proposed project area.
- Construction and operational noise near residences and structures.
- Additional water pumping requirements for cavern leaching.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the Bobcat Expansion Project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send in your comments so that they will be received in Washington, DC on or before January 7, 2009.

For your convenience, there are three methods which you can use to submit your written comments to the Commission. The three methods are:

(1) You may file your comments electronically by using the Quick Comment feature, which is located on the Commission's Internet Web site at *http://www.ferc.gov* under the link to Documents and Filings. A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the eFiling feature, which is located on the Commission's Internet Web site at *http://www.ferc.gov* under the link to Documents and Filings. eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. New eFiling users must first create an account by clicking on ''Sign up'' or ''eRegister.'' You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing;'' or

(3) You may file your comments via mail to the Commission by sending an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.

Label one copy of the comments for the attention of Gas Branch 3, PJ–11.3.

In all instances please reference the project docket number (CP09–19–000) with your submission. The Commission strongly encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at 202–502–8258 or *efiling@ferc.gov.*

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding known as an ''intervenor''. Intervenors play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must send one electronic copy (using the Commission's eFiling system) or 14 paper copies of its filings to the Secretary of the Commission and must send a copy of its filings to all other parties on the Commission's service list for this proceeding. If you want to become an intervenor you must file a motion to intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214). Interventions may also be filed electronically via the Commission's Internet Web site at *http://www.ferc.gov.* Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. This includes all landowners who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within distances defined in the Commission's regulations of certain aboveground facilities. By this notice we are also asking governmental agencies, especially those in Appendix 2, to express their interest in becoming cooperating agencies for the preparation of the EA.

We may mail the EA for comment. If you are interested in receiving the EA for review and/or comment, please return the Mail List Retention Form (Appendix 3). In addition, all individuals who provide written comments to the FERC will remain on our environmental mailing list for this project. If you do not return the Mail List Retention Form or provide written comments, you will be taken off the mailing list.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the ''eLibrary'' link. Click on the eLibrary link, click on ''General Search'' and enter the docket number excluding the last three digits in the Docket Number field (e.g., CP09–19). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at

FercOnlineSupport@ferc.gov or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Fact sheets prepared by the FERC are also available for viewing on the FERC Internet Web site (*http://www.ferc.gov*), using the ''For Citizens'' link. The fact sheet, ''Guide to Electronic Information at FERC,'' provides instructions on how to stay informed and participate in the Commission's proceedings.

Finally, Bobcat will be updating its Web site at *http://www.BobcatStorage.com/* to share news and updates as the environmental review of its project proceeds.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–29474 Filed 12–11–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP09–8–000]

Tuscarora Gas Transmission Company; Notice Deferring Technical Conference Date

December 8, 2008.

On December 8, 2008, Tuscarora Gas Transmission Company (Tuscarora) filed a request for deferral of the technical conference scheduled in the above-captioned proceeding for December 11, 2008.[1] Tuscarora states that deferral of the technical conference until January 15, 2009, will provide additional time for settlement discussions among the parties. Tuscarora further states that it has contacted the intervenors in this proceeding and is authorized by all parties to express their support for this request.

By this notice, Tuscarora's request for deferral of the technical conference date is granted. The technical conference scheduled for December 11, 2008, is cancelled and will be rescheduled for Thursday, January 15, 2009, at 10 a.m (EDT), in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or (202) 502–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

All interested persons are permitted to attend. For further information please contact Timothy Duggan at (202) 502–8326 or e-mail *Timothy.Duggan@ferc.gov*.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–29463 Filed 12–11–08; 8:45 am]

BILLING CODE 6717–01–P

[1] The Commission directed that a technical conference be held to address the issues raised by Tuscarora's October 1, 2008 tariff filing in this proceeding. *Tuscarora Gas Transmission Co.*, 125 FERC ¶ 61,133 (2008).

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8751–1]

Agency Information Collection Activities OMB Responses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the Office of Management and Budget's (OMB) responses to Agency Clearance requests, in compliance with the Paperwork Reduction Act (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 currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

FOR FURTHER INFORMATION CONTACT: Rick Westlund (202) 566–1682, or e-mail at *westlund.rick@epa.gov* and please refer to the appropriate EPA Information Collection Request (ICR) Number.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency Clearance Requests

Correction to Previous Action

EPA ICR Number 2097.03; The National Primary Drinking Water Regulations; Long Term 2 Enhanced Surface Water Treatment Rule; OMB Number 2040–0266; on 10/31/2008, OMB corrected a previous Disapproval of this ICR. The ICR is approved through 12/31/2008.

OMB Approvals

EPA ICR Number 1977.03; National Wastewater Operator Training and Technical Assistance Program—Clean Water Act 104(g)(1) (Renewal); in 40 CFR part 45; was approved 11/21/2008; OMB Number 2040–0238; expires 11/30/2011.

EPA ICR Number 1759.05; Pesticide Worker Protection Standard Training and Notification; in 40 CFR part 170; was approved 11/25/2008; OMB Number 2070–0148; expires 11/30/2011.

EPA ICR Number 1985.04; NESHAP for Leather Finishing Operations (Renewal); in 40 CFR part 63, subpart TTTT; was approved 11/28/2008; OMB Number 2060–0478; expires 11/30/2011.

EPA ICR Number 1850.05; NESHAP for Primary Cooper Smelters (Renewal); in 40 CFR part 63, subpart QQQ; was approved 11/28/2008; OMB Number 2060–0476; expires 11/30/2011.

EPA ICR Number 2025.04; NESHAP for Friction Materials Manufacturing (Renewal); in 40 CFR part 63, subpart QQQQQ; was approved 11/28/2008; OMB Number 2060–0481; expires 11/30/2011.

EPA ICR Number 2066.04; NESHAP for Engine Test Cells/Stands (Renewal); in 40 CFR part 63, subpart PPPPP; was approved 11/28/2008; OMB Number 2060–0481; expires 11/30/2011.

EPA ICR Number 1750.05; National Volatile Organic Compound Emission Standards for Architectural Coatings (Renewal); in 40 CFR part 59, subpart D; was approved 12/02/2008; OMB Number 2060–0393; expires 12/31/2011.

EPA ICR Number 1896.08; Disinfectants/Disinfection Byproducts, Chemical and Radionuclides (Renewal); in 40 CFR parts 141 and 142; was approved 12/04/2008; OMB Number 2040–0204; expires 12/31/2011.

OMB Comments Filed

EPA ICR Number 1989.05; Revised National Pollutant Discharge Elimination System Permit Regulations for Concentrated Animal Feeding Operations (SNPRM); on 11/19/2008 OMB filed comment.

EPA ICR Number 2279.01; Aircraft Drinking Water (Proposed Rule); on 11/20/2008 OMB filed comment.

Withdrawn from OMB

EPA ICR Number 2255.01; Performance Measurement Reporting for Training and Education/Outreach; was

withdrawn from OMB review on 12/03/2008.

Dated: December 8, 2008.

John Moses,

Acting Director, Collection Strategies Division.

[FR Doc. E8–29479 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–SFUND–2005–0008, FRL–8751–6]

Agency Information Collection Activities; Proposed Collection; Comment Request; Emergency Planning and Release Notification Requirements Under Emergency Planning and Community Right-to-Know Act Sections 302, 303, and 304.EPA ICR No. 1395.07, OMB Control No. 2050–0092

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 et seq.), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire on May 31, 2009. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before February 10, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–SFUND–2005–0008 by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: superfund.docket@epa.gov.*
- *Fax:* (202) 566–0224.
- *Mail:* Superfund Docket, Environmental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* Docket Center, EPA West Bldg, Room 3334, 1301 Constitution Avenue, NW., Washington DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–SFUND–2005–0008. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

FOR FURTHER INFORMATION CONTACT: Sicy Jacob, Office of Emergency Management, Mail Code 5104A, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–8019; fax number: (202) 564–2620; e-mail address: *jacob.sicy@epa.gov*.

SUPPLEMENTARY INFORMATION:

How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–SFUND–2005–0008, which is available for online viewing at *www.regulations.gov*, or in person viewing at the Superfund Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Superfund Docket is 202–566–1744.

Use *www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) 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;

(ii) 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;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) 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. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What Should I Consider When I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Offer alternative ways to improve the collection activity.

6. Make sure to submit your comments by the deadline identified under DATES.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number

assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What Information Collection Activity or ICR Does This Apply to?

Docket ID No. EPA–HQ–SFUND–2005–0008.

Affected entities: Entities potentially affected by this action are those which have a threshold planning quantity of an extremely hazardous substance (EHS) listed in 40 CFR Part 355, Appendix A and those which have a release of any of the EHS above a reportable quantity. Entities more likely to be affected by this action may include chemical manufacturers, non-chemical manufacturers, retailers, petroleum refineries, utilities, etc.

Title: Emergency Planning and Release Notification Requirements under Emergency Planning and Community Right-to-Know Act Sections 302, 303, and 304.

ICR number: EPA ICR No. 1395.07, OMB Control No. 2050–0092.

ICR status: This ICR is currently scheduled to expire on May 31, 2009. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The authority for these requirements is sections 302, 303, and 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 1986 (42 U.S.C. 11002, 11003, and 11004). EPCRA established broad emergency planning and facility reporting requirements. Section 302 requires facilities to notify their state emergency response commission (SERC) that the facility is subject to emergency planning. This activity has been completed; this ICR covers only new facilities that are subject to this requirement. Section 303 requires the local emergency planning committees (LEPCs) to prepare emergency plans for facilities that are subject to section 302. This activity has been also completed; this ICR only covers any updates needed for these emergency response plans. Section 304 requires facilities to report to SERCs and LEPCs releases in excess of the reportable quantities listed for each extremely hazardous substance (EHS). This ICR also covers the notification and the written follow-up required under this section. The implementing regulations and the list of substances for emergency planning and emergency release notification are codified in 40 CFR part 355.

On November 3, 2008 (73 FR 64452), EPA has revised some of the requirements in 40 CFR part 355, specifically, the requirements related to emergency planning notification. EPA is now requiring facilities to notify their LEPC within 30 days of any changes occurring at the facility that may be relevant to emergency planning. This revision should not impose any additional burden on facilities subject to emergency planning. Prior to the November 3, 2008 final rule, facilities were required to provide any changes to the LEPC promptly. This final rule now requires facilities to provide any changes within 30 days. Other revisions finalized on November 3, 2008 do not impose any burden on facilities subject to Section 302 and 304 requirements.

Burden Statement: The burden and costs stated below are from the current approved ICR. The average reporting burden for a limited number of existing facilities, to inform the LEPC of any changes at the facility that may affect emergency planning (1.50 hours). The average reporting burden for facilities reporting releases under 40 CFR 355.40 is estimated to average approximately 5 hours per release, including the time for determining if the release is a reportable quantity, notifying the LEPC and SERC, or the 911 operator, and developing and submitting a written follow-up notice. There are no record keeping requirements for facilities under EPCRA Sections 302–304. The total burden to facilities over three years is 229,473 hours at a cost of $11.1 million.

The average burden for emergency planning activities is 21 hours per plan for LEPCs, and 16 hours per plan for SERCs. Each SERC and LEPC is also estimated to incur an annual record keeping burden of 10 hours. The total burden to LEPC and SERC over three years is 320,568 hours at a cost of $8.1 million.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 84,215.

Frequency of response: Occasionally.

Estimated total average number of responses for each respondent: Once.

Estimated total annual burden hours: 183,347.

Estimated total annual costs: $27,000 includes annualized capital or O&M costs.

What Is the Next Step in the Process for This ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: December 5, 2008.

Deborah Y. Dietrich,

Director, Office of Emergency Management.

[FR Doc. E8–29469 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0414; FRL–8751–2]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Submission of Protocols and Study Reports for Environmental Research Involving Human Subjects; EPA ICR No. 2195.03, OMB Control No. 2070–0169

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document

announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before January 12, 2009.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OPP–2008–0414, to (1) EPA online using *www.regulations.gov* (our preferred method), by e-mail to *opp.ncic@epa.gov*, or by *mail to:* OPP Regulatory Public Docket (7502P), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Attention:* Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Joseph Hogue, Field and External Affairs Division, Office of Pesticide Programs, (7506P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* 703–308–9072; *fax number:* 703–305–5884; *e-mail address: hogue.joe@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 13, 2008 (73 FR 33811), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received two comments during the comment period, which are addressed in the ICR. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OPP–2008–0414, which is available for online viewing at *www.regulations.gov*, or in person viewing at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Building), 2777 S. Crystal Drive, Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

Use EPA's electronic docket and comment system at *www.regulations.gov*, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov*.

Title: Submission of Protocols and Study Reports for Environmental Research Involving Human Subjects.

ICR numbers: EPA ICR No. 2195.03, OMB Control No. 2070–0169.

ICR Status: This ICR is scheduled to expire on January 31, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: In January 2006, EPA issued a final rule to amend the Federal Policy for the Protection of Human Subjects (also known as the Common Rule) at 40 CFR part 26. EPA's final rule significantly strengthened and expanded the protections for subjects of ''third-party'' human research (i.e., research that is not conducted or supported by EPA). Affected entities are required to submit information to EPA and an institutional review board (IRB) prior to initiating, and to EPA upon the completion of, certain studies that involve human research participants. The information collection activity imposed by this final rule consists of activity-driven reporting and recordkeeping requirements for those who intend to conduct research for submission to EPA under the pesticide laws. If such research involves intentional dosing of human subjects, these individuals (respondents) are required to submit study protocols to EPA and a cognizant local Human Subjects IRB before such research is initiated so that the scientific design and ethical standards that will be employed during the proposed study may be reviewed and approved. Also, respondents are required to submit information about the ethical conduct of completed research that involved human subjects when such research is submitted to EPA.

This renewal ICR estimates the third party response burden from complying with the January 2006 final rule. Information is typically submitted by registrants of pesticide products to support the registration of their products. Responses to this collection of information are mandatory. The authority for this information collection is provided under section 25 of FIFRA and 40 CFR part 26.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 598 hours per response for research involving intentional exposure of human subjects, and 12 hours per response for all other submitted research with human subjects. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Pesticide registrants.

Estimated Number of Responses: 54.

Frequency of Response: On occasion.

Estimated Total Annual Hour Burden: 20,572.

Estimated Total Annual Cost: $1,579,098, includes $0 annualized capital or O&M costs.

Changes in the Estimates: There is an increase of 19,168 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This increase is an adjustment to the estimate, based on input received during the consultation process from entities that have submitted human subjects research since the implementation of the rule. The burden estimates in the previous (new) ICR were developed before the rule was

implemented, and were based on EPA's predictions of how long it would take study sponsors to prepare submissions. Based on the information provided in the consultation responses, it appears that the actual amount of time necessary to comply with the paperwork and recordkeeping requirements is higher than originally estimated.

Dated: December 8, 2008.

John Moses,

Acting Director, Collection Strategies Division.

[FR Doc. E8–29483 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2008–0864; FRL–8393–4]

Certain New Chemicals; Receipt and Status Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5 of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a premanufacture notice (PMN) or an application for a test marketing exemption (TME), and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from October 20, 2008 through October 31, 2008, consists of the PMNs or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

DATES: Comments identified by the specific PMN number or TME number, must be received on or before January 12, 2009.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2008–0864, by one of the following methods:

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

• *Mail*: Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Hand Delivery*: OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2008–0864. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2008–0864. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division, Office of Pollution Prevention and Toxics (7408M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitter of the premanufacture notices addressed in the action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically

within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

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

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

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

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

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

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

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

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

II. Why is EPA Taking this Action?

Section 5 of TSCA requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a PMN or an application for a TME and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from October 20, 2008 through October 31, 2008, consists of the PMNs or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

III. Receipt and Status Report for PMNs

This status report identifies the PMNs or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period. If you are interested in information that is not included in the following tables, you may contact EPA as described in Unit I. to access additional non-CBI information that may be available.

In Table I of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the PMNs received by EPA during this period: the EPA case number assigned to the PMN; the date the PMN was received by EPA; the projected end date for EPA's review of the PMN; the submitting manufacturer; the potential uses identified by the manufacturer in the PMN; and the chemical identity.

I. 24 PREMANUFACTURE NOTICES RECEIVED FROM: 10/20/08 TO 10/31/08

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–09–0025	10/20/08	01/17/09	CBI	(G) Additive for polymers	(G) Polyacrylic
P–09–0026	10/20/08	01/17/09	CBI	(G) Additive, open, non-dispersive use	(G) 2-(dimethylamino)ethyl methyl-2-propenoate, polymer with alkyl-substituted 2-methyl-2-propenoate and arylsubstituted methyl-2-propanoate,
P–09–0027	10/20/08	01/17/09	CBI	(G) Component of a pressure sensitive adhesive	(G) Functionalized benzophenone
P–09–0028	10/20/08	01/17/09	CBI	(G) Acrylic pressure sensitive adhesive	(G) Acrylic solution polymer
P–09–0029	10/23/08	01/20/09	CBI	(S) Polyester acrylate oligomer used in the manufacture of ultra violet curable coatings.	(G) Polyester acrylate
P–09–0030	10/23/08	01/20/09	CBI	(S) Polyester acrylate used in uv curable inks and coatings.	(G) Polyester acrylate
P–09–0031	10/24/08	01/21/09	CBI	(G) Binder resin for use in printing applications.	(G) Methacrylic polymer
P–09–0032	10/27/08	01/24/09	CBI	(G) Textile treatment additive	(G) Fluoroalkyl methacrylate copolymer
P–09–0033	10/27/08	01/24/09	CBI	(G) Textile treatment additive	(G) Fluoroalkyl methacrylate copolymer
P–09–0034	10/27/08	01/24/09	CBI	(G) Carpet treatment additive	(G) Fluoroalkyl methacrylate copolymer
P–09–0035	10/27/08	01/24/09	CBI	(G) Carpet treatment additive	(G) Fluoroalkyl methacrylate copolymer
P–09–0036	10/27/08	01/24/09	CBI	(G) Textile treatment additive	(G) Fluoroalkyl methacrylate copolymer
P–09–0037	10/27/08	01/24/09	CBI	(G) Textile treatment additive	(G) Fluoroalkyl methacrylate copolymer
P–09–0038	10/29/08	01/26/09	Incorez Corporation	(G) Curing agent for polyurethane systems	(G) Reaction product of aldehyde and cyclic amine
P–09–0039	10/29/08	01/26/09	Coim USA Inc.	(S) Copying machine roller manufacture; squeegee manufacture	(G) TDI polyester prepolymer
P–09–0040	10/29/08	01/26/09	CBI	(S) Copying machine roller manufacture; squeegee manufacture	(G) MDI polyester prepolymer

I. 24 PREMANUFACTURE NOTICES RECEIVED FROM: 10/20/08 TO 10/31/08—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–09–0041	10/30/08	01/27/09	Coim USA Inc.	(S) Flexible foam manufacturer; chemical raw material for prepolymer manufacture	(S) Decanedioic acid, polymer with 2,2-dimethyl-1,3-propanediol and 1,6-hexanediol
P–09–0042	10/30/08	01/27/09	CBI	(G) Anionic surfactant	(G) Alkoxy phosphate ester salt
P–09–0044	10/30/08	01/27/09	Materia Inc.	(S) Methathesis catalyst	(S) Ruthenium [1,3-bis(2,4,6-trimethylphenyl)-2-imidazolidinylidene]dichloro[[2-(1-methylethoxy-.kappa.O)phenyl]methylene-.kappa.C]-, (SP-5-41]-
P–09–0045	10/31/08	01/28/09	CBI	(S) Chemical intermediate for surfactants; formulation component for drilling fluid (mining aid)	(S) Propanol, 1(or 2)-(methyl-2-phenoxyethoxy)-
P–09–0046	10/31/08	01/28/09	CBI	(G) Thermoset adhesive performance enhancing additive	(S) Cyclosilanes, 3-[2-hydroxy-3-[(2-methyl-1-oxo-2-propen-1-yl)oxy]propoxy]propyl ME, 3-[3-hydroxy-2-[(2-methyl-1-oxo-2-propen-1-yl)oxy]propoxy]propyl ME, ME 3-(2-oxiranylmethoxy)propyl
P–09–0047	10/31/08	01/28/09	3M Company	(G) Surface modifier	(G) Alkyl carboxyl polyester acrylate
P–09–0048	10/31/08	01/28/09	3M Company	(G) Film coating additive	(G) Surface modified ceramic particles
P–09–0049	10/31/08	01/28/09	CBI	(G) Detergents and cleaner additive	(G) Acrylic copolymer

In Table II of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the Notices of Commencement to manufacture received:

II. 5 NOTICES OF COMMENCEMENT FROM: 10/20/08 TO 10/31/08

Case No.	Received Date	Commencement Notice End Date	Chemical
P–05–0820	10/28/08	10/23/08	(G) Polyacrylate resin
P–06–0299	10/20/08	10/08/08	(S) 1,6-hexanediaminium, *N,N,N,N′,N′,N′*, -hexamethyl-,dibromide
P–08–0286	10/29/08	10/23/08	(G) Fatty acids, polymers with 2-[[4-(1,1-dimethylethyl)phenoxy]methyl]oxirane, glycidyl PH ether, fatty acid dimers and polyalkylenepolyamines
P–08–0432	10/23/08	10/03/08	(G) Phenol-xylylene resin
P–08–0452	10/17/08	09/30/08	(G) Urethane prepolymer (polyether polyol react with organic isocyanate)

List of Subjects

Environmental protection, Chemicals, Premanufacturer notices.

Dated: December 3, 2008.

Chandler Sirmons,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. E8–29464 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2008–0865; FRL–8393–5]

Certain New Chemicals; Receipt and Status Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5 of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a premanufacture notice (PMN) or an application for a test marketing exemption (TME), and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from November 3, 2008 through November 14, 2008, consists of the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

DATES: Comments identified by the specific PMN number or TME number, must be received on or before January 12, 2009.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2008–0865, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery*: OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW.,

Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2008–0865. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2008–0865. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division, Office of Pollution Prevention and Toxics (7408M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitter of the premanufacture notices addressed in the action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

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

2. *Tips for preparing your comments.* When submitting comments, remember to:

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

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

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

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

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

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

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

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

II. Why is EPA Taking this Action?

Section 5 of TSCA requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a PMN or an application for a TME and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from November 3, 2008 through November 14, 2008, consists of the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

III. Receipt and Status Report for PMNs

This status report identifies the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time

period. If you are interested in information that is not included in the following tables, you may contact EPA as described in Unit I. to access additional non-CBI information that may be available.

In Table I of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the PMNs received by EPA during this period: the EPA case number assigned to the PMN; the date the PMN was received by EPA; the projected end date for EPA's review of the PMN; the submitting manufacturer; the potential uses identified by the manufacturer in the PMN; and the chemical identity.

I. 21 PREMANUFACTURE NOTICES RECEIVED FROM: 11/03/08 TO 11/14/08

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–09–0051	11/04/08	02/01/09	CBI	(G) Additive for polymers	(G) Polyacrylic
P–09–0052	11/05/08	02/02/09	CBI	(S) Latent catalyst for specialty coatings, appliance coatings, coil coating, can coatings, wood, etc;	(G) Dodecylbenzene sulfonic acid, complex with aliphatic alkanolamine
P–09–0053	11/05/08	02/02/09	CBI	(S) Latent catalyst for specialty coatings, appliance coatings, coil coating, can coatings, wood, etc;	(G) Toluenesulfonic acid, salt with aliphatic alkanolamine
P–09–0054	11/05/08	02/02/09	Nano-C. Inc.	(S) (1) Compound for use in organic electronic devices. (2) Compound used to improve the mechanical properties of rubbers, plastics, and lubricants. (3) Compound for use as an additve to increase the conductivity of materials.	(S) [5,6]fullerene-C_{60}-ih
P–09–0055	11/05/08	02/02/09	Nano-C. Inc.	(S) (1) Compound for use in organic electronic devices. (2) Compound used to improve the mechanical properties of rubbers, plastics, and lubricants. (3) Compound for use as an additve to increase the conductivity of materials	(S) [5,6]fullerene-C_{70}-d5h(6)
P–09–0056	11/05/08	02/02/09	Nano-C. Inc.	(S) (1) Compound for use in organic electronic devices. (2) Compound used to improve the mechanical properties of rubbers, plastics, and lubricants. (3) Compound for use as an additve to increase the conductivity of materials.	(S) [5,6]fullerene-C_{84}-d2
P–09–0057	11/05/08	02/02/09	Nano-C. Inc.	(S) (1) Compound for use in organic electronic devices. (2) Compound used to improve the mechanical properties of rubbers, plastics, and lubricants. (3) Compound for use as an additve to increase the conductivity of materials.	(S) [5,6]fullerene-C_{84}-d2d
P–09–0058	11/06/08	02/03/09	CBI	(G) Oilfield production chemical	(G) Alkenylsuccinicanhydride derivative
P–09–0059	11/06/08	02/03/09	CBI	(G) Coatings	(G) Urethane methacrylate
P–09–0060	11/07/08	02/04/09	CBI	(S) Waterborne urethane acrylate used in wood coatings by kitchen cabinet makers	(G) Polyurethane oligomer
P–09–0061	11/07/08	02/04/09	Dupont Agricultural Caribe Industries, Ltd	(S) Industrial intermediate	(G) Hydroxy-chloro-cyclopropyl-heteromonocycliccarboxylic acid
P–09–0062	11/07/08	02/04/09	3M	(G) Battery additive	(G) Alkyl aryl ether
P–09–0063	11/07/08	02/04/09	Dupont Agricultural Caribe Industries, Ltd	(S) Industrial intermediate	(G) Amino-chloro-cyclopropyl-heteromonocycliccarboxylic acid
P–09–0064	11/07/08	02/04/09	CBI	(G) Coloration auxiliary for cellulosic materials and substrates	(G) Substituted sulfonated phenylazo naphthalene sufonic acid salt
P–09–0065	11/10/08	02/07/09	CBI	(G) A lubricant additive for engines	(G) Benzoic acid phenyl ester
P–09–0066	11/10/08	02/07/09	CBI	(G) A lubricant additive for engines	(G) Benzoic acid phenyl ester
P–09–0067	11/12/08	02/09/09	CBI	(G) Binder resin ingredient	(G) Polyester resin amine salt
P–09–0068	11/12/08	02/09/09	CBI	(G) Lubricant additive	(G) Alkoxylated alkyl phosphate, bis(alkyl)amine salt
P–09–0069	11/13/08	02/10/09	Meadwestvaco Corporation	(S) Asphalt emulsifer	(G) Amides, from lignin, tall oil fatty acids, C_{21} dicarboxylic acids and polyalkanolamines.
P–09–0070	11/13/08	02/10/09	Meadwestvaco Corporation	(S) Asphalt emulsifer salt	(G) Amides, from lignin, tall oil fatty acids, C_{21} dicarboxylic acids and polyalkanolamines, hydrochlorides

In Table II of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the Notices of Commencement to manufacture received:

II. 10 NOTICES OF COMMENCEMENT FROM: 11/03/08 TO 11/14/08

Case No.	Received Date	Commencement Notice End Date	Chemical
P–06–0469	11/10/08	10/22/08	(G) Chlorinated polyester resin
P–07–0348	10/31/08	10/29/08	(G) Copolymer based on sulfonic acid monomer
P–08–0127	11/10/08	11/05/08	(S) 2-hexenoic acid, 2-methyl-, methyl ester, (2)-
P–08–0191	10/31/08	10/22/08	(G) Modified polyamine
P–08–0192	10/31/08	10/23/08	(G) Modified polyamine
P–08–0382	11/05/08	10/27/08	(G) Propenenitrile, reaction products with alkylenediamine, hydrogenated, *N*-aryl derivates
P–08–0499	11/05/08	10/29/08	(S) Arylesterase - The CAS registy number (9032–73–9) was determined by using the enzyme classification number for this enzyme. arylesterase (EC# 3.1.1.2) is referenced in the Brenda Comprehensive Enzyme Information System and in the expasy enzyme database. Synonyms are paraoxonase and alpha-esterase. The systematic name is aryl-ester hydrolase. Arylesterases act on many phenolic esters. It is likely that the three forms of human paraoxonase are lactonases rather than aromatic esterases [7,8]. The natural substrates of the paraoxonases are lactones, with ()-5-hydroxy-6*E*,8*Z*,11*Z*,4*Z*-eicostetraenoic-acid 1,5-lactone being the best substrate
P–08–0528	11/05/08	10/16/08	(S) Butanoic acid, 2-methyl-, 5-hexen-1-yl ester
P–08–0529	11/06/08	10/21/08	(G) 1,2,3 - propanetriol, homopolymer, ether with aliphatic alcohol
P–08–0553	11/06/08	10/20/08	(G) Polycarbonate polyurethane acrylate oligomer

List of Subjects

Environmental protection, Chemicals, Premanufacturer notices.

Dated: December 3, 2008.

Chandler Sirmons,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. E8–29466 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8588–5]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at 202–564–7146. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 6, 2008 (73 FR 19833).

Draft EISs

EIS No. 20080282, ERP No. D–UPS–K80007–CA, Aliso Viejo Incoming Mail Facility, Proposed Construction and Operation of a Mail Processing Facility on a 25-Acre Parcel, Aliso Viejo, Orange County, CA.

Summary: EPA expressed environmental concerns about air quality, water quality and stormwater impacts, and requested that the final EIS and ROD commit to all stated mitigation measures. Rating EC1.

EIS No. 20080292, ERP No. D–IBR–K65343–CA, Millerton Lake Resource Management Plan (RMP) and General Plan, Implementation, Fresno and Madera Counties, CA.

Summary: EPA expressed environmental concerns about environmental resource and noise impacts. EPA also requested additional information on climate change, funding, and enforcement. Rating EC2.

EIS No. 20080293, ERP No. D–IBR–K65344–CA, Cachuma Lake Resource Management Plan, Implementation, Cachuma Lake, Santa Barbara County, CA.

Summary: EPA expressed environmental concerns about air quality, water quality and cumulative impacts. Rating EC2.

EIS No. 20080314, ERP No. D–NOA–L39067–OR, Elliott State Forest Habitat Conservation Plan, Proposed Issuance of an Incidental Take Permit, US Army Corps section 10 and 404 Permits, Coos and Douglas Counties, OR.

Summary: EPA expressed environmental concerns about impacts to headwater streams and aquatic resources. Rating EC2.

EIS No. 20080372, ERP No. D–AFS–L65558–ID, Salmon-Challis National Forest (SCNF), Proposes Travel Planning and OHV Route Designation, Lemhi, Custer and Butte Counties, ID.

Summary: EPA expressed environmental concerns about potential impacts to water quality, fish habitat, noxious weed infestations and air quality. EPA recommends increased restrictions in vulnerable watersheds, especially for motorized dispersed camping and for crossing streams and wet meadows. Rating EC2.

EIS No. 20080381, ERP No. D–IBR–K39115–CA, South Coast Conduit/Upper Reach Reliability Project, Construction of a Second Water Pipeline for Improving Water Supply, U.S. Army COE section 10 and 404 Permits, Santa Barbara County, CA.

Summary: EPA continues to have environmental concerns about impacts to aquatic resources and oak woodland habitat. Rating EC2.

EIS No. 20080388, ERP No. D–AFS–L65559–OR, BLT Project, Proposed Vegetation Management Activities, Crescent Ranger District, Deschutes National Forest, Deschutes County, OR.

Summary: EPA expressed environmental concerns about air quality and visibility, water quality, and health impacts. Rating EC2.

EIS No. 20080391, ERP No. D–FHW–F40444–MN, Trunk Highway 14 (US 14) Project, Proposed Construction from Interstate 35 to Trunk Highway 56, Funding, NPDES and U.S. Army COE section 404 Permits, Steele and Doge Counties, MN.

Summary: EPA expressed environmental concerns about wetland and noise impacts. EPA also recommended green construction and development practices. Rating EC2.

EIS No. 20080330, ERP No. DS–COE–E11060–NC, Topsail Beach Interim (Emergency) Beach Fill Project—Permit Request, Proposal to Place Sand on 4.7 miles of the Town's Shoreline to Protect the Dune Complex and Oceanfront Development, Onslow and Pender Counties, NC.

Summary: EPA expressed environmental concerns about borrow site impacts to Lea/Hutaff Island. EPA requested clarification on beach erosion, and the assumptions of beachfront real estate values used in the economic impact analysis. Rating EC2.

EIS No. 20080364, ERP No. DS–NPS–E61077–GA, Chattahoochee River National Recreation Area General Management Plan, Updated Information on Analyzing Six Alternative Future Directions for the Management and Use of Chattachoochee River National Recreation Area, Implementation, Chattahoochee River, Atlanta, GA.

Summary: EPA does not object to the proposed project. Rating LO.

Final EISs

EIS No. 20080355, ERP No. F–AFS–L65489–OR, Ashland Forest Resiliency Project, To Recover from Large-Scale High-Severity Wild Land Fire, Upper Bear Analysis Area, Ashland Ranger District, Rogue River-Siskiyou National Forest, Jackson County, OR.

Summary: The Final EIS addressed EPA's concerns about potential impacts from sediment to drinking water; therefore, EPA does not object to the proposed action.

EIS No. 20080424, ERP No. F–NOA–E91025–00, Reef Fish Amendment 30B: Gag-End Overfishing and Set Management Thresholds and Targets; Red Grouper—Set Optimum Yield, Total Allowable Catch (TAC), and Management Measures: Area Closures: and Federal Regulatory Compliance, Implementation, Gulf of Mexico.

Summary: No formal comment letter was sent to the preparing agency.

EIS No. 20080429, ERP No. F–BLM–A09825–00, PROGRAMMATIC—Geothermal Leasing in the Western United States.

Summary: EPA continues to have environmental concerns about groundwater quantity and quality impacts, especially where there are sole source aquifers and protected geothermal resources.

EIS No. 20080430, ERP No. F–COE–K39114–CA, Three Rivers Levee Improvement Authority, proposes construct and maintain the Feather River Levee Repair Project, Segment 2, Issuing 408 Permission and 404 Permit, Yuba County, CA.

Summary: EPA continues to have environmental concerns and recommends sustainable agricultural practices to reduce impacts to water quality and requested review of the Best Management Practices Plan required by the State of California.

EIS No. 20080444, ERP No. F–NPS–K65334–HI, PROGRAMMATIC EIS—Ala Kahakai National Historic Trail Comprehensive Management Plan, To Provide Long-Term Direction for Natural and Cultural Resource, Island of Hawaii, HI.

Summary: EPA does not object to the proposed project.

EIS No. 20080410, ERP No. FA–FTA–K40208–CA, South Sacramento Corridor Phase 2, Improve Transit Service and Enhance Regional Connectivity, Funding, in the City and County Sacramento, CA.

Summary: EPA does not object to the proposed project.

Dated: December 9, 2008.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. E8–29489 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8588–4]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements.

Filed 12/01/2008 through 12/05/2008. Pursuant to 40 CFR 1506.9.

EIS No. 20080499, Final EIS, NPS, MD, White-Tailed Deer Management Plan, Preferred Alternative is Alternative C, Implementation, Catocin Mountain Park, Frederick and Washington Counties, MD, Wait Period Ends: 01/12/2009, Contact: Sean Denniston, 301–416–0536.

EIS No. 20080500, Final EIS, DHS, 00, National Bio and Agro-Defense Facility, Preferred Alternative is (2) Manhattan Campus Site, Propose to Site, Construct and Operate at one of the Proposed Locations: (1) South Milledge Avenue Site, Clarke County, GA; (2) Manhattan Campus Site, Riley County, KS; (3) Flora Industrial Park Site, Madison County, MS; (4) Plum Island Site, Suffolk County, NY; (5) Umstead Research Park Site, Granville County, NC; and (6) Texas Research Park Site, Bexar and Medina Counties, TX, Wait Period Ends: 01/12/2009, Contact: James V. Johnson, 202–254–6098.

EIS No. 20080501, Final EIS, AFS, 00, Wild and Scenic River Suitability Study for National Forest System Lands on the Ashley, Dixie, Fishlake, Manti-La Sal, Uinta and Wasatch-Cache National Forests in UT and Portion of National Forests extend into Colorado and Wyoming, several counties, UT, Montrose County, CO and Uinta County, WY, Wait Period Ends: 01/12/2009, Contact: Catherine Kahlow, 801–236–3412.

EIS No. 20080502, Draft EIS, FTA, WA, East Link Rail Transit Project, Proposes to Construct and Operate an Extension of the Light Rail System from downtown Seattle to Mercer Island, Bellevue, and Redmond via Interstate 90, Funding and U.S. Army COE Section 404 and 10 Permits, Seattle, WA, Comment Period Ends: 02/25/2009, Contact: Johnn Witmer, 206–220–7964.

EIS No. 20080503, Draft EIS, NRC, PA, GENERIC—License Renewal of Nuclear Plants, Supplement 37 to NUREG–1437, Regarding Three Mile Island Nuclear Station, Unit 1, in Londonterry Township in Dauphin County, PA, Comment Period Ends: 03/04/2009, Contact: Sarah L. Lopas 301–415–1147.

EIS No. 20080504, Final EIS, FRC, MD, Sparrows Point Liquefied Natural Gas (LNG) Import Terminal Expansion and Natural Gas Pipeline Facilities, Construction and Operation, Application Authorization, U.S. COE Section 10 and 404 Permits, Baltimore County, MD, Wait Period Ends: 01/12/2009, Contact: Patricia Schaub, 1–866–208–3372.

EIS No. 20080505, Final EIS, FHW, IN, US 31 Improvement Project (I–465 to IN 38), between I–465 North Leg and IN–38, NPDES Permit and U.S. Army Section 10 and 404 Permits, Hamilton County, IN, Wait Period Ends: 01/12/2009, Contact: Larry Heil, 317–226–7480.

EIS No. 20080506, Draft EIS, USA, GA, Maneuver Center of Excellence at Fort Benning, Georgia Project, Proposed Community Services, Personnel Support, Classroom Barracks, and

Dining Facilities would be Constructed in three of the four Cantonment Areas, Fort Benning, GA, Comment Period Ends: 01/26/2009, Contact: Bob Ross, 703–602–2878.

EIS No. 20080507, Final EIS, FHW, CA, CA–76 Corridor Project, Transportation Improvements from Melrose Drive to South Mission Road, San Diego County, CA, Wait Period Ends: 01/16/2009, Contact: Susanne Glasgow, 619–688–0100.

EIS No. 20080508, Draft EIS, COE, OH, Lorain Harbor. Ohio Federal Navigation Project, Dredged Material Management Plan, Implementation, Lorain Harbor, Lorain County, Ohio, Comment Period Ends: 01/30/2009, Contact: William Butler, 716–879–4268.

EIS No. 20080509, Final EIS, IBR, ND, Northwest Area Water Supply Project, To Construct a Biota Water Treatment Plant, Lake Sakakawea, Missouri River Basin to Hudson Bay Basin, Divide, Williams, Burke, Renville, Bottineau, Pierce, McHenry, Ward, Mountrail and McLean Counties, ND, Wait Period Ends: 01/12/2009, Contact: Alicia Waters, 701–221–1206.

EIS No. 20080510, Final EIS, STB, 00, Elgin, Joliet & Eastern Railroad (Finance Docket No. 35087) Proposed Acquisition by Canadian National (CN) Railway and Grand Trunk Corporation to connect all Five of CN's Rail lines, Chicago, Illinois and Gary, Indiana, Wait Period Ends: 01/12/2009, Contact: Phillis Johnson-Ball, 202–245–0304.

EIS No. 20080511, Final Supplement, USN, 00, Developing Home Port Facilities for Three NIMITZ-Class Aircraft Carriers in Support of the U.S. Pacific Fleet, New Circumstances and Information to Supplements (the 1999 FEIS) Coronado, CA, Wait Period Ends: 01/12/2009, Contact: Robert Montana, 619–556–8509.

EIS No. 20080512, Final EIS, USN, 00, Atlantic Fleet Active Sonar Training Program, To Provide Mid- and High-Frequency Active Sonar Technology and the Improved Ext ended Echo Ranging (IEER) System during Atlantic Fleet Training Exercises, Along the East Coast of United States (U.S.) and in the Gulf of Mexico, Wait Period Ends: 01/05/2009: EPA Approved a Reduce Wait Period because of Compelling Reasons of National Policy Pursuant to 40 CFR Part 1506.10(c). Contact: Todd Williamson, 757–322–8162.

Amended Notices

EIS No. 20080469, Draft EIS, FTA, HI, Honolulu High-Capacity Transit Corridor Project, Provide High-Capacity Transit Service on O'ahu from Kapolei to the University of Hawaii at Manoa and Waikiki, City and County of Honolulu, O'ahu, Hawaii, Comment Period Ends: 01/07/2009, Contact: Ted Matley, 415–744–3133. Revision to FR Notice Published 11/21/2008: Correction to the Federal Agency.

EIS No. 20080497, Draft EIS, STA, 00, Alberta Clipper Pipeline Project, Application for a Presidential Permit to Construction, Operation and Maintenance of Facilities in ND, MN and WI, Comment Period Ends: 01/30/2009, Contact: Elizabeth Orlando, Esq., 202–647–4284. Revision to FR Published 12/05/2008: Extending Comment Period from 01/20/2009 to 01/30/2009.

EIS No. 20080498, Final EIS, NOA, CA, Channel Islands National Marine Sanctuary Management Plan, Implementation, Santa Barbara and Ventura Counties, CA, Wait Period Ends: 01/05/2009, Contact: Chris Mobley, 805–966–7107 ext. 465. Revision to FR Notice Published 12/05/2008: Correction to Status from Final Supplement to Final.

Dated: December 9, 2008.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. E8–29491 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8750–6]

Integrated Science Assessment for Oxides of Nitrogen and Sulfur—Environmental Criteria

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Availability.

SUMMARY: The U.S. Environmental Protection Agency is announcing the availability of a final document entitled, ''Integrated Science Assessment for Oxides of Nitrogen and Sulfur—Ecological Criteria,'' and the supplementary annexes (EPA/600/R–08/082F). The document was prepared by the National Center for Environmental Assessment (NCEA) within EPA's Office of Research and Development as part of the review of the secondary National Ambient Air Quality Standards (NAAQS) for oxides of nitrogen and sulfur. EPA's secondary NAAQS are based on ecological and welfare effects.

DATES: The document will be available on or about December 12, 2008.

ADDRESSES: The ''Integrated Science Assessment for Oxides of Nitrogen and Sulfur—Environmental Criteria'' will be available primarily via the Internet on the National Center for Environmental Assessment's home page under the Recent Additions and Publications menus at *http://www.epa.gov/ncea.* A limited number of CD–ROM or paper copies will be available. Contact Ms. Ellen Lorang by phone (919–541–2771), fax (919–541–5078), or e-mail (*lorang.ellen@epa.gov*) to request either of these, and please provide your name, your mailing address, and the document title, ''Integrated Science Assessment for Oxides of Nitrogen and Sulfur—Environmental Criteria'' (EPA/600/R–08/082F), to facilitate processing of your request.

FOR FURTHER INFORMATION CONTACT: For technical information, contact Tara Greaver, Ph.D., NCEA [telephone: 919–541–2435; facsimile: 919–541–5078; or e-mail: *greaver.tara@epa.gov*].

SUPPLEMENTARY INFORMATION: Section 108(a) of the Clean Air Act directs the Administrator to identify certain pollutants that ''may reasonably be anticipated to endanger public health and welfare'' and to issue air quality criteria for them. These air quality criteria are to ''accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air. * * *'' Under section 109 of the Act, EPA is then to establish NAAQS for each pollutant for which EPA has issued criteria. Section 109(d) of the Act requires subsequent periodic review and, if appropriate, revision of existing air quality criteria to reflect advances in scientific knowledge on the effects of the pollutant on public health and welfare. EPA is also to revise the NAAQS, if appropriate, based on the revised air quality criteria.

Oxides of nitrogen and sulfur are two of six principal (or ''criteria'') pollutants for which EPA has established air quality criteria and NAAQS. EPA periodically reviews the scientific basis for these standards by preparing an Integrated Science Assessment (ISA) (formerly called an Air Quality Criteria Document). The ISA and supplementary annexes, in conjunction with additional technical and policy assessments, provide the scientific basis for EPA decisions on the adequacy of a current NAAQS and the appropriateness of new or revised standards. The Clean Air Scientific Advisory Committee

(CASAC), an independent science advisory committee established pursuant to section 109 of the Clean Air Act and part of the EPA's Science Advisory Board (SAB), provides independent scientific advice on NAAQS matters, including advice on EPA's draft ISAs.

EPA formally initiated its current review of the criteria for oxides of nitrogen and sulfur in December 2005 (70 FR 73236) and May 2006 (71 FR 28023) respectively, requesting the submission of recent scientific information on specified topics. In the initial stages of the criteria reviews, EPA recognized the merit of integrating the science assessment for these two pollutants due to their combined effects on atmospheric chemistry, deposition processes, and environment-related public welfare effects. In July 2007 (72 FR 34004), EPA held a workshop to discuss, with invited scientific experts, initial draft materials prepared in the development of the ISA and supplementary annexes for oxides of nitrogen and sulfur. EPA's ''Draft Plan for Review of the Secondary National Ambient Air Quality Standards for Nitrogen Dioxide and Sulfur Dioxide'' was made available in September 2007 for public comment and was discussed by the Clean Air Scientific Advisory Committee (CASAC) via a publicly accessible teleconference consultation on October 30, 2007 (72 FR 57568). EPA made its Draft Plan available on EPA's Web site: *http://www.epa.gov/ttn/naaqs/standards/no2so2sec/cr_pd.html*. The draft ''Integrated Science Assessment for Oxides of Nitrogen and Sulfur—Environmental Criteria; First External Review Draft'' was released for review on December 21, 2007 (72 FR 72719). The CASAC reviewed the first draft document at a public peer review meeting on April 2–3, 2008. EPA addressed comments from the CASAC and the public in the second external review draft document, ''Integrated Science Assessment for Oxides of Nitrogen and Sulfur—Environmental Criteria; Second External Review Draft,'' which was released for public comment on August 12, 2008 (72 FR 46908). The second draft was reviewed by the CASAC at a public meeting on October 2–3, 2008. EPA has considered comments by CASAC and by the public in preparing this final ISA.

Dated: December 4, 2008.

Rebecca Clark,

Acting Director, National Center for Environmental Assessment.

[FR Doc. E8–29347 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–New England Region I—EPA–R01–OW–2008–0875; FRL–8751–3]

Maine Marine Sanitation Device Standard—Receipt of Petition

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice—Receipt of Petition.

SUMMARY: Notice is hereby given that a petition has been received from the state of Maine requesting a determination by the Regional Administrator, U.S. Environmental Protection Agency, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the waters of Kennebunk, Kennebunkport and Wells.

DATES: Comments due by January 12, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OW–2008–0875, by one of the following methods: *http://www.regulations.gov*, Follow the on-line instructions for submitting comments.

- *E-mail: rodney.ann@epa.gov*.
- *Fax:* (617) 918–0538.

Mail and hand delivery: U.S. Environmental Protection Agency—New England Region, One Congress Street, Suite 1100, COP, Boston, MA 02114–2023. Deliveries are only accepted during the Regional Office's normal hours of operation (8 a.m.–5 p.m., Monday through Friday, excluding legal holidays), and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R01–OW–2008–0875. 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 copy-righted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the U. S. Environmental Protection Agency—New England Region, One Congress Street, Suite 1100, COP, Boston, MA 02114–2023. Such deliveries are only accepted during the Regional Office's normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office is open from 8 a.m.–5 p.m. Monday through Friday, excluding legal holidays. The telephone number is (617) 918–1538.

FOR FURTHER INFORMATION CONTACT: Ann Rodney, U. S. Environmental Protection Agency—New England Region, One Congress Street, Suite 1100, COP, Boston, MA 02114–2023. Telephone: (617) 918–1538, Fax number: (617) 918–0538; e-mail address: *rodney.ann@epa.gov*.

SUPPLEMENTARY INFORMATION: Notice is hereby given that a petition has been received from the State of Maine requesting a determination by the Regional Administrator, U. S. Environmental Protection Agency, pursuant to section 312(f)(3) of Public Law 92–500 as amended by Public Law 95–217 and Public Law 100–4, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the Kennebunk, Kennebunkport, Wells area.

The proposed no discharge area for the KENNEBUNK/KENNEBUNKPORT/WELLS:

Waterbody/general area	Latitude	Longitude
From ''Moody Point in Wells north to a point a the westerly head of navigation of the Webehannet River.	43°19′19.07″ N	70°33′57.8″ W.
Northeast to the head of navigation of the middle fork of the Webehannet River	43°17′12.21″ N	70°34′143.98″ W.
Northeast to the head of navigation of the eastern fork of the Webehannet River	43°19′25.8″ N	70°33′32.54″ W.
East to the head of navigation of the Mousam River	43°21′44.16″ N	70°31′35.53″ W.
East to the head of navigation of the Kennebunk River	43°22′23.52″ N	70°29′3.77″ W.
East to ''Cape Arundel''	43°20′25.42″ N	70°27′58.36″ W.
Southwest in a straight line to Moody Point	42°17′12.21″ N	70°34′14.98″ W.

The proposed NDA includes the municipal waters of Kennebunkport, Kennebunk, and Wells.

There are marinas, yacht clubs and public landings/piers in the proposed area with a combination of mooring fields and dock space for the recreational and commercial vessels. Maine has certified that there are five pumpout facilities within the proposed area available to the boating public. The majority of facilities are connected to the sewage system. A list of the facilities, phone numbers, locations, and hours of operation is provided at the end of this petition.

Maine has provided documentation indicating that the total vessel population is estimated to be 537 in the proposed area. It is estimated that 195 of the total vessel population may have a Marine Sanitation Device (MSD) of some type.

The proposed area is identified as a High Value Wildlife Habitat by the U.S. fish and Wildlife Service and contains the Wells National Estuarine Research Reserve and the Rachel Carson National Wildlife Refuge. The intertidal zone includes a diverse array of habitats from rocky shores to large amounts of wetland and salt marshes and mud flats. There are over 19,700 acres of salt marshes. The area includes 672 acres of essential habitat for the federally endangered Piping Plover and Least Tern. There are 11 beaches, three marinas, three boat launches, and four campgrounds in the proposed area. This area is a popular destination for boaters due to its natural environmental diversity and would benefit from a No Discharge Area.

PUMPOUT FACILITIES WITHIN PROPOSED NO DISCHARGE AREAS

Name	Location	Contact info.	Hours	Mean low water depth (feet)
Kennebunk/Kennebunk/Wells				
Harbormaster	Wells	207–646–3226, VHF 16	7 a.m.–3 p.m.	10
Yachtsman	Kennebunk River	207–967–2511, VHF 9	8 a.m.–5 p.m., 7 days	10
Kennebunkport Marina	Kennebunk River	207–967–3411, VHF 9	8 a.m.–5 p.m., 7 days	10
Chicks Marina	Kennebunk River	207–967–2782, VHF 9	8 a.m.–5 p.m., 7 days	10
River Commission pumpout float.	Kennebunk River	207–967–4243	24/7 self service	8

Dated: November 30, 2008.

Robert W. Varney,

Regional Administrator, New England Region.

[FR Doc. E8–29478 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2007–0484; FRL–8751–4]

Board of Scientific Counselors, National Center for Environmental Research Standing Subcommittee Meeting—2009

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency (EPA), Office of Research and Development (ORD), gives notice of a meeting of the Board of Scientific Counselors (BOSC) National Center for Environmental Research Subcommittee (NCER).

DATES: The meeting (teleconference call) will be held on Monday, January 12, 2009 from 1 p.m. to 3 p.m. Eastern Standard Time. The meeting may adjourn early if all business is finished. Requests for the draft agenda or for making an oral presentation at the conference calls will be accepted up to one business day before the meeting.

ADDRESSES: Participation in the meeting will be by teleconference only—a meeting room will not be used. Members of the public may obtain the call–in number and access code for the call from Susan Peterson, the Designated Federal Officer, whose contact information is listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice. Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2007–0484, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail:* Send comments by electronic mail (e–mail) to: *ORD.Docket@epa.gov*, Attention Docket ID No. EPA–HQ–ORD–2007–0484.
- *Fax:* Fax comments to: (202) 566–0224, Attention Docket ID No. EPA–HQ–ORD–2007–0484.
- *Mail:* Send comments by mail to: Board of Scientific Counselors, NCER Standing Subcommittee—2009 Docket, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–ORD–2007–0484.
- *Hand Delivery or Courier:* Deliver comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. EPA–HQ–ORD–2007–0484. Note: This is not a mailing address. Such deliveries are only accepted during the docket's normal hours of operation, and

special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2007–0484. 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. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Board of Scientific Counselors, NCER Standing Subcommittee—2009 Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer via mail at: Susan Peterson, Mail Code 8104–R, Office of Science Policy, Office of Research and Development, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; via phone/voice mail at: (202) 564–1077; via fax at: (202) 565–2911; or via e-mail at: *peterson.susan@epa.gov*.

SUPPLEMENTARY INFORMATION:

General Information

Proposed agenda items for the meeting include, but are not limited to, a discussion of the ORD Research Program, the NCER reorganization and vision, and the charge to the subcommittee. The conference calls are open to the public.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Susan Peterson at (202) 564–1077 or *peterson.susan@epa.gov.* To request accommodation of a disability, please contact Susan Peterson, preferably at least ten days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: December 4, 2008.

Fred Hauchman,

Director, Office of Science Policy.

[FR Doc. E8–29476 Filed 12–11–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10 a.m. on Tuesday, December 16, 2008, to consider the following matters:

SUMMARY AGENDA: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of previous Board of Directors' meetings.

Summary reports, status reports, and reports of actions taken pursuant to authority delegated by the Board of Directors.

Memorandum and resolution re: Proposed Modification to FDIC Strategic Plan, 2008–2013.

DISCUSSION AGENDA:

Memorandum and resolution re: Final Rule on Assessment Rates for First Quarter 2009.

Memorandum and resolution re: Final Rule on Recordkeeping Requirements for Qualified Financial Contracts.

Memorandum and resolution re: Interagency Final Rule on Capital Maintenance: Deduction of Goodwill Net of Associated Deferred Tax Liabilities.

Memorandum and resolution re: Proposed 2009 Corporate Operating Budget.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550 17th Street, NW., Washington, DC.

This Board meeting will be Webcast live via the Internet and subsequently made available on-demand approximately one week after the event. Visit *http://www.vodium.com/goto/fdic/boardmeetings.asp* to view the event. If you need any technical assistance, please visit our Video Help page at: *http://www.fdic.gov/video.html.*

The FDIC will provide attendees with auxiliary aids (e.g., sign language interpretation) required for this meeting. Those attendees needing such assistance should call (703) 562–6067 (Voice or TTY), to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at (202) 898–7043.

Dated: December 9, 2008.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E8–29552 Filed 12–11–08; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 10:30 a.m. on Tuesday, December 16, 2008, the Federal Deposit Insurance Corporation's Board of Directors will meet in closed session, pursuant to section 552b(c)(2), (c)(4), (c)(6), (c)(8), (9)(A)(ii), (9)(B), and (10) of Title 5, United States Code, to consider matters relating to the Corporation's supervisory and corporate activities.

The meeting will be held in the Board Room on the sixth floor of the FDIC

Building located at 550 17th Street, NW., Washington, DC.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at (202) 898–7043.

Dated: December 9, 2008.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E8–29553 Filed 12–11–08; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 29, 2008.

A. Federal Reserve Bank of Chicago (Burl Thornton, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. Donald M. Soenen, Plymouth, Michigan, as Trustee of the Donald M. Soenen Trust dated 9/14/84 and Michael J. Soenen, Chicago, Illinois, to retain control of Plymouth Financial Corporation, and thereby indirectly retain shares of New Liberty Bank, both of Plymouth, Michigan.

Board of Governors of the Federal Reserve System, December 9, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–29461 Filed 12–11–08; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. 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 the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 8, 2009.

A. Federal Reserve Bank of Atlanta (Steve Foley, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. First Trust Corporation, New Orleans, Louisiana, to acquire 100 percent of the voting shares of Globe Bancorp, Inc., and thereby directly and indirectly acquire voting shares of Globe Homestead Savings Bank, FSA, both of Metairie, Louisiana, and thereby engage in operating a savings association, pursuant to section 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, December 9, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–29460 Filed 12–11–08; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute for Occupational Safety and Health; Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice of a decision to designate a class of employees at the Connecticut Aircraft Nuclear Engine Laboratory in Middletown, Connecticut, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On October 24, 2008, the Secretary of HHS designated the following class of employees as an addition to the SEC:

All employees of the Department of Energy (DOE), its predecessor agencies, and DOE contractors or subcontractors who worked at the Connecticut Aircraft Nuclear Engine Laboratory in Middletown, CT, from January 1, 1958 through December 31, 1965 for a number of work days aggregating at least 250 work days occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort.

This designation will become effective on November 23, 2008, unless Congress provides otherwise prior to the effective date. After this effective date, HHS will publish a notice in the **Federal Register** reporting the addition of this class to the SEC or the result of any provision by Congress regarding the decision by HHS to add the class to the SEC.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV*.

Dated: December 8, 2008.

Christine M. Branche,

Acting Director, National Institute for Occupational Safety and Health.

[FR Doc. E8–29391 Filed 12–11–08; 8:45 am]

BILLING CODE 4160–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-09–09AH]

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, 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

Improving the Quality and Delivery of CDC's Heart Disease and Stroke Prevention Programs—New—Division for Heart Disease and Stroke Prevention (DHDSP), National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Heart disease and stroke are the first and third leading causes of death for both men and women in the United States, accounting for more than 35% of all deaths. They are also among the leading causes of disability in the U.S. workforce, with projected costs of more than $448 billion in 2008, including health care expenditures and lost productivity from death and disability. As the U.S. population ages, the economic impact of cardiovascular diseases on the health care system is expected to become even greater.

While heart disease and stroke are among the most widespread and costly health problems facing our nation today, they are also among the most preventable. In 2006, CDC created the Division of Heart Disease and Stroke Prevention (DHDSP) in response to the epidemic of heart disease and stroke facing our nation. The DHDSP provides national leadership for efforts to reduce the burden of disease, disability, and death from heart disease and stroke for all Americans. The DHDSP's key partners include state and local health departments, public health organizations, community organizations, nonprofit organizations, and professional organizations.

Many heart disease and stroke prevention and control activities are conducted through DHDSP-funded heart disease and stroke prevention programs, including the State Heart Disease and Stroke Prevention Program, the Paul Coverdell National Acute Stroke Registry, and the Well-Integrated Screening and Evaluation for Women Across the Nation (WISEWOMAN) Program.

The DHDSP supports the development of CDC-funded programs, as well as external partners, by conducting trainings, providing scientific guidance and technical assistance, and producing scientific information and supporting tools. For example, the DHDSP provides training to States on how to implement and evaluate their programs and provides guidance on how to best apply evidence-based practices. In addition the DHDSP translates its scientific studies into informational products, such as on-line reports and data on heart disease and stroke trends.

The DHDSP recognizes the importance of ensuring that its activities are useful, well implemented, and effective in achieving intended public health goals. To evaluate its current and future program activities, the DHDSP has developed a comprehensive assessment strategy based on the criteria of relevance, quality and impact.

Over the next three years, DHDSP plans to conduct a series of information collections based on a reference set of questions that address relevance, quality and impact of DHDSP services and guidance. Respondents will be the DHDSP's partners in state and local government as well as organizations in the private sector. A generic clearance is requested in order to provide flexibility in the content and timing of specific information collections. Surveys tailored to specific public health partners, services, or other programmatic initiatives will be developed from the reference set of pre-approved questions. A small number of demographic and descriptive questions may be included in specific surveys to assess the extent to which perceptions and use of DHDSP services vary across types of respondents. The DHDSP also seeks approval to include a limited number of customized questions within each survey to ensure responsiveness to specific needs. The evaluation information will be used to determine whether DHDSP activities and products are reaching the intended audiences, whether they are deemed to be useful by those audiences, and whether DHDSP efforts improve public health practices. Finally, the generic clearance format will allow the DHDSP to identify new programmatic opportunities and to respond to partners' concerns.

Whenever feasible, information will be collected electronically to reduce burden on respondents. In addition, information may be collected through in-person or telephone interviews or focus groups when Web-based surveys are impractical or when in-depth responses are required. Without the proposed collection of information, DHDSP's evaluation initiatives would be based on informal and partial feedback from a limited number of partners.

There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Data collection mechanism	Number of respondents	Average burden per response (in hours)	Total Burden (in hours)
State and Local Health Departments	Web-based survey	250	30/60	125
	Interview	30	1	30

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondent	Data collection mechanism	Number of respondents	Average burden per response (in hours)	Total Burden (in hours)
Private Sector Partners	Focus group	32	1	32
	Web-based survey	120	30/60	60
	Interview	120	1	120
	Focus group	48	1	48
Total				415

Dated: December 5, 2008.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–29399 Filed 12–11–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–09–07AB]

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

Measuring the Psychological Impact on Communities Affected by Landmines—New—National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The purpose of this project is to conduct focus groups and an observational baseline survey that assesses the effectiveness of Humanitarian Mine Action (landmine and unexploded ordnance clearance, also known as de-mining) upon the economic, social and mental well being of impacted communities.

This work will be conducted by the Harvard Humanitarian Initiative, a center of Harvard University, under a cooperative agreement with CDC. The study will examine the impact that individuals and communities in these locations suffer when living in an area with landmines and unexploded ordnance (UXO). Individuals and communities also suffer from the lack of use of all land resources as well as the trauma of injured or killed family members.

This research on the impact of demining is necessary because landmines and UXO continue to negatively impact civilian populations. For example, it has been estimated that each year landmines and unexploded ordnance lead to the injury and death of 24,000 persons worldwide, predominately civilians. At the same time, it is estimated that civilians account for 35% to 65% of war-related deaths and injuries. The use of landmines and UXO is ongoing, and therefore this issue merits continued attention.

Up to this point, however, little if any of the international response to landmines has studied the economic, social, and mental impact upon a community. Instead the focus has been their physical impact in terms of numbers of injured and killed. There are no statistics nor is there research that can accurately capture these alternative measures of impact.

There now exists an opportunity for further research that will benefit the general public as well as the organizations and governments working with persons impacted by landmines and UXO. The proposed work will allow CDC to continue its commitment to reduce the negative health impact posed by landmines and unexploded ordnance, both for U.S. and non-U.S.-based populations. Approximately 1,264 respondents will come from the Lebanon area. The estimates of annualized burden hours for the household surveys and the focus groups are shown in the table below.

There are no costs to respondents except their time to participate in the survey. The total estimated annualized burden hours are 1,328.

ESTIMATED ANNUALIZED BURDEN

Type of respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hrs)
Household Survey—Cluster munitions	600	1	1
Household Survey Control—Remote landmines	600	1	1
Focus Group—Cluster munitions	32	1	2
Focus Group Control—Remote landmines	32	1	2

Dated: December 2, 2008.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–29402 Filed 12–11–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0499]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Implementation of Sections 222, 223, and 224 of the Food and Drug Administration Amendments Act of 2007

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by January 12, 2009.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *oira_submissions@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0625. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3793.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Implementation of Sections 222, 223, and 224 of the Food and Drug Administration Amendments Act of 2007 (OMB Control Number 0910–0625)—Extension

Sections 222, 223, and 224 of the Food and Drug Administration Amendments Act of 2007 (FDAAA), which were in effect on October 1, 2007, require that device establishment registrations and listings under section 510 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360), (including the submission of updated information), be submitted to the Secretary by electronic means, unless the Secretary grants a request for waiver of the requirement because the use of electronic means is not reasonable for the person requesting the waiver. FDA expects 20,000 to 30,000 device establishments to begin registering electronically at that time.

Section 222 of FDAAA amends section 510(b) of the FD&C Act to require domestic establishments to register annually during the period beginning October 1 and ending December 31 of each year. Section 222 of FDAAA also amends section 510(i)(1) of the FD&C Act to require foreign establishments to register immediately upon first engaging in one of the covered device activities described under the statute, and in addition, they must also register annually during the time period beginning October 1 and ending December 31 of each year. Further, section 223 of FDAAA amends section 510(j)(2) of the FD&C Act to require establishments list their devices with FDA annually, during the time period beginning October 1 and ending December 31 of each year.

Under FDAAA, device establishment owners and operators are required to keep their registration and device listing information up-to-date using the agency's new electronic system. Owners and operators of new device establishments must use the electronic system to create new accounts, new registration records, and new device listings. Section 224 of FDAAA amends section 510(p) of the FD&C Act by allowing an affected person to request a waiver from the requirement to register electronically when the ''use of electronic means'' is not reasonable for the person.

In the **Federal Register** of October 1, 2008 (73 FR 57106), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Section of the 2007 Amendments	FDA Form No.	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
222[2]	3673	2,600	1	2,704	0.5	1,352
223[2]	3673	24,382	1	24,382	0.25	6,095
224[2]		29,370	1	29,370	0.75	22,028
224[3]		2,600	1	2,600	0.5	1,300
224 (waiver request)[2]		20	1	20	1	20
224 (waiver request)[3]		1	1	1	1	1
Total Hours						30,796

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] One time burden.
[3] Annual increase in burden.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

Section of the 2007 Amendments	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
222[2]	33,490	1	29,900	0.25	7,475
223[2]	16,524	4	66,096	0.5	33,048
Total Hours					40,523

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Recurring burden.

The estimates in Table 1 of this document are based on FDA's experience, data from the device registration and listing database, and our estimates of the time needed to complete the previously required forms. We estimate that the time needed to enter registration and listing information electronically using FDA Form 3673 will not differ significantly from the time needed to fill in the paper forms (FDA Forms 2891, 2891a, and 2892) that previously were used for this purpose because the information required is essentially identical.

In addition, under section 224 of FDAAA, device establishment owner/operators, for whom registering and listing by electronic means is not reasonable, may request a waiver from the Secretary. Because a device establishment's owner/operator is required to register and list, they would need only to have access to a computer, Internet and an e-mail address for registration and listing by electronic means, the agency did not anticipate receipt of a large number of requests for waiver. For the first few months of operation of the web-based system, from the October through December 2007 timeframe, FDA received fewer than 10 requests for waivers for the requirement to submit registration and listing information electronically. As data for more than 16,000 establishments have been received electronically for the same period, these requests amount to less than 1 percent of the total number of establishments that have responded.

Based on information taken from our databases, FDA estimates that there are 29,370 owner/operators who collectively register a total of 33,490 device establishments. The number of respondents listed for section 224 of FDAAA in Table 1 of this document is 29,370, which corresponds to the number of owner/operators who annually register one or more establishments. In addition, FDA estimates that 4,988 owner/operators are initial importers who must register their establishments but who, under FDA's existing regulations, are not required to list their devices unless they initiate or develop the specifications for the devices or repackage or relabel the devices. The number of respondents included in Table 1 of this document for section 223 of FDAAA is 24,382, which corresponds to the number of owner/operators who annually list one or more devices (29,370 – 4,988 = 24,382).

To calculate the burden estimate for waiver requests under section 224 of FDAAA, we assume as stated previously, that less than one tenth of 1 percent of the 33,490 total device establishments would request waivers from FDA. This means the total number of waiver requests would probably not exceed 20 requests (33,490 x 0.0006). We also estimate that the one-time burden on these establishments would be an hour of time for a mid-level manager to draft, approve, and mail a letter. In addition, FDA estimates the total number of establishments will increase by 2,600 new establishments each year. Of the 2,600 new registrants each year, we assume that less than 1 percent (i.e., 1) of these will also request waivers each year. The total, therefore, is 21 waiver requests, which could increase by only one additional request each year.

The burden estimate for recordkeeping requirements under section 222 of FDAAA in Table 2 of this document, complies with the requirement that owners or operators keep a list of officers, directors, and partners for each establishment. Owners or operators will need to provide this information only upon request from FDA. However, it is assumed that some effort will need to be expended for keeping such lists current.

The burden estimate for recordkeeping requirements under section 223 of FDAAA in Table 2 of this document reflect other recordkeeping requirements for devices listed with FDA, and the requirement to provide these records upon request from FDA. These estimates are based on FDA experience.

Dated: December 8, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–29459 Filed 12–11–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0611]

Draft Guidance for Industry and Food and Drug Administration Staff; Submission and Review of Sterility Information in Premarket Notification Submissions for Devices Labeled as Sterile; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the draft guidance entitled ''Submission and Review of Sterility Information in Premarket Notification (510(k)) Submissions for Devices Labeled as Sterile.'' This draft guidance document updates and clarifies the procedures for reviewing premarket notification submissions (510(k)s) for devices labeled as sterile, particularly with respect to sterilization technologies FDA considers novel, and the information that should be included in 510(k)s for devices labeled as sterile.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by March 12, 2009.

ADDRESSES: Submit written requests for single copies of the draft guidance document entitled ''Submission and Review of Sterility Information in Premarket Notification (510(k)) Submissions for Devices Labeled as Sterile'' to the Division of Small Manufacturers, International, and

Consumer Assistance (HFZ–220), Center for Devices and Radiological Health (CDRH), Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850 or to the Office of Communication, Training, and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to CDRH at 240–276–3151. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT:

Steven Turtil, Center for Devices and Radiological Health (HFZ–480), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3747;

Chiu Lin, Center for Devices and Radiological Health (HFZ–480), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3700; or

Leonard Wilson, Center for Biologics Evaluation and Research (HFM–25), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852 301–827–0373.

SUPPLEMENTARY INFORMATION:

I. Background

This draft guidance document updates and clarifies the procedures for reviewing premarket notification submissions (510(k)s) for devices labeled as sterile, particularly with respect to sterilization technologies FDA considers novel. The draft guidance provides details about the pyrogenicity information we recommend be included in 510(k)s for devices labeled as sterile. When final, this draft will supersede the guidance entitled ''Updated 510(k) Sterility Review Guidance K90–1'' that FDA issued on August 30, 2002 (available at *http://www.fda.gov/cdrh/ode/guidance/361.pdf*).

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on premarket notification submissions for devices labeled as sterile. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by using the Internet. To receive ''Submission and Review of Sterility Information in Premarket Notification (510(k)) Submissions for Devices Labeled as Sterile,'' you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 240–276–3151 to receive a hard copy. Please use the document number 1615 to identify the guidance you are requesting.

CDRH maintains an entry on the Internet for easy access to information, including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH Web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available on the CBER Internet site at *http://www.fda.gov/cber/guidelines.htm* or the Division of Dockets Management Internet site at *http://www.regulations.gov*.

IV. Paperwork Reduction Act of 1995

This draft guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520). This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120; and the collections of information in 21 CFR part 820 have been approved under OMB control number 0910–0073.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

Dated: December 3, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–29413 Filed 12–11–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; The Hispanic Community Health Study (HCHS)/ Study of Latinos (SOL)

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Heart, Lung, and Blood Institute (NHLBI), the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request for review and approval the information collection listed below. This proposed information collection was previously published in the **Federal Register** on October 3, 2008, page 57634, and allowed 60 days for public comment. One comment was received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it

displays a currently valid OMB control number.

Proposed Collection: Title: Hispanic Community Health Study (HCHS)/Study of Latinos (SOL). *Type of Information Collection Request:* New Collection. *Need and Use of Information Collection:* The Hispanic Community Health Study (HCHS)/ Study of Latinos (SOL) will identify risk factors for cardiovascular and lung disease in Hispanic populations and determine the role of acculturation in the prevalence and development of these diseases. Hispanics, now the largest minority population in the US, are influenced by factors associated with immigration from different cultural settings and environments, including changes in diet, activity, community support, working conditions, and health care access. This project is a multicenter, six-and-a-half year epidemiologic study and will recruit 16,000 Hispanic men and women aged 18–74 in four community-based cohorts in Chicago, Miami, San Diego, and the Bronx. The study will examine measures of obesity, physical activity, nutritional habits, diabetes, lung and sleep function, cognitive function, hearing, and dental conditions. Closely integrated with the research component will be a community and professional education component, with the goals of bringing the research results back to the community, improving recognition and control of risk factors, and attracting and training Hispanic researchers in epidemiology and population-based research. *Frequency of Response:* The participants will be contacted annually. *Affected Public:* Individuals or households; Businesses or other for profit; Small businesses or organizations. *Type of Respondents:* Individuals or households; physicians. The annual reporting burden is as follows: *Estimated Number of Respondents:* 30,401; *Estimated Number of Responses per Respondent:* 2.234; *Average Burden Hours Per Response: 0.7178*; and *Estimated Total Annual Burden Hours Requested:* 48,755. The annualized cost to respondents is estimated at $756,412, assuming respondents time at the rate of $15 per hour and physician time at the rate of $55 per hour. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

ESTIMATE OF ANNUAL HOUR BURDEN

Type of response	Number of respondents	Frequency of responses	Average hours per response	Annual hour burden
Participant Recruitment Contact	29,036	1	0.123	3,571
Participant Examinations and Questionnaires	5,333[1]	1	6.49	34,611
Participant Telephone Interviews	5,333[1]	1	1.83	9,759
Physician, Medical Examiner, next of kin or other contact follow-up[2]	1,284	1	.50	642
Focus Groups	81	1	1.5	121
Total unique respondents	30,401			48,755

[1] Subset of participant recruitment contact.
[2] Annual burden is placed on doctors and respondent relatives/informants through requests for information which will help in the compilation of the number and nature of new fatal and nonfatal events.

Request for Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: Desk Officer for NIH.

To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Ms. Lorraine Silsbee, Deputy Project Officer, NIH, NHLBI, 6701 Rockledge Drive, MSC 7936, Bethesda, MD 20892–7936, or call non-toll-free number 301–435–0709 or E-mail your request, including your address to: *silsbeeL@nhlbi.nih.gov*.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: December 2, 2008.

Michael S. Lauer,

Director, Division of Prevention and Population Sciences, NHLBI, National Institutes of Health.

Dated: December 3, 2008.

Suzanne Freeman,

Chief, FOIA, NHLBI, National Institutes of Health.

[FR Doc. E8–29427 Filed 12–11–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; F05 K 21 Fellowships.

Date: December 10–11, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Alessandra M. Bini, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5142, MSC 7840, Bethesda, MD 20892, 301–435–1024, *binia@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflicts: Musculoskeletal Tissue Engineering.

Date: December 11, 2008.

Time: 11:30 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: John P. Holden, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4211, MSC 7814, Bethesda, MD 20892, 301–496–8551, *holdenjo@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 3, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–29149 Filed 12–11–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center For Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Member Conflicts: Skeletal Muscle and Exercise Physiology.

Date: December 16, 2008

Time: 3:30 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: John P. Holden, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4211, MSC 7814, Bethesda, MD 20892, 301–496–8551, *holdenjo@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel Member Conflict: Behavior and Health.

Date: December 19, 2008.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Gayle M. Boyd, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3141, MSC 7808, Bethesda, MD 20892, 301–451–9956, *gboyd@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Oncological Sciences Integrated Review Group Basic Mechanisms of Cancer Therapeutics Study Section.

Date: January 26–27, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Lambratu Rahman, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804, Bethesda, MD 20892, 301–451–3493, *rahmanl@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 4, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–29286 Filed 12–11–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye 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 Eye Institute Special Emphasis Panel; NEI R24 Research Applications.

Date: December 16, 2008.

Time: 12 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Samuel Rawlings, PhD, Chief, Scientific Review Branch, Division of Extramural Research, National Eye Institute, 5635 Fishers Lane, Suite 1300, MSC 9300, Bethesda, MD 20892–9300, 301–451–2020, *rawlings@nei.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: December 4, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–29287 Filed 12–11–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Deafness and Other

Communication Disorders Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Deafness and Other Communication Disorders Advisory Council.

Date: January 23, 2009.

Closed: 8:30 a.m. to 10:50 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Open: 10:50 a.m. to 2:30 p.m.

Agenda: Staff reports on divisional, programmatic, and special activities.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Contact Person: Craig A. Jordan, PhD, Director, Division of Extramural Activities, NIDCD, NIH, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD 20892–7180, 301–496–8693, *jordanc@nidcd.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nidcd.nih.gov/about/groups/ndcdac/*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: December 3, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–29148 Filed 12–11–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Initial Review Group; Treatment Research Subcommittee.

Date: February 10, 2009.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

Contact Person: Kristen V Huntley, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, 301–435–1433, *huntleyk@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

December 4, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–29274 Filed 12–11–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Time Sensitive Research Opportunities.

Date: December 18, 2008.

Time: 1:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Nadine Rogers, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, 301–402–2105, *rogersn2@nida.nih gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 4, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–29284 Filed 12–11–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, Genes Environment and Health Initiative.

Date: January 28–29, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Mandarin Oriental Hotel, 1330 Maryland Ave., SW., Washington, DC 20024.

Contact Person: Gerald L. McLaughlin, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Blvd., Bethesda, MD 20892–8401, 301–402–6626, *gm145a@nih.gov.*

Name of Committee: National Institute on Drug Abuse Initial Review Group, Treatment Research Subcommittee.

Date: February 10, 2009.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

Contact Person: Kristen V Huntley, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, 301–435–1433, *huntleyk@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 4, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–29288 Filed 12–11–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; 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 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 on Drug Abuse; Special Emphasis Panel NIDA Center for Genetic Studies.

Date: January 27, 2009. Time: 9 a.m. to 1 p.m.

Agenda: To review and evaluate contract proposals.

Place: Courtyard by Marriott Rockville, 2500 Research Boulevard, Rockville, MD 20850.

Contact Person: Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 435–1439, *lf33c.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 4, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–29290 Filed 12–11–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Disaster Housing Assistance Program (DHAP)–Ike

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This document provides notice that the Federal Emergency Management Agency (FEMA) and the Department of Housing and Urban Development (HUD) executed an Interagency Agreement (IAA) establishing a grant program called ''Disaster Housing Assistance Program (DHAP)–Ike'' for Hurricanes Ike and Gustav. DHAP–Ike is a temporary housing rental assistance and case management program for identified individuals and families displaced by Hurricanes Ike and Gustav. Under the IAA, HUD acts as the servicing agency of DHAP–Ike and will begin administration of the program effective November 1, 2008.

DATES: FEMA and HUD executed the Interagency Agreement and established DHAP–Ike for Hurricanes Ike and Gustav on September 23, 2008.

ADDRESSES: Details about DHAP–Ike will be published by HUD in a subsequent **Federal Register** Notice. In addition, a copy of the full text of the FEMA–HUD IAA can be accessed via the FEMA Web site at *http://www.fema.gov*. Other related program information on DHAP–Ike is available on the HUD Web site at *http://hud.gov/offices/pih/publications/ike.cfm*. Periodic updates on DHAP–Ike will be posted on FEMA and HUD's Web sites.

FOR FURTHER INFORMATION CONTACT: Berl D. Jones, Jr., Director, Individual Assistance Division, Disaster Assistance Directorate, Federal Emergency Management Agency, Department of Homeland Security, 500 C Street, SW., Washington, DC 20472, telephone (202) 212–1000 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: In September 2008, Hurricanes Ike and Gustav struck the United States causing significant damage to property and the displacement of tens of thousands of individuals and families from their homes and communities. Under section 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5174, the Federal Emergency Management Agency (FEMA) disaster housing programs are short-term assistance programs with a limitation of 18 months, unless extended by the President.

Because HUD has the expertise in administering various Federal housing programs, FEMA is relying on HUD's experience to design, implement, and administer DHAP–Ike for Hurricanes Ike and Gustav in coordination with and on behalf of FEMA. Under DHAP–Ike, HUD will provide housing assistance, security and utility deposits, and case management services to individuals and families displaced by Hurricane Gustav and Ike. The local Public Housing Agencies (PHAs), which currently administer the Housing Choice Voucher Program (HCVP) and the Disaster Housing Assistance Program (DHAP) for Hurricanes Katrina and Rita, will be designated by HUD to administer DHAP–Ike in their jurisdictions. PHAs will be awarded grants from FEMA to provide rent subsidies to eligible families for a period not to exceed 17 months commencing November 1, 2008

and ending no later than March 13, 2010.

Families eligible for DHAP–Ike are those identified by FEMA who currently receive or are eligible to receive initial and/or continued rental assistance authorized under section 408 of the Stafford Act, 42 U.S.C. 5174, pursuant to the Presidential major disaster declarations resulting from Hurricane Ike. FEMA will rely on the eligibility standards established for its temporary housing program at 44 CFR 206.113 and 44 CFR 206.114 in determining who is eligible for referral to DHAP–Ike. All eligible families wishing to participate in DHAP–Ike must sign and execute a HUD-provided DHAP lease or addendum to their current lease, with their landlord, which sets forth the new obligations to receive the rental subsidy. Similarly, landlords who agree to participate in DHAP–Ike must sign and execute a Disaster Rent Subsidy Contract (DRSC) with the PHA outlining the new conditions and obligations, in addition to signing a lease addendum with the tenant.

On November 1, 2008, HUD assumed the responsibilities for providing rental assistance and case management to families identified by FEMA. Beginning May 1, 2009, the Incremental Rent Transition (IRT) will be implemented, under which HUD will reduce the amount of rent paid incrementally by $50 and individuals and families are required to contribute $50 towards their rental payment. Every month thereafter, the individual or family's rent contribution will increase in increments of $50, as HUD's provision is reduced by an equal amount, until the program ends in March 2010. The program provides a hardship waiver for the IRT if individuals and families demonstrate they cannot afford their incremental rent increase.

No later than August 1, 2009, individuals and families whose rent burden is less than 30 percent of their post-disaster gross income, taking into account existing mortgages for primary residences that remain uninhabitable, will no longer be eligible for DHAP–Ike. Individuals and families whose rent burden and mortgage exceed 30 percent of their post-disaster income will continue to receive assistance, subject to the IRT, through March 2010 when the program ends. Details of the program, including descriptions of IRT, hardship provision, and 30 percent post-disaster income determinations will be spelled out in the **Federal Register** Notice and standard operating procedures published by HUD.

The designated PHAs will also provide case management services, which will include a needs assessment and individual development plan (IDP) for each family. The objective of HUD case management services is to promote self-sufficiency for the participating family.

Details about DHAP–Ike will be published by HUD in a subsequent **Federal Register** Notice. In addition, a copy of the full text of the FEMA–HUD IAA can be accessed via the FEMA Web site at *http://www.fema.gov*. Other related program information on DHAP–Ike is available on the HUD Web site at *http://hud.gov/offices/pih/publications/ike.cfm*. Periodic updates on DHAP–Ike will be posted on FEMA and HUD's Web sites.

Authority: Legal authority for DHAP–Ike is based on the Department of Homeland Security's (DHS) general grant authority under section 102(b)(2) of the Homeland Security Act, 6 U.S.C. 112, and sections 306(a), 408(b)(1), and 426 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5149(a), 5174(b)(1), and 5189d, respectively. As a servicing agency under a grant from FEMA, and consistent with The Economy Act (31 U.S.C. 1535), HUD derives all authority under the program from FEMA and any and all actions originate from FEMA's authority.

Dated: December 5, 2008.

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–29438 Filed 12–11–08; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities Arrival and Departure Record

AGENCY: Customs and Border Protection (CBP), Department of Homeland Security

ACTION: 60-Day Notice and request for comments; Extension of an existing information Collection: 1651–0111.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Form I–94 (Arrival/Departure Record), the Form I–94W (Nonimmigrant Visa Waiver Arrival/Departure), and the Electronic System for Travel Authorization (ESTA). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before February 10, 2009, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn.: Tracey Denning, 1300 Pennsylvania Avenue, NW., Room 3.2.C, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs and Border Protection, *Attn.:* Tracey Denning, 1300 Pennsylvania Avenue, NW., Room 3.2C, Washington, DC 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (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 estimates 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 including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Arrival and Departure Record, Nonimmigrant Visa Waiver Arrival/Departure, the Electronic System for Travel Authorization (ESTA).

OMB Number: 1651–0111.

Form Numbers: I–94 and I–94W.

Abstract: Form I–94 (Arrival/Departure Record) and Form I–94W (Nonimmigrant Visa Waiver Arrival/Departure Record) are used to document a traveler's admission into the United States. These forms include date of arrival, visa classification and the date the authorized stay expires. The forms are also used by business employers and other organizations to confirm legal status in the United States. The Electronic System for Travel Authorization (ESTA) applies to aliens traveling to the United States under the

Visa Waiver Program (VWP) and requires that VWP travelers provide information electronically to CBP before embarking on travel to the United States. The recent expansion of the VWP to include seven additional countries resulted in a change to the burden hours of this collection of information.

Current Actions: This submission is being made to extend the expiration date.

Type of Review: Extension (with change).

Affected Public: Individuals.

Estimated Number of Respondents (I–94 and I–94W): 30,924,380.

Estimated Number of Respondents (ESTA): 18,000,000.

Estimated Time per Response (I–94 and I–94W): 8 minutes.

Estimated Time per Response (ESTA): 15 minutes.

Estimated Total Annual Burden Hours: 8,623,249.

Estimated Total Annualized Cost on the Public: $185,546,280.

Dated: December 3, 2008.

Tracey Denning,

Agency Clearance Officer, Customs and Border Protection.

[FR Doc. E8–29423 Filed 12–11–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Complaint Management System

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day Notice and request for comments; Request for a new collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Complaint Management System. This is a new collection of information collection. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (73 FR 58253) on October 6, 2008, allowing for a 60-day comment period. One public comment was received. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before January 12, 2009.

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 the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components' estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Title: Complaint Management System.

Form Number: None.

Abstract: CBP is creating the Complaint Management System (CMS) in order to allow anybody who has interacted with CBP, either as a result of importing or exporting goods, traveling to or from the U.S., seeking a job, or simply living in an area where CBP conducts operations such as border patrol checkpoints, to file a complaint or comment about their CBP experience through an on-line portal.

Current Actions: This submission is being made to establish a new collection of information.

Type of Review: New collection of information.

Affected Public: Individuals and businesses.

Estimated Number of Respondents: 3,000.

Estimated Number of Annual Responses: 3,000.

Estimated Time per Response: 23 minutes.

Estimated Total Annual Burden Hours: 1,199.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 3.2.C, Washington, DC 20229, at 202–344–1429.

Dated: December 4, 2008.

Tracey Denning,

Agency Clearance Officer, Customs and Border Protection.

[FR Doc. E8–29424 Filed 12–11–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5194–N–17]

Notice of Proposed Information Collection for Public Comment; Training Evaluation Form

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments Due Date: February 10, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name or OMB Control Number and should be sent to: Lillian L. Deitzer, Department Reports Management Officer, ODAM, Department of Housing and Urban Development, 451 7th Street, SW., Room 4116, Washington, DC 20410–5000; telephone: 202–708–2374, (this is not a toll-free number) or e-mail Ms. Deitzer at *Lillian_L._Deitzer@HUD.gov* for a copy of the proposed form and other available information.

FOR FURTHER INFORMATION CONTACT: Mary Schulhof, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone: 202–708–0713, (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Training Evaluation Form.

OMB Control Number: 2577—Pending.

Description of the need for the information and proposed use: On September 19, 2005 (70 FR 54983), HUD published a final rule amending the regulations of the Public Housing Operating Fund Program at 24 CFR part 990, which was developed through negotiated rulemaking. Part 990 provides a new formula for distributing operating subsidy to public housing agencies (PHAs) and establishes requirements for PHAs to convert to asset management.

Subpart H of the part 990 regulations (§§ 990.255 to 990.290) establishes the requirements regarding asset management. Under § 990.260(a), PHAs that own and operate 250 or more dwelling rental units must operate using an asset management model consistent with the subpart H regulations. However, for calendar year 2008, that regulation is superseded by § 225 of Title II of Division K of the Consolidated Appropriations Act, 2008, Public Law 110–161 (approved December 26, 2007). Under that law, PHAs that own or operate 400 or fewer units may elect to transition to asset management, but they are not required to do so.

The Consolidated Appropriations Act, 2008, Public Law 110–161, also provided '' * * * $5,940,000 for competitive grants and contracts to third parties for the provision of technical assistance to public housing agencies related to the transition and implementation of asset-based management in public housing.'' The contract now in effect will provide for web-based training, on-site seminars and on-site technical assistance to assist PHAs in implementing asset management. The Training Evaluation Form will be used by the Office of Public and Indian Housing to determine how the training and technical assistance can be improved to meet PHA needs.

Agency form number, if applicable: Pending.

Members of affected public: Public housing agencies.

Estimation of the total number of hours needed to prepare the information collection including number of respondents: The estimated number of respondents is 29,288 annually with one response per respondent. The average number for each response is .033 hours, for a total reporting burden of 966 hours.

Status of the proposed information collection: New collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 1, 2008.

Bessy Kong,

Deputy Assistant Secretary for Policy, Programs and Legislative Initiatives.

[FR Doc. E8–29145 Filed 12–11–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5186–N–50]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

DATES: *Effective Date: December 12, 2008.*

FOR FURTHER INFORMATION CONTACT: Kathy Ezzell, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7262, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: December 4, 2008.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

[FR Doc. E8–29144 Filed 12–11–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5218–N–02]

Notice of Funding Availability (NOFA) for the Section 202 Demonstration Pre-Development Grant Program: Extension of Application Due Date

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

ACTION: Notice of Funding Availability (NOFA), Extension of Application Due Date.

SUMMARY: On October 10, 2008, HUD published the NOFA for the Section 202 Demonstration Pre-Development Grant Program. Through this NOFA, HUD is making available approximately $20 million for pre-development grants to private nonprofit organizations and consumer cooperatives in connection with the development of housing under the Section 202 Supportive Housing for the Elderly program. The October 10, 2008 publication established December 16, 2008 as the deadline date for the submission of applications. Today's **Federal Register** publication extends the deadline date for the submission of applications to February 18, 2009. HUD is also extending the deadline for applicants to submit requests for waivers from the electronic application submission requirements to February 11, 2009.

DATES: The application deadline date for the Section 202 Demonstration Pre-Development Grant Program is February 18, 2009.

FOR FURTHER INFORMATION CONTACT: Individuals may direct questions regarding the Section 202 Demonstration Pre-Development Grant

Program to the individuals listed in Section VII of the October 10, 2008, Section 202 Demonstration Pre-Development Grant Program NOFA. For technical assistance in downloading and submitting an application package through *http://www.grants.gov/applicants/apply_for_grants.jsp*, contact the Grants.gov Help Desk at 1–800–518–GRANTS, or by sending an e-mail to *support@grants.gov*.

SUPPLEMENTARY INFORMATION: On October 10, 2008 (73 FR 60312), HUD published its NOFA for the Section 202 Demonstration Pre-Development Grant Program, and established December 16, 2008 as the deadline date for the submission of applications. Through the NOFA, HUD is making available approximately $20 million for pre-development grants to private nonprofit organizations and consumer cooperatives in connection with the development of housing under the Section 202 Supportive Housing for the Elderly program. HUD stated in the October 10, 2008, NOFA that funding awards under the Section 202 Demonstration Pre-Development Grant program would be restricted to applicants selected for Fund Reservation Awards under the FY2008 Section 202 Supportive Housing for the Elderly program.

Today's **Federal Register** publication extends the deadline date for the submission of applications for the Section 202 Demonstration Pre-Development Grant program to February 18, 2009. Similarly, HUD extending the deadline for applicants to submit requests for waivers from the electronic application submission requirements to February 11, 2009. HUD is extending the application submission deadline date to permit it to complete selections under FY2008 Section 202 Supportive Housing for the Elderly program. This extension will ensure that ineligible Section 202 applicants need not go through the expense of preparing and submitting an application for funding under the Section 202 Demonstration Pre-Development Grant program if they are not eligible to receive this funding.

Deadline for Applications

The application deadline date for the Section 202 Demonstration Pre-Development Grant Program is February 18, 2009. All applications must be received and validated by *Grants.gov* no later than 11:59:59 p.m. Eastern Time on the application deadline date. Refer to the General Section of the SuperNOFA published on March 19, 2008 (72 FR 14882), the FY2008 SuperNOFA published on May 12, 2008 (72 FR 27032), the Notice of HUD's FY2008 SuperNOFA for HUD's Discretionary Programs; Correction for Section 202 and Section 811 Programs published on June 9, 2008 (72 FR 32592), and Section IV of the Section 202 Demonstration Pre-Development Grant Program NOFA published on October 10, 2008 (72 FR 60312), for further information about application, submission, and timely receipt requirements.

Dated: December 5, 2008.

Brian D. Montgomery,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. E8–29425 Filed 12–11–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5251–N–01]

Reconsideration of Waivers Granted to and Alternative Requirements for the State of Mississippi's CDBG Disaster Recovery Grant Under the Department of Defense Emergency Supplemental Appropriations To Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of reconsidered waivers, alternative requirements, and statutory program requirements.

SUMMARY: This notice describes HUD's reconsideration of some of the additional waivers and alternative requirements applicable to the Community Development Block Grant (CDBG) disaster recovery grant provided to the State of Mississippi for the purpose of assisting in the recovery in the most impacted and distressed areas related to the consequences of Hurricane Katrina in 2005. HUD previously published an allocation and application notice on February 13, 2006, applicable to this grant and four others under the same appropriation, and reconsidered the waivers in that notice on August 8, 2008. The original June 14, 2006, notice has now been reconsidered and all waivers are being retained, with the exception of some of the overall benefit waivers.

DATES: *Effective Date:* December 17, 2008.

FOR FURTHER INFORMATION CONTACT: Jessie Handforth Kome, Director, Disaster Recovery and Special Issues Division, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7286, Washington, DC 20410–7000, telephone number 202–708–3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339. Facsimile inquiries may be sent to Ms. Kome at 202–401–2044. (Except for the ''800'' number, these telephone numbers are not toll free.)

SUPPLEMENTARY INFORMATION:

Authority To Grant Waivers

The Department of Defense, Emergency Supplemental Appropriations To Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Pub. L. 109–148, approved December 30, 2005) (the 2006 Act) appropriated $11.5 billion in CDBG funds for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure directly related to the consequences of the covered disasters. The State of Mississippi received an allocation of $5,058,185,000 from this appropriation. The 2006 Act authorized the Secretary to waive, or specify alternative requirements for, any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary or use by the recipient of these funds and guarantees, except for requirements related to fair housing, nondiscrimination, labor standards, and the environment, upon a request by the State and a finding by the Secretary that such a waiver would not be inconsistent with the overall purpose of the statute. The law further provided that the Secretary may waive the requirement that activities benefit persons of low and moderate income, except that at least 50 percent of the funds granted must benefit primarily persons of low and moderate income, unless the Secretary otherwise makes a finding of compelling need. Additionally, regulatory waiver authority is provided by 24 CFR 5.110. The following waivers and alternative requirements came in response to written requests from the State of Mississippi and are being retained, with the exception of some of the overall benefit waivers, after reconsideration.

The Secretary has found that the following waivers and alternative requirements, as described below, are not inconsistent with the overall purpose of 42 U.S.C. 5301 *et seq.*, Title I of the Housing and Community Development Act of 1974, as amended (the 1974 Act); or of 42 U.S.C. 12704 *et seq.*, the Cranston-Gonzalez National Affordable Housing Act, as amended.

Under the requirements of the Department of Housing and Urban Development Act, as amended (42 U.S.C. 3535(q)), regulatory waivers must

be published in the **Federal Register**. The Department is also using this notice to provide information about other ways in which the requirements for this grant vary from regular CDBG program rules. Therefore, HUD is using this notice to make public alternative requirements and to note the applicability of disaster recovery-related statutory provisions. Compiling this information in a single notice creates a helpful resource for Mississippi grant administrators and HUD field staff. Waivers and alternative requirements regarding the common application and reporting process for all grantees under the 2006 Act were published in a prior notice published February 13, 2006 (71 FR 7666) and retained in a notice published on August 8, 2008 (73 FR 46312).

Except as described in notices regarding this grant, the statutory and regulatory provisions governing the CDBG program for states, including those at 24 CFR part 570, shall apply to the use of these funds.

Descriptions of Changes

This section of the notice briefly describes the basis for each waiver and provides an explanation of related alternative requirements, if additional explanation is necessary.

Except as provided in the October 30, 2006, and August 8, 2008, notices, the waivers, alternative requirements, and statutory changes apply only to the CDBG supplemental disaster recovery funds appropriated in the 2006 Act and allocated to the State of Mississippi. These actions provide additional flexibility in program design and implementation and note statutory requirements unique to this appropriation.

Eligibility

Eligibility—housing related. The waiver of section 105(a) that allows new housing construction and of section 105(a)(24) to allow homeownership assistance for families whose income is up to 120 percent of median income and payment of up to 100 percent of a housing downpayment is necessary following major disasters in which large numbers of affordable housing units have been damaged or destroyed, as is the case in the disaster eligible under this notice. The state requested that HUD broaden the section 105(a)(24) waiver to allow it to serve families with income up to 120 percent of median income to implement its Long Term Workforce Housing program in accordance with its accepted Action Plan for Disaster Recovery.

General planning activities use entitlement presumption. The annual state CDBG program requires that local government grant recipients of planning-only grants must document that the use of funds meets a national objective. In the state CDBG program, these planning grants are typically used for individual project plans. By contrast, planning activities carried out by entitlement communities are more likely to include non-project specific plans such as functional land use plans, historic preservation plans, comprehensive plans, development of housing codes, and neighborhood plans related to guiding long-term community development efforts comprising multiple activities funded by multiple sources. In the annual entitlement program, these more general stand-alone planning activities are presumed to meet a national objective under the requirements at 24 CFR 570.208(d)(4). The Department noted that almost all effective CDBG disaster recoveries in the past have relied on some form of area-wide or comprehensive planning activity to guide overall redevelopment independent of the ultimate source of implementation funds. Therefore, the Department has removed the eligibility requirement that CDBG disaster recovery assisted planning-only grants or state directly administered planning activities that will guide recovery in accordance with the appropriations act, must comply with the state CDBG program rules at 24 CFR 570.483(b)(5) or (c)(3).

Compensation for disaster-related losses. The state is providing compensation to homeowners who lived outside the floodplain and whose homes were damaged by flooding during the covered disasters, if the homeowners agreed to meet the stipulations of the published program design. The state is also providing compensation to homeowners affected by the disaster in other circumstances, under Phase II and other aspects of the state's homeowner compensation program. The Department has waived the 1974 Act and associated regulations to make this use of grant funds eligible.

Anti-pirating. The limited waiver of the anti-pirating requirements allowed the flexibility to provide assistance to a business located in another state or market area within the same state if the business was displaced from a declared area within the state by the disaster and the business wishes to return. This waiver is necessary to allow a grantee affected by a major disaster to rebuild its employment base.

Program Income

A combination of CDBG provisions limited the flexibility available to the state for the use of program income. Prior to 2002, program income earned on disaster recovery grants was usually program income in accordance with the rules of the regular CDBG program of the applicable state and lost its disaster recovery grant identity, thus losing use of the waivers and streamlined alternative requirements. Also, the state CDBG program rule and law are designed for a program in which the state distributes all funds rather than carrying out activities directly. The 1974 Act specifically provides for a local government receiving CDBG grants from a state to retain program income if it uses the funds for additional eligible activities under the annual CDBG program. The 1974 Act allows the state to require return of the program income to the state under certain circumstances. The notice waived the existing statute and regulations to give the state, in all circumstances, the choice of whether or not a local government receiving a distribution of CDBG disaster recovery funds and using program income for activities in the Action Plan could retain this income and use it for additional disaster recovery activities. In addition, the notice allowed program income to the disaster recovery grant generated by activities undertaken directly by the state or its agent(s) to retain the original disaster recovery grant's alternative requirements and waivers and to remain under the state's discretion until grant closeout, at which point any program income on hand or received subsequently would become program income to the state's annual CDBG program. The alternative requirements provide all the necessary conforming changes to the program income regulations.

Relocation Requirements

HUD provided and is continuing a limited waiver of the relocation requirements. HUD waived the one-for-one replacement of low- and moderate-income housing units demolished or converted using CDBG funds requirement for housing units damaged by one or more disasters. HUD has waived this requirement because it did not take into account the large, sudden changes a major disaster may cause to the local housing stock, population, or local economy.

Further, the requirement did not take into account the threats to public health and safety and to economic revitalization that may be caused by the presence of disaster-damaged structures that are unsuitable for rehabilitation. Left unchanged, the requirement could have impeded disaster recovery and discouraged grantees from acquiring,

converting, or demolishing disaster-damaged housing because of excessive costs that would have resulted from replacing all such units within the specified time frame.

HUD also waived the relocation benefits requirements contained in Section 104(d) of the 1974 Act to the extent they differ from those of the Uniform Relocation Assistance and Real Properties Acquisition Act of 1970 (42 U.S.C. 4601 *et seq.*). This change simplifies implementation while preserving statutory protections for persons displaced by projects assisted with CDBG disaster recovery grant funds.

Overall Benefit

The waivers related to overall benefit in Mississippi were published in several previous notices. Because the waivers are inextricably interrelated and have common alternative requirements, HUD is reconsidering all of them at this point, as the reconsideration of the first of them is now required. The State complied fully with the alternative data collection requirements included with the original waivers and collected income information for all of its direct benefit activities, regardless of overall benefit waivers. This data, and the State's completion of the initial budgeting of all of its disaster recovery grant funds, provided HUD with enough information to determine whether the State still has the statutorily mandated ''compelling need'' for each of those previously granted waivers.

A CDBG grantee uses its grant funds for *eligible activities,* such as rehabilitation of a single house, construction of a water and sewer line, providing childcare through a particular program, or making a loan to a small business. Each activity must demonstrate benefit by meeting one of the three *national objectives* of the CDBG program. These national objectives are:

(1) Provide benefit to low- and moderate-income persons (low/mod activities);

(2) prevent or eliminate slums or blight (slum/blight activities); or

(3) address urgent community needs for which no other funding exists (urgent need activities).

For purposes of reporting to HUD, the funds and performance of some types of activities, such as single family housing, may be aggregated. For example, Mississippi has been reporting quarterly on its single-family homeowner compensation program under two categories, one that aggregates activity performance and costs for payments to low- and moderate-income households and one that aggregates payments made under the urgent need national objective.

The regular CDBG program also subtotals the funds used for each national objective and compares the subtotals to the overall grant amount (minus general administration and planning costs) in a test called *overall benefit.* To meet the overall benefit test, the percentage of *funds* a grantee has expended for the subtotal of individual activities that meet the national objective of benefit to low- and moderate-income persons must be at least 70 percent of the total funds used for all activities (excluding general administration and planning costs).

For the CDBG supplemental grants for recovery from the consequences of Hurricanes Katrina, Rita, and Wilma, HUD granted two kinds of overall benefit waivers. The first kind is common to all five state grantees. Published February 13, 2006, this waiver lowered the overall benefit threshold from 70 percent to 50 percent for each of the recovery grants under Public Law 109–148. The same waiver was made October 30, 2006, for the recovery grants under Public Law 109–234. These waivers were reconsidered and republished August 8, 2008. Therefore, absent an additional waiver, 50 percent of each Gulf Coast recovery grant governed by those notices must support activities that meet the low- and moderate-income national objective.

The second kind of waiver granted for Gulf Coast recovery grants was only requested by the State of Mississippi and only then for the first recovery grant made under Public Law 109–148, not for the second grant. Between October 2006 and July 2008, Mississippi requested multiple additional waivers of the overall benefit requirement for its first grant and HUD provided some limited approvals for specific activities.

The standard that Congress provided for granting an overall benefit waiver for a disaster recovery grant is ''compelling need'' for the waiver. HUD denied several blanket waiver requests for the overall benefit test primarily because the State had not yet budgeted enough of its grant to allow HUD to weigh the necessity for a blanket waiver.

The additional waivers HUD granted provided that specified activities undertaken by Mississippi would not be considered in calculating the overall benefit test if such consideration would cause the State to fail to meet the requirement. Each of these waivers is only needed if the State needs the activity to continue its recovery and the State would be in noncompliance with the overall benefit provision without the waiver. To determine if the State is in compliance with the overall benefit requirement, HUD calculates the overall benefit test as usual by excluding all planning and general administration activities, and then removing the funds applied to waivered slum/blight or urgent need activities one at a time until the State passes the test. To facilitate this process, HUD required the State to keep beneficiary data for each activity despite the waivers. (Note that, although the Disaster Recovery Grant Reporting (DRGR) system is used to collect the benefit information, it only calculates the overall benefit test as usual, not as waived. The effects of the waiver on compliance must be manually determined. Therefore, the automatically calculated percentages in the published reports are technically inaccurate.) In the notices, HUD linked all of the Mississippi-only overall benefit waivers to specific, named and dated action plans. This means that when the State substantially amends an activity under the waiver, that waiver no longer applies to the funds removed from the original activity. This occurred frequently as the budget for Phase I of the homeowner compensation program decreased in size from over $3 billion to about $1.5 billion and as the State completed other reprogramming from undersubscribed activities.

At this time, using budgets and data provided by the State, HUD has calculated that the State is likely to achieve approximately 40 percent overall benefit for the whole grant (before applying the waivers). Next, based on the information available prior to publication of this notice, HUD has performed the overall benefit test by removing an activity at a time, in the date order in which the waivers were granted. If, at any point in the calculation the State would clearly be in compliance with the overall benefit requirement without further waivers, then there can be no compelling need for subsequent waivers.

HUD calculates that, if the original waivers for three activities launched early in the recovery that now have been completed or nearly completed in reliance on those waivers (homeowner compensation Phase 1, assistance to private utilities, and windpool payments) remain without change, then the State will pass the overall benefit test with the remaining grant funds as they are currently budgeted. This conclusion removes the compelling need for the waivers granted for other activities and they are hereby rescinded, as shown in the table below.

Activity or program	Original waiver date	Reconsideration status
Regional Infrastructure Program	August 24, 2007 (72 FR 48808)	Waiver rescinded.
Economic Development and Community Revitalization.	March 6, 2007 (72 FR 10020)	Waiver rescinded.
Regional Infrastructure Program—Master Plan and Emergency Infrastructure.	October 24, 2006 (71 FR 62372)	Waiver rescinded.
Ratepayer and Windpool Mitigation	October 24, 2006 (71 FR 62372)	Waiver retained as originally granted.
Compensation for housing loss	June 14, 2006 (71 FR 34457)	Waiver retained for Phase 1 Urgent Need activities.

HUD notes that the change in the status of these waivers will require no changes in the State's currently budgeted and operating programs beyond the stipulated attention on the part of the State to addressing the recovery needs of low- and moderate-income persons in the required proportions for the remainder of its activities.

The original waiver notices include greater detail about the State's requests and the waivers and alternative requirements. The specific notices to reference are:

- 71 FR 34457, published June 14, 2006;
- 71 FR 62372, published October 24, 2006;
- 72 FR 10020, published March 6, 2007; and
- 72 FR 48808, published August 24, 2007.

Timely Distribution of Funds

The state CDBG program regulation regarding timely distribution of funds is at 24 CFR 570.494. This provision is designed to work in the context of an annual program in which almost all grant funds are distributed to units of general local government. Because the State may have used its disaster recovery grant funds to carry out activities directly, and because Congress expressly allowed this grant to be available until expended, HUD waived this requirement. However, HUD still expects the State of Mississippi to expeditiously obligate and expend all funds, including any recaptured funds or program income, in carrying out activities in a timely manner.

Waivers and Alternative Requirements

1. Program income waivers and alternative requirement. 42 U.S.C. 5304(j) and 24 CFR 570.489(e) are waived to the extent that they conflict with the rules stated in the program income alternative requirement below. The following alternative requirement applies instead.

(a) Program income. (1) For the purposes of this subpart, ''program income'' is defined as gross income received by a state, a unit of general local government, a tribe, or a subrecipient of a unit of general local government or a tribe that was generated from the use of CDBG funds, except as provided in paragraph (a)(2) of this section. When income is generated by an activity that is only partially assisted with CDBG funds, the income shall be prorated to reflect the percentage of CDBG funds used (e.g., a single loan supported by CDBG funds and other funds; a single parcel of land purchased with CDBG funds and other funds). Program income includes, but is not limited to, the following:

(i) Proceeds from the disposition by sale or long-term lease of real property purchased or improved with CDBG funds;

(ii) Proceeds from the disposition of equipment purchased with CDBG funds;

(iii) Gross income from the use or rental of real or personal property acquired by the unit of general local government or tribe or subrecipient of a state, a tribe, or a unit of general local government with CDBG funds, less the costs incidental to the generation of the income;

(iv) Gross income from the use or rental of real property owned by a state, tribe, or the unit of general local government or a subrecipient of a state, tribe, or unit of general local government, that was constructed or improved with CDBG funds, less the costs incidental to the generation of the income;

(v) Payments of principal and interest on loans made using CDBG funds;

(vi) Proceeds from the sale of loans made with CDBG funds;

(vii) Proceeds from the sale of obligations secured by loans made with CDBG funds;

(viii) Interest earned on program income pending disposition of the income, but excluding interest earned on funds held in a revolving fund account;

(ix) Funds collected through special assessments made against properties owned and occupied by households not of low and moderate income, where the special assessments are used to recover all or part of the CDBG portion of a public improvement; and

(x) Gross income paid to a state, tribe, or a unit of general local government or subrecipient from the ownership interest in a for-profit entity acquired in return for the provision of CDBG assistance.

(2) ''Program income'' does not include the following:

(i) The total amount of funds which is less than $25,000 received in a single year that is retained by a unit of general local government, tribe, or subrecipient;

(ii) Amounts generated by activities eligible under section 105(a)(15) of the 1974 Act and carried out by an entity under the authority of section 105(a)(15) of the Act.

(3) The state may permit the unit of general local government or tribe that receives or will receive program income to retain the program income, subject to the requirements of paragraph (a)(3)(ii) of this section, or the state may require the unit of general local government or tribe to pay the program income to the state.

(i) Program income paid to the state. Program income that is paid to the state or received by the state is treated as additional disaster recovery CDBG funds subject to the requirements of this notice and must be used by the state or distributed to units of general local government in accordance with the state's Action Plan for Disaster Recovery. To the maximum extent feasible, program income shall be used or distributed before the state makes additional withdrawals from the United States Treasury, except as provided in paragraph (b) of this section.

(ii) Program income retained by a unit of general local government or tribe.

(A) Program income that is received and retained by the unit of general local government or tribe before closeout of the grant that generated the program income is treated as additional disaster recovery CDBG funds and is subject to the requirements of this notice.

(B) Program income that is received and retained by the unit of general local government or tribe after closeout of the grant that generated the program

income, but that is used to continue the disaster recovery activity that generated the program income, is subject to the waivers and alternative requirements of this notice.

(C) All other program income is subject to the requirements of 42 U.S.C. 5304(j) and subpart I of 24 CFR part 570.

(D) The state shall require units of general local government or tribes, to the maximum extent feasible, to disburse program income that is subject to the requirements of this notice before requesting additional funds from the state for activities, except as provided in paragraph (b) of this section.

(b) Revolving funds.

(1) The state may establish or permit units of general local government or tribes to establish revolving funds to carry out specific, identified activities. A revolving fund, for this purpose, is a separate fund (with a set of accounts that are independent of other program accounts) established to carry out specific activities that, in turn, generate payments to the fund for use in carrying out such activities. These payments to the revolving fund are program income and must be substantially disbursed from the revolving fund before additional grant funds are drawn from the United States Treasury for revolving fund activities. Such program income is not required to be disbursed for nonrevolving fund activities.

(2) The state may also establish a revolving fund to distribute funds to units of general local government or tribes to carry out specific, identified activities. A revolving fund, for this purpose, is a separate fund (with a set of accounts that are independent of other program accounts) established to fund grants to units of general local government to carry out specific activities which, in turn, generate payments to the fund for additional grants to units of general local government to carry out such activities. Program income in the revolving fund must be disbursed from the fund before additional grant funds are drawn from the Treasury for payments to units of general local government that could be funded from the revolving fund.

(3) A revolving fund established by either the state or unit of general local government shall not be directly funded or capitalized with grant funds.

(c) Transfer of program income. Notwithstanding other provisions of this notice, the state may transfer program income before closeout of the grant that generated the program income to its own annual CDBG program or to any annual CDBG-funded activities administered by a unit of general local government or Indian tribe within the state.

(d) Program income on hand at the state or its subrecipients at the time of grant closeout by HUD and program income received by the state after such grant closeout shall be program income to the most recent annual CDBG program grant of the state.

2. Housing-related eligibility waivers. 42 U.S.C. 5305(a) is waived to the extent necessary to allow homeownership assistance for households with up to 120 percent of area median income and downpayment assistance for up to 100 percent of the downpayment (42 U.S.C. 5305(a)(24)(D)) and to allow new housing construction.

3. Compensation for loss of housing. 42 U.S.C. 5305(a) is waived to the extent necessary to allow compensation for unreimbursed loss of housing caused by the disaster. The grantee must undertake any compensation activity in accordance with the state's approved action plan and published program design.

4. Planning requirements. For CDBG disaster-recovery-assisted general planning activities that will guide recovery in accordance with the 2006 Act, the state CDBG program rules at 24 CFR 570.483(b)(5) and (c)(3) are waived and the presumption at 24 CFR 570.208(d)(4) applies.

5. Waiver and modification of the anti-pirating clause to permit assistance to help a business return. 42 U.S.C. 5305(h) and 24 CFR 570.482(h) are hereby waived only to allow the grantee to provide assistance under this grant to any business that was operating in the covered disaster area before the incident date of Hurricane Katrina and has since moved, in whole or in part, from the affected area to another state or to a labor market area within the same state to continue business.

6. Waiver of one-for-one replacement of units damaged by disaster. 42 U.S.C. 5304(d)(2)(A)(i)–(ii) and 42 U.S.C. 5304(d)(2)(A)(iii)–(iv) are waived to remove the one-for-one replacement requirements for occupied and vacant, occupiable lower-income dwelling units that may be demolished or converted to a use other than for housing; and to remove the relocation benefits requirements contained at 42 U.S.C. 5304(d) to the extent they differ from those of the Uniform Relocation Act. Also, 24 CFR 42.375 is waived to remove the requirements implementing the above-mentioned statutory requirements regarding replacement of housing and 24 CFR 42.350, to the extent that these regulations differ from the regulations contained in 49 CFR part 24. These requirements are waived provided the grantee assures HUD it will use all resources at its disposal to ensure no displaced homeowner will be denied access to decent, safe, and sanitary suitable replacement housing because he or she has not received sufficient financial assistance.

7. Overall benefit. 42 U.S.C. 5301(c) and 5304(b)(3), and 24 CFR 570.484 and 24 CFR 91.325(b)(4)(ii), with respect to the overall benefit requirement, were waived June 14 and October 24, 2006; and March 6 and August 24, 2007, for the CDBG disaster recovery grant covered by this notice, to the extent necessary to permit Mississippi to carry out activities specified in each notice provided that the state must give reasonable priority for the balance of its funds to activities that will primarily benefit persons of low and moderate income.

a. After the required reconsideration, HUD is retaining waivers granted under 71 FR 34460 paragraph 7, and 71 FR 62374 paragraph 4, to the extent necessary to allow the retention of the overall benefit waiver for the ratepayer mitigation and windpool activities.

b. After the required reconsideration, the Department no longer finds compelling need for, and is therefore rescinding, the waivers granted under 71 FR 62374 paragraph 4, to the extent that the waiver originally was granted for the Regional Infrastructure Program—Master Plan and Emergency Infrastructure; 72 FR 10021 paragraph 5, to the extent that it covers the Economic Development and Community Revitalization program; and 72 FR 48811 paragraph 2, to the extent that it covers the Regional Infrastructure Program. HUD continues to expect the grantee to maintain low- and moderate-income benefit documentation for each activity providing such benefit.

8. Waiver of requirement for timely distribution of funds. 24 CFR 570.494 regarding timely distribution of funds is waived.

9. Note on the eligibility of providing funds to Enterprise and Local Initiatives Support Corporation (LISC) for certain purposes. The appropriations statute provides that the states of Louisiana and Mississippi may each use up to $20,000,000 (with up to $400,000 each for technical assistance) from funds made available under this heading for LISC and the Enterprise Foundation for activities authorized by section 4 of the HUD Demonstration Act of 1993 (Pub. L. 103–120, 42 U.S.C. 9816 note), as in effect immediately before June 12, 1997, and for activities authorized under section 11 of the Housing Opportunity Program Extension Act of 1996 (Pub. L. 104–120, 42 U.S.C. 12805 note),

including demolition, site clearance and remediation, and program administration.

10. Non-Federal Cost Sharing of Army Corps of Engineers Projects. Public Law 105–276, Title II, Oct. 21, 1998, 112 Stat. 2478, provided in part that: ''For any fiscal year, of the amounts made available as emergency funds under the heading 'Community Development Block Grants Fund' and notwithstanding any other provision of law, not more than $250,000 may be used for the non-Federal cost-share of any project funded by the Secretary of the Army through the Corps of Engineers.''

Finding of No Significant Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the finding by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number).

Dated: November 24, 2008.

Roy A. Bernardi,

Deputy Secretary.

[FR Doc. E8–29426 Filed 12–11–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5217–N–03]

Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2008

AGENCY: Office of the General Counsel, HUD.

ACTION: Notice.

SUMMARY: Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly **Federal Register** notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous **Federal Register** notice. The purpose of this notice is to comply with the requirements of section 106 of the HUD Reform Act. This notice contains a list of regulatory waivers granted by HUD during the period beginning on July 1, 2008, and ending on September 30, 2008.

FOR FURTHER INFORMATION CONTACT: For general information about this notice, contact Aaron Santa Anna, Assistant General Counsel for Regulations, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500, telephone number 202–708–3055 (this is not a toll-free number). Persons with hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

For information concerning a particular waiver that was granted and for which public notice is provided in this document, contact the person whose name and address follow the description of the waiver granted in the accompanying list of waivers that have been granted in the third quarter of calendar year 2008.

SUPPLEMENTARY INFORMATION: Section 106 of the HUD Reform Act added a new section 7(q) to the Department of Housing and Urban Development Act (42 U.S.C. 3535(q)), which provides that:

1. Any waiver of a regulation must be in writing and must specify the grounds for approving the waiver;

2. Authority to approve a waiver of a regulation may be delegated by the Secretary only to an individual of Assistant Secretary or equivalent rank, and the person to whom authority to waive is delegated must also have authority to issue the particular regulation to be waived;

3. Not less than quarterly, the Secretary must notify the public of all waivers of regulations that HUD has approved, by publishing a notice in the **Federal Register**. These notices (each covering the period since the most recent previous notification) shall:

a. Identify the project, activity, or undertaking involved;

b. Describe the nature of the provision waived and the designation of the provision;

c. Indicate the name and title of the person who granted the waiver request;

d. Describe briefly the grounds for approval of the request; and

e. State how additional information about a particular waiver may be obtained.

Section 106 of the HUD Reform Act also contains requirements applicable to waivers of HUD handbook provisions that are not relevant to the purpose of this notice.

This notice follows procedures provided in HUD's Statement of Policy on Waiver of Regulations and Directives issued on April 22, 1991 (56 FR 16337). In accordance with those procedures and with the requirements of section 106 of the HUD Reform Act, waivers of regulations are granted by the Assistant Secretary with jurisdiction over the regulations for which a waiver was requested. In those cases in which a General Deputy Assistant Secretary granted the waiver, the General Deputy Assistant Secretary was serving in the absence of the Assistant Secretary in accordance with the office's Order of Succession.

This notice covers waivers of regulations granted by HUD from July 1, 2008, through September 30, 2008. For ease of reference, the waivers granted by HUD are listed by HUD program office (for example, the Office of Community Planning and Development, the Office of Fair Housing and Equal Opportunity, the Office of Housing, and the Office of Public and Indian Housing, etc.). Within each program office grouping, the waivers are listed sequentially by the regulatory section of title 24 of the Code of Federal Regulations (CFR) that is being waived. For example, a waiver of a provision in 24 CFR part 58 would be listed before a waiver of a provision in 24 CFR part 570.

Where more than one regulatory provision is involved in the grant of a particular waiver request, the action is listed under the section number of the first regulatory requirement that appears in 24 CFR and that is being waived. For example, a waiver of both § 58.73 and § 58.74 would appear sequentially in the listing under § 58.73.

Waiver of regulations that involve the same initial regulatory citation are in time sequence beginning with the earliest-dated regulatory waiver.

Should HUD receive additional information about waivers granted during the period covered by this report (the third quarter of calendar year 2008) before the next report is published (the fourth quarter of calendar year 2008), HUD will include any additional waivers granted for the third quarter in the next report.

Accordingly, information about approved waiver requests pertaining to HUD regulations is provided in the Appendix that follows this notice.

Dated: December 3, 2008.

Michael C. Flynn,

Acting General Counsel.

Appendix

Listing of Waivers of Regulatory Requirements Granted by Offices of the Department of Housing and Urban Development July 1, 2008 Through September 30, 2008

Note to Reader: More information about the granting of these waivers, including a copy of the waiver request and approval, may be obtained by contacting the person whose name is listed as the contact person directly after each set of regulatory waivers granted.

The regulatory waivers granted appear in the following order:

I. Regulatory waivers granted by the Office of Community Planning and Development.

II. Regulatory waivers granted by the Office of Housing.

III. Regulatory waivers granted by the Office of Public and Indian Housing.

I. Regulatory Waivers Granted by the Office of Community Planning and Development

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 51.202(a).

Project/Activity: Mississippi Development Authority requested a wavier of the regulation 24 CFR part 51, subpart C, for the Small Rental Property Assistance Program and the Long Term Workforce Housing Program. These programs provide Community Development Block Grant disaster assistance for projects located in Hancock, Harrison, Jackson, and Pearl River counties in the Gulf Coast region in Mississippi.

Nature of Requirement: HUD's regulations in 24 CFR part 51, subpart C, specifically at § 51.202(a) do not allow approval of an application for assistance for a proposed project located at less than the acceptable separation distance from a hazard, as defined in § 51.201, unless appropriate mitigating measures, as defined in § 51.205 are implemented, or unless mitigating measures are already in place. The purpose of this regulation is to establish safety standards which can be used as a basis for calculating acceptable separation distance for HUD-assisted projects from specific, stationary, hazardous operations which store, handle, or process hazardous substances.

Granted By: Susan D. Peppler, Assistant Secretary for Community Planning and Development

Date Granted: August 27, 2008.

Reason Waived: Mississippi Development Authority advised HUD that of the 1,200 applicants for the Small Rental Property Assistance Program (SRAP), about 750 applications would require mitigation of one or more adjacent residential propane tanks because the HUD assisted project is located at less than the acceptable separation distance pursuant to HUD's regulations at 24 CFR part 51, subpart C. MDA estimated that there are approximately 10,357 above-ground storage tanks along the Gulf Coast. The majority of residential propane tanks were 250 gallons; however, there were instances where the residential propane tank was greater than 250 gallons. The acceptable separation distance (for blast overpressure) for a 250 gallon tank of propane is 135 feet.

Mitigation measures included constructing a barrier to surround the tank or building a structure on the HUD property site to shield the proposed project from the hazard. The residential propane tanks that impact the HUD assisted project are located off-site on adjacent properties. In the Mississippi Gulf Coast, generally the residential propane tanks are leased from the propane distributor and the tanks are aboveground (not buried). The average SRAP grant is $30,000. For these reasons, mitigating residential propane tanks on adjacent properties is not practical or economically feasible.

The National Fire Protection Association (NFPA), through its development of codes and standards, is an authoritative source on public safety regarding fire and other hazards. Its mission is to reduce the burdens of fire and hazards by providing consensus codes and standards, research, training and education. As an authoritative source on public safety, NFPA developed NFPA Code 58 that established codes and standards used by the propane industry and operators regarding storage and handling of liquefied petroleum gases (LPG). NFPA Code 58 is intended to provide the industry with a framework of operational information and standards that, if followed, will minimize the probability of risk and accidents. Most states, including Mississippi, have adopted and integrated the NFPA Code 58 into their state and local codes for LPG operations. A recent study by NFPA on natural gas and LP-gas home structure fires confirms that one of the reasons why LP-gas home structure fires have fallen 83% nationally is due to increased awareness from following NFPA Code 58 Section 2–2.1.4 specifically. It is the responsibility of the container's owner to follow NFPA Code 58 to see that proper maintenance and re-qualification is accomplished on liquid petroleum gas containers, in order to minimize the probability of accidents and risks to human populations and structures.

It is also the responsibility of the propane marketer to follow NFPA Code 58 and verify that a container is fit for service before filling it. NFPA Code 58 requires that containers be designed, fabricated, tested and marked (or stamped) in accordance with the Regulations of the U.S. Department of Transportation (DOT), the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code, ''Rules for the Construction of Unfired Pressure Vessels'', Section VIII, or the American Petroleum Institute (API)–ASME Code for Unfired Vessels for Petroleum Liquids and Gases applicable at the date of manufacture of the container.

The waiver was granted based on the following findings: the Small Rental Property Assistance Program and Long Term Workforce Housing Program will further the objective of providing much needed housing units in established residential communities affected by hurricane Katrina; there are significant economic and practical difficulties in mitigating the off-site residential propane tanks located on adjacent properties; the particular facts in Mississippi as described above suggest that any danger to HUD sites is minimal; and a site visit conducted by HUD staff verified the facts and examined a sample of the proposed sites also suggested any danger to HUD sites is minimal.

This waiver does not apply to proposed HUD-assisted propane containers of volume capacities higher than 250 gallons and applicants for HUD funding assistance for such projects are required to be in compliance with the requirements of 24 CFR part 51, subpart C. The waiver was granted for residential propane tanks of 250 gallons or less located off-site on adjacent properties, provided that these residential propane tanks are designed, fabricated, tested and marked (or stamped) in accordance with the regulations of the U.S. Department of Transportation (DOT), the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code, ''Rules for the Construction of Unfired Pressure Vessels,'' Section VIII, or the American Petroleum Institute (API)–ASME Code for Unfired Vessels for Petroleum Liquids and Gases applicable at the date of manufacture of the container. This waiver does not

apply to containers that are required to be removed from service because they have passed their useful life due to corrosion, mechanical damage, or lack of a nameplate.

Contact: Danielle Schopp, Office of Environment and Energy, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7250, Washington, DC 20410–7000, telephone number 202–402–4442.

• *Regulation:* 24 CFR 58.22(a)

Project/Activity: Catholic Community Services of Utah submitted an application for building rehabilitation, operating costs and supportive services for St. Mary's/Marillac House in Salt Lake City, Utah. The project provides 70 treatment beds, office and treatment spaces to accommodate clients and 47 staff members and site improvements, including outdoor playground areas. Catholic Community Services committed nonfederal funds by executing a construction contract, an action that limits the choice of reasonable alternatives, before receiving an approved Request for Release of Funds.

Nature of Requirement: HUD's regulation at 24 CFR 58.22(a) requires that an environmental review be performed and a request for release of funds be completed and certified prior to the commitment of non-HUD funds to a project using HUD funds.

Granted By: Susan D. Peppler, Assistant Secretary for Community Planning and Development.

Date Granted: August 1, 2008.

Reason Waived: The waiver was granted based on the following findings: the project furthered the objective of providing much needed housing for homeless individuals and families; no HUD funds were committed, and an environmental assessment and several site visits by HUD staff concluded that the granting of the waiver would not result in any adverse environmental impact.

Contact: Danielle Schopp, Office of Environment and Energy, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7250, Washington, DC 20410–7000, telephone number 202–402–4442.

• *Regulation:* 24 CFR 91.115(c)(2).

Project/Activity: The State of Iowa to waive 24 CFR 91.115(c)(2).

Nature of Requirement: The provisions of 24 CFR 91.115(c)(2) require that a minimum of 30 days be allowed for public comment following a substantial amendment to the Consolidated Plan.

Granted By: Susan D. Peppler, Assistant Secretary for Community Planning and Development.

Date Granted: August 22, 2008.

Reason Waived: A reduced public comment period allowed the State to implement the amendment to the 2008 Method of Distribution (MOD) and annual action plan expeditiously and enabled the State to provide assistance to affected units of general local governments for disaster recovery in a timely manner. The State's proposed amendment to reallocate recaptured funds or uncommitted funds for their current program year will provide the State with additional flexibility to address urgent needs in the transition period until supplemental funding becomes available.

Contact: Diane Lobasso, Director, State and Small Cities Division, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, Room 7184, 451 7th Street, SW., Washington, DC 20410–7000, telephone number 202–708–1322.

• *Regulation:* 24 CFR 91.115(i).

Project/Activity: The State of Iowa Community Development Block Grant Program.

Nature of Requirement: Section 91.115(i) of HUD's regulations in 24 CFR part 91 requires the State to follow its citizen participation plan.

Granted By: Susan D. Peppler, Assistant Secretary for Community Planning and Development.

Date Granted: August 28, 2008.

Reason Waived: This waiver, in conjunction with the waiver of 24 CFR 91.115(c)(2), allowed the State of Iowa to amend its action plan to reallocate recaptured funds or uncommitted funds for the current program year and provided the State with additional flexibility to address urgent needs in the transition period until supplemental funding becomes available.

Contact: Diane Lobasso, Director, State and Small Cities Division, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7184, Washington, DC 20410–7000, telephone number 202–402–2191.

• *Regulation:* 24 CFR 91.325(b)(4)(ii).

Project/Activity: The State of Iowa's Community Development Block Grant Program.

Nature of Requirement: Section 91.325(b)(4)(ii) of HUD's regulations in 24 CFR part 91 requires a certification that the State has complied with the criterion that the aggregate use of CDBG funds, including Section 108 guaranteed loans, during a period specified by the State, consisting of one, two, or three specific consecutive program years, shall principally benefit low and moderate income families in a manner that ensures that at least 70 percent of the amount is expended for activities that benefit such persons during the designated period.

Granted By: Susan D. Peppler, Assistant Secretary for Community Planning and Development.

Date Granted: August 28, 2008.

Reason Waived: This waiver allowed the State of Iowa to change its certification of compliance with this requirement retroactively, if the State so chooses, to a three-year period. This waiver also allowed the state to effectively ''front-load'' the overall 70% calculation which, in turn, allowed the state to use a higher percentage of funds for activities that meet the urgent need or slum/blight national objectives in year one. Nonetheless, HUD encouraged the State to maximize the amount of funding for activities that benefit low- and moderate-income persons.

Contact: Diane Lobasso, Director, State and Small Cities Division, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7184, Washington, DC 20410–7000, telephone number 202–402–2191.

• *Regulations:* 24 CFR 92.300(a)(1).

Project/Activity: The State of Washington requested a waiver of the HOME final rule to allow it to provide HOME CHDO (community housing development organization) set-aside funds to a limited liability company (LLC) that has a qualified CHDO as its sole managing partner in order to purchase and renovate affordable rental housing in downtown Spokane.

Nature of Requirement: The HOME regulations at 24 CFR 92.300(a)(1) permits a participating jurisdiction to award CHDO set-aside funds to limited partnerships that include a qualified CHDO as the managing partner. LLCs are not an allowable form of CHDO project ownership in the HOME Regulation.

Granted by: Nelson R. Bregon, General Deputy Assistant Secretary for Community Planning and Development.

Date Granted: September 2, 2008.

Reasons Waived: Spokane Housing Ventures (SHV) is a local nonprofit organization that is designated as a CHDO by the City. The waiver was granted so that SHV could purchase and renovate the Bel Franklin Apartments in downtown Spokane; the financing is to include HOME CHDO set-aside funds and Low-Income Housing Tax Credits

(LIHTC). To facilitate the LIHTC financing, SHV formed the Bel Franklin Apartments LLC (LLC); SHV is the sole member of the LLC with 100 percent ownership of the project. The City wished to provide HOME CHDO set-aside funds to the LLC. LLCs are not an allowable form of CHDO project ownership in the HOME regulation. The PJ, the CHDO and the LLC agreed that SHV is to be the sole managing member of the Bel Franklin Apartments LLC when the tax credit investors are brought into the transaction and will have effective project control over its operation. Ownership is to revert to SHV at the end of the 15-year tax compliance period. SHV also is to serve as the project developer and property manager. Both SHV and the LLC are bound by the provisions of the HOME regulations and the partnership operating agreement.

Contact: Virginia Sardone, Deputy Director, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7154, Washington, DC 20410–7000, telephone number 202–708–2470.

• *Regulation:* 24 CFR 570.208(a)(3).

Project/Activity: Orange County, California.

Nature of Requirement: Section 570.208(a)(3) of HUD's regulations in 24 CFR part 570 provide that in order to meet the criteria for the national objective of low- and moderate-income housing activities, two or more rental buildings, under common ownership and management and on the same or contiguous properties, may be treated as a single structure.

Granted By: Susan D. Peppler, Assistant Secretary for Community Planning and Development.

Date Granted: September 22, 2008.

Reason Waived: The Aliso Meadows Condominium complex is comprised of 248 units in 62 buildings. These units are occupied by a combination of owners and renters. The regulation only addresses rental buildings. The waiver was granted because this complex is primarily occupied by low- and moderate-income households and the complex is one of the few affordable housing developments in the city of Laguna Hills, a participant in the Orange County CDBG program. Also, without CDBG assistance this complex would become a blighting influence in the community.

Contact: Mr. Steve Johnson, Director, Entitlement Communities Division, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7282, Washington, DC 20410–7000, telephone number 202–402–4548.

• *Regulation:* 24 CFR 570.308(a).

Project/Activity: The city of Hammonton, NJ, elected to accept its status as an entitlement community and desired a joint agreement with Atlantic County, NJ to plan and implement a joint housing and community development program.

Nature of Requirement: Communities that have been designated as a metropolitan city by OMB may accept or decline their status. A city or town such as Hammonton that accepts its status may enter into a joint agreement with an urban county, but it may only do so when the county is seeking a three-year requalification as an urban county. Atlantic County is currently entering into its third year of qualification for FYs 2007–2009 and will requalify as an urban county in 2009 for FYs 2010–2012.

Granted By: Susan D. Peppler, Assistant Secretary for Community Planning and Development.

Date Granted: September 25, 2008.

Reason Waived: Hammonton is only allowed by regulation to spend $30,000 on administrative expenses, which is insufficient to begin and administer a separate CDBG program. In addition, Hammonton does not have the available resources to prepare the CDBG application and reporting documentation, such as the citizen participation plan, Consolidated Plan/Action Plan, fair housing analysis, and Consolidated Annual Performance and Evaluation Report. Finally, Hammonton staff does not have the skills to conduct transaction in HUD's Integrated Disbursement and Information System, which is necessary for successful CDBG program administration. Atlantic County is willing to provide Hammonton with administrative services and fully supports Hammonton's request for a waiver of 24 CFR 570.308(a).

Contact: Gloria Coates, Entitlement Communities Division, Office of Block Grant Assistance, Office of Community and Planning Development, 451 7th Street, SW., Room 7282, Washington, DC 20410–7000, telephone number 202–708–1577.

• *Regulation:* 24 CFR 570.483(b)(4)(iv)(A)(1).

Project/Activity: The State of Iowa's Community Development Block Grant Program.

Nature of Requirement: Section 570.483(b)(4)(iv)(A)(1) of HUD's regulations in 24 CFR part 570 requires that for the purpose of determining whether a job is held by or made available to a low or moderate income person, the person may be presumed to be a low or moderate income person if he/she resides within a census tract (or block numbering area) or meets other criteria as mentioned in the regulation.

Granted By: Susan D. Peppler, Assistant Secretary for Community and Planning Development.

Date Granted: August 28, 2008.

Reason Waived: This waiver was granted and modified the criteria for locations in which a person may be presumed to be low or moderate income. The impact of the disaster on the State's economy (and on individual businesses) was so severe that, absent substantial evidence to the contrary, the State was reasonable in presuming that jobs would actually be lost from businesses that have been put out of operation or whose continued operation is endangered. The Housing and Community Development Act describes certain situations in which jobs may be presumed to principally benefit low- and moderate-income persons. The degree of socioeconomic and physical distress that exists in many Iowa communities was functionally equivalent to the degree of distress recognized by the statutory criteria allowing such presumptions.

Contact: Diane Lobasso, Director, State and Small Cities Division, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7184, Washington, DC 20410–7000, telephone number 202–402–2191.

• *Regulation:* 24 CFR 570.483(b)(4)(v).

Project/Activity: The State of Iowa's Community Development Block Grant Program.

Nature of Requirement: Section 570.483(b)(4)(v) of HUD's regulations provides that a census tract (or block numbering area) qualifies for certain presumptions under paragraphs (b)(4)(iv)(A)(1) and (B) of the regulations if it is either part of a Federally-designated Empowerment Zone or Enterprise Community or meets other criteria.

Granted By: Susan D. Peppler, Assistant Secretary for Community Planning and Development.

Date Granted: August 28, 2008.

Reason Waived: This waiver was granted and modified the criteria for locations in which a person may be presumed to be low or moderate income. The impact of the disaster on the State's economy (and on individual

businesses) was so severe that, absent substantial evidence to the contrary, the State was reasonable in presuming that jobs would actually be lost from businesses that have been put out of operation or whose continued operation is endangered. The Housing and Community Development Act describes certain situations in which jobs may be presumed to principally benefit low- and moderate-income persons. The degree of socioeconomic and physical distress that exists in many Iowa communities was functionally equivalent to the degree of distress recognized by the statutory criteria allowing such presumptions.

Contact: Diane Lobasso, Director, State and Small Cities Division, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7184, Washington, DC 20410–7000, telephone number 202–402–2191.

• *Regulation:* 24 CFR 570.484.

Project/Activity: The State of Iowa's Community Development Block Grant Program.

Nature of Requirement: Section 570.484 of HUD's regulations requires the State to certify that, in the aggregate, not less than 70 percent of CDBG funds received by the State during a period specified by the State, not to exceed three years, will be used for activities that benefit persons of low and moderate income.

Granted By: Susan D. Peppler, Assistant Secretary for Community Planning and Development.

Date Granted: August 28, 2008.

Reason Waived: This waiver allowed the State of Iowa to change its certification of compliance with this requirement, retroactively if the State so chooses, to a three-year period. This waiver also allowed the State to effectively ''front-load'' the overall 70% calculation which allowed the state to use a higher percentage of funds for activities that meet the urgent need for slum/blight national objectives in year one. Nonetheless, HUD encouraged the State to maximize the amount of funding for activities that benefit low- and moderate-income persons.

Contact: Diane Lobasso, Director, State and Small Cities Division, Office of Block Grant Assistance, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7184, Washington, DC 20410–7000, telephone number 202–402–2191.

II. Regulatory Waivers Granted by the Office of Housing-Federal Housing Administration (FHA)

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 203.43f.

Project/Activity: State of Louisiana.

Nature of Requirement: Section 203.43f of HUD's regulations in 24 CFR part 203 authorizes the insuring of manufactured homes built pursuant to the National Manufactured Home Construction and Safety Standards and meeting certain other requirements set forth therein. Among the requirements in Section 203.43f(c)(i) manufactured homes which have not been permanently sited for more than one year prior to the date of application for mortgage insurance must have the finished grade beneath the manufactured home at or above the 100 year return frequency flood elevation. Section 203.43f(d)(ii) provides that manufactured homes which have been permanently erected on a site for more than one year prior to the date of application for mortgage insurance must have the finished grade level beneath the manufactured home at or above the 100 year return frequency flood elevation.

Granted By: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 1, 2008.

Reason Waived: The waiver was granted to permit the placement of FHA mortgage insurance on manufactured homes installed in the Federal Emergency Management Agency-designated flood plains in accordance with the National Flood Insurance Program installation requirements for manufactured homes found at 44 CFR 60.3(c)(6) or 44 CFR 60.3(c)(12). The waiver of the regulations required that the lowest floor of the manufactured home to be at or above the 100 year return frequency flood elevation for the purpose of not violating any statutory requirements. Accordingly, the waiver permits the placement of FHA mortgage insurance on manufactured homes sited in the State of Louisiana, in flood designated areas with the lowest floor at or above the 100 year return frequency, and otherwise conforming with HUD requirements for Title II, Section 203(b) financing of manufactured homes.

Contact: Joanne B. Kuczma, Director, Home Mortgage Insurance Division, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 9266, Washington, DC 20410–8000, telephone number 202–708–2121.

• *Regulation:* 24 CFR 219.220(b).

Project/Activity: Pinelake Village Cooperative, Ann Arbor, Michigan—FHA Project Number 044–44290. The property is a 129-unit cooperative which requires renovations to continue as a well-maintained source of affordable housing. Refinancing will provide sufficient funds for needed capital improvements at the property.

Nature of Requirement: Section 219.220(b) of HUD's regulations in 24 CFR part 219 governs the repayment of operating assistance provided under the Flexible Subsidy Program for Troubled Projects prior to May 1, 1996 states: ''Assistance that has been paid to a project owner under this subpart must be repaid at the earlier of the expiration of the term of the mortgage, termination of these actions would typically terminate FHA involvement with the property, and the Flexible Subsidy loan would be repaid, in whole, at that time.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 21, 2008.

Reason Waived: This waiver was granted to preserve this much needed affordable housing. Pinelake Village is a 129-unit Section 236 property with a flexible subsidy loan. Eighty one units receive Section 8 project based rental assistance. Providing this waiver allowed the owner to prepay the existing mortgage, obtain financing to perform substantial rehabilitation of the property and allow the amortization of the flexible subsidy loan with the new mortgage.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 219.220(b).

Project/Activity: St. Patrick's Terrace, Oakland, California—FHA Project Number 121–44816. The owner/managing agent is requesting a deferral of the repayment of the Flexible Subsidy loan. Major rehabilitation is needed at the project.

Nature of Requirement: Section 219.220(b) of HUD's regulations in 24 CFR part 219 governs the repayment of operating assistance provided under the Flexible Subsidy Program for Troubled Projects prior to May 1, 1996 states: ''Assistance that has been paid to a project owner under this subpart must be repaid at the earlier of the expiration of the term of the mortgage, termination

of these actions would typically terminate FHA involvement with the property, and the Flexible Subsidy loan would be repaid, in whole, at that time.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 27, 2008.

Reason Waived: The property owner was granted the waiver of the regulations which required repayment of the operating assistance loans in order to defer repayment of the Flexible Subsidy loan and preserve the long-term affordability of the project. This waiver allowed the property to undergo major rehabilitation. The owner is to refinance the insured mortgage with a non-insured lender, and amortize the flexible subsidy debt over the new mortgage term. A new Use Agreement is to be recorded in first position ahead of any new financing and rents will be affordable for 55 years.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 219.220(b).

Project/Activity: St. Andrew's Manor, Oakland, California—FHA Project Number 121–44818. The owner/managing agent is requesting a deferral of the repayment of the Flexible Subsidy loan. Major rehabilitation is needed at the project.

Nature of Requirement: Section 219.220(b) of HUD's regulations in 24 CFR part 219 governs the repayment of operating assistance provided under the Flexible Subsidy Program for Troubled Projects prior to May 1, 1996 states: ''Assistance that has been paid to a project owner under this subpart must be repaid at the earlier of the expiration of the term of the mortgage, termination of these actions would typically terminate FHA involvement with the property, and the Flexible Subsidy loan would be repaid, in whole, at that time.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 28, 2008.

Reason Waived: The property owner was granted the waiver of the regulations which required repayment of the operating assistance loans in order to defer repayment of the Flexible Subsidy loan and preserve the long-term affordability of the project. This waiver allowed the property to undergo major rehabilitation. The owner proposes to refinance the insured mortgage with a non-insured lender, and amortize the flexible subsidy debt over the new mortgage term. A new Use Agreement is to be recorded in first position ahead of any new financing and rents will be affordable for 55 years.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 266.638(d).

Project/Activity: Villa St. Maurice, New Orleans, LA—FHA Project Number 064–98016, Villa Additions, New Orleans, LA—FHA Project Number 064–98017, St. Bernard I—Meraux, LA—FHA Project Number 064–98012, St. Bernard II—Meraux, LA—FHA Project Number 064–98013, St. Martin Manor—FHA Project Number 064–98014, and St. Martin House—FHA Project Number 064–98015. The projects were destroyed by Hurricane Katrina in August 2005. HUD agreed to allow an 18-month suspension of debenture interest accrual.

Nature of Requirement: Under HUD's regulation at 24 CFR 266.638(d), the housing finance agency (HFA) debenture shall bear interest at HUD's published debenture at the earlier of initial endorsement or final endorsement. Interest shall be due and payable annually on the anniversary date of the initial claim payment and on the date of redemption when redeemed or canceled before an anniversary date. Interest shall be computed on the full face amount of the HFA debenture through the term of the HFA debenture.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 19, 2008.

Reason Waived: This waiver allowed full refinancing for the reconstruction of the projects. The owner's history of successfully settling Risk Sharing claims on 5 properties resulted in the full redemption of the Louisiana HFA debentures. This included currently accrued interest and will assure concrete plans are in place to refinance the remaining 6 properties as well.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–7000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 290.30(a).

Project/Activity: Kimberly Parkway (a/k/a Marsh Run) Columbus, Ohio—FHA Project Number 043–35369. The insured loan on this property went into default and was assigned to HUD in August 2007. Waiver of this regulation would allow the Columbus Metropolitan Housing Authority to purchase this defaulted unsubsidized mortgage loan on a noncompetitive basis.

Nature of Requirement: HUD's regulations governing the sale of HUD-held mortgages are set forth in 24 CFR part 290, subpart B. Section 290.30(a) of those regulations state that ''[e]xcept as otherwise provided in section 290.31(a)(2), HUD will sell HUD-held multifamily mortgages on a competitive basis.'' Section 290.31(a)(2) permits ''negotiated'' sales to state or local governments for mortgage loans that are current and secured by subsidized projects, provided such loans are sold with FHA insurance.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 18, 2008.

Reason Waived: This regulation was waived in order to allow the sale of Kimberly Parkway and to prevent foreclosure of the property. Foreclosure would have terminated the free lunch program, child care for working parents, job training and search services and other services at the project, causing a hardship for the tenants who live in this economically distressed area of Columbus. Seventy percent of residents are very low-income. All residents receive rental assistance through Section 8 housing vouchers. The assistance will continue after the mortgage is sold to the Columbus Metropolitan Housing Authority.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–7000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 290.30(a).

Project/Activity: Bethany Homes, New Orleans, Louisiana—FHA Project Number 064–43051. The project is unsubsidized and in default. Since the Department seeks to sell the note, a waiver of this regulation was requested by the Fort Worth Multifamily Hub.

Nature of Requirement: HUD's regulations governing the sale of HUD-Held mortgages are set forth in 24 CFR part 290, subpart B. Section 290.30(a) of those regulations state that ''[e]xcept as otherwise provided in section 290.31(a)(2), HUD will sell HUD-Held multifamily mortgages on a competitive basis.'' Section 290.31(a)(2) permits ''negotiated'' sales to state or local governments for mortgage loans that are

current and secured by subsidized projects, provided such loans are sold with FHA insurance.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 18, 2008.

Reason Waived: This regulation was waived in order to allow the noncompetitive sale of Bethany Homes and to prevent foreclosure of the property. Waiver of this requirement would produce budget savings by generating proceeds to the U.S. Treasury and reduce the number of loans in the HUD-held mortgage inventory.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 290.30(a).

Project/Activity: Malta Square, New Orleans, Louisiana—FHA Project Number 064–43079. This property is an independent care and assisted living facility which has been vacant since September 2005 when it was flooded during Hurricane Katrina.

Nature of Requirement: HUD's regulations governing the sale of HUD-Held mortgages are set forth in 24 CFR part 290, subpart B. Section 290.30(a) of those regulations state that ''[e]xcept as otherwise provided in section 290.31(a)(2), HUD will sell HUD-Held multifamily mortgages on a competitive basis.'' Section 290.31(a)(2) permits ''negotiated'' sales to state or local governments for mortgage loans that are current and secured by subsidized projects, provided such loans are sold with FHA insurance.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 18, 2008.

Reason Waived: This regulation was waived in order to allow the noncompetitive sale of Malta Square and prevent foreclosure of the property. Waiver of this requirement would produce budget savings by generating proceeds to the U.S. Treasury and reduce the number of loans in the HUD-held mortgage inventory.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 5.655(b)(5).

Project/Activity: Tumbleweed Apartments, Lyons, Kansas—FHA Project Number 102–35164V and W. This 16-unit project is experiencing difficulty in leasing units to qualified families of two or more individuals.

Nature of Requirement: Section 5.655(b)(5) of HUD's regulations in 24 CFR part 5 applies to Section 8 project based assistance program requirements for selection for occupancy of a project or unit. Housing assistance limitation for single persons—a single person who is not an elderly or displaced person, a person with disabilities, or the remaining member of a resident family may not be provided a housing unit with two or more bedrooms.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 22, 2008.

Reason Waived: This waiver was granted because of the project's difficulty in locating potential qualified occupants. Management had exhausted all reasonable marketing efforts, including advertising locally continually in the Lyons Daily News, as well as distributing flyers locally. This waiver allowed admission of single adults who are otherwise eligible and qualified for occupancy in these two-bedroom units. The owner will be able to maintain full occupancy and the project will not fail.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Lakeview Properties, Baltimore, MD, Project Number: 052–HD071/MD06–Q051–005.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to initial closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 10, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Carlsbad Senior Community, Carlsbad, NM, Project Number: 116–EE040/NM16–S061–003.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advcance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 10, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and GrantAdministration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Deneki House, Wasilla, AK, Project Number: 176–HD028/AK06–Q061–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advcance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 10, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Princeton Manor, Florida City, FL, Project Number: 066–EE103/FL29–S041–006.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advcance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 18, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant

Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Golden Age Apartments, Pine Bluff, AR, Project Number: 082–EE177/AR37–S061–004.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advcance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 28, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Penelope 35–II Apartments, Bloomington, MN, Project Number: 092–EE127/MN46–S071–003.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 30, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Cornerstone Homes, New Orleans, LA, Project Number: 064–EE167/LA48–S041–005.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 5, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Waynedale II Apartment, Fort Wayne, IN, Project Number: 073–HD084/IN36–Q071–003.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 6, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Hawkins House Apartments, Lake Stevens, WA, Project Number: 127–EE059/WA19–S061–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 7, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Bayou LaBatre VOA Elderly Housing, Incorporated, Bayou LaBatre, AL, Project Number: 062–EE082/AL09–S061–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 8, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Vista Gallinas Apartments, Las Vegas, NM, Project Number: 116–HD030/NM16–Q061–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 13, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: TELACU–El Paseo, Riverside, CA, Project Number: 143–EE064/CA43–Q061–003.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 14, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).
Project/Activity: Community Homes of Bismarck, Bismarck, ND, Project Number: 094–HD015/ND99–Q061–001.
Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.
Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: August 15, 2008.
Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).
Project/Activity: Rockland Street Elderly Housing, Roxbury, MA, Project Number: 023–EE206/MA06–S061–005.
Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.
Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: August 16, 2008.
Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).
Project/Activity: Ken-Crest PA 2006, Philadelphia, PA, Project Number: 034–HD093/PA26–Q061–001.
Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.
Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: August 18, 2008.
Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).
Project/Activity: Oasis de Amor, Patillas, PR, Project Number: 056–HD032/RQ46–Q061–002.
Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.
Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: August 25, 2008.
Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).
Project/Activity: La Casa de Dona Here, Mayaguez, PR, Project Number: 056–HD028/RQ46–Q051–003.
Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.
Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: August 25, 2008.
Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).
Project/Activity: Community Options Eleanor, Howell Twp, NJ, Project Number: 031–HD148/NJ39–Q061–001.
Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.
Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: August 26, 2008.
Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).
Project/Activity: Golden Plains II, Garden City, KS, Project Number: 102–HD039/KS16–Q071–003.
Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.
Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: September 4, 2008.
Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).
Project/Activity: SHDC No. 12, Kailua Kona, HI, Project Number: 140–HD030/HI10–Q041–001.
Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.
Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: September 5, 2008.
Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).
Project/Activity: Lovejoy Road, North Andover, MA, Project Number: 023–HD220/MA06–Q051–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 8, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Valley Affordable, Warwick, RI, Project Number: 016–EE059/RI43–S051–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 9, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Leonia Retirement Housing II, Leonia, NJ, Project Number: 031–EE069/NJ39–S061–003.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 9, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: ASI-Worthington, Worthington, MN, Project Number: 092–EE125/MN46–S071–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 9, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Gracemont House, Baytown, TX, Project Number: 114–HD038/TX24–Q071–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 10, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: South Central Industries, Shawnee, OK, Project Number: 117–HD038/OK56–Q071–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 10, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Toby House VII, Phoenix, AZ, Project Number: 123–HD039/AZ20–Q051–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 12, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Henderson Supportive Housing, Henderson, NV, Project Number: 125–HD074/NV25–Q061–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 12, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Silvercrest Senior Housing, Briarwood, NY, Project Number: 012–EE349/NY36–S061–005.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 23, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Vista Gallinas, Las Vegas, NM, Project Number: 116–HD030/NM16–Q061–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 23, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: CSPNJ Homes 2006, Pennsville, NJ, Project Number: 035–HD064/NJ39–Q061–005.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 23, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Margaret B. Mack Apartments, New Haven, CT, Project Number: 017–HD038/CT26–Q061–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 24, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: St. Mary's Senior Residence, Dumont, NJ, Project Number: 031–EE067/NY39–S061–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 25, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Middle Street Residence, Amesbury, MA, Project Number: 023–HD199/MA06–Q031–007.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 1, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources. The sponsor/owner required additional time to find a suitable site.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165

Project/Activity: Ottawa Oak Harbor, Oak Harbor, OH, Project Number: 042–EE194/OH12–S051–008.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 8, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources. The sponsor/owner required additional time to achieve an initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Berkshire County ARC-Lanesborough, Lanesborough, MA, Project Number: 023–HD224/MA06–Q051–005.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 13, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources. The sponsor/owner required additional time to achieve an initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Transitional Services for New York, New York, NY, Project Number: 012–EE128/NY36–Q051–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 15, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources. The sponsor/owner required additional time to achieve an initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Roncalli Apartments, Augusta, ME, Project Number: 024–EE085/ME36–S041–003.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 15, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources. The sponsor/owner required additional time to achieve an initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Shillman House, Framingham, MA, Project Number: 023–EE187/MA06–S051–004.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 19, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources. Additional time was needed for the firm commitment application to be processed and for the project to achieve an initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: TRC Senior Village I, Chicago, IL, Project Number: 071–EE212/IL06–S051–006.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 25, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources. Additional time was needed for the firm commitment application to be processed and for the project to achieve an initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Independence Manor III, Braintree, MA, Project Number: 023–EE169/MA06–S031–004.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of the approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 10, 2008.

Reason Waived: The project is economically designed and comparable in cost to similar projects in the area, and the sponsor/owner exhausted all efforts to obtain additional funding from other sources. The sponsor/owner required additional time to resolve site issues.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.130(b).

Project/Activity: Roncalli Apartments, Augusta, ME, Project Number: 024–EE085/ME36–S041–003.

Nature of Requirement: Section 891.130(a) prohibits an identity of interest between the Sponsor or Owner with development team members or between development team members until two years after final closing.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 17, 2008.

Reason Waived: All three entities have five common board members and fall under the umbrella of the Catholic

Church and meet the HUD requirements.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: TBD, Pittsfield, MA, Project Number: 023–HD214/MA06–Q041–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 5, 2008.

Reason Waived: Additional time was needed for the firm commitment application to be processed and for the project to achieve an initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Claremont House, Mt. Vernon, NY, Project Number: 012–HD135/NY36–Q011–007.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 5, 2008.

Reason Waived: The sponsor/owner needed additional time to resolve issues with the City of Mt. Vernon, NY regarding its tax exemption status.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Lovejoy Road, North Andover, MA, Project Number: 023–HD220/MA06–Q051–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 5, 2008.

Reason Waived: The sponsor/owner needed additional time for an initial closing to take place.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Mulberry Manor, Wayne, West Virginia, Project Number: 045–HD041/WV15–Q051–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 7, 2008.

Reason Waived: Additional time was needed for the project to be initially closed.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Easter Seals-Goodwill, Sheridan, WY, Project Number: 109–HD014/WY99–Q051–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 13, 2008.

Reason Waived: The sponsor/owner needed additional time to resolve site issues and for the project to be initially closed.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Denver VOA Lawrence Street, Denver, CO, Project Number: 101–HD040/CO99–Q051–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 19, 2008.

Reason Waived: Additional time was needed for the project to reach initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Morning Star Housing, Moline, IL, Project Number: 071–HD156/IL06–Q061–007.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 4, 2008.

Reason Waived: Additional time was needed to process the firm commitment and for the project to reach initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Morning Star Senior Residences, Moline, IL, Project Number: 071–EE216/IL06–S051–011.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 9, 2008.

Reason Waived: The owner/sponsor needed additional time to resubmit

exhibits for the site change to be approved, for the firm commitment to be processed and for the project to reach initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Center of Hope, Southbridge, MA, Project Number: 023–HD221/MA06–Q051–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 18, 2008.

Reason Waived: The sponsor/owner needed additional time to reach an agreement with the state architect concerning the resigning of the configuration of the project.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Laurel Place, West Hollywood, CA, Project Number: 122–EE187/CA16–S031–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 23, 2008.

Reason Waived: The sponsor/owner needed additional time to resolve opposition and litigation issues and for the project to achieve an initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Academy Place, Gowanda, NY, Project Number: 014–EE253/NY06–Q051–009.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 30, 2008.

Reason Waived: Additional time was needed for the firm commitment to be issued and for the project to be initially closed.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Red Lake Supportive Housing, Red Lake, MN, Project Number: 092–HD069/MN46–Q061–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 30, 2008.

Reason Waived: The sponsor/owner needed additional time to complete submission of the firm application and for the project to be initially closed.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.165 and 24 CFR 891.805 and 891.830(b) and 891.830(c)(4).

Project/Activity: Montclair Senior Apartments, Montclair, CA, Project Number: 143–EE062/CA43–S061–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation of the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis. Section 891.805 requires that the general partner in the for-profit limitied partnership be a Private Nonprofit Organization. Section 891.830(b) requires that capital advance funds be drawn down only in an approved ratio to other funds in accordance with a drawndown schedule approved by HUD. Section 891.830(c)(4) prohibits the capital advance funds from paying off bridge or construction financing, or repaying or collateralizing bonds.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 8, 2008.

Reason Waived: Additional time was needed for the firm commitment to be issued and for the project to be initially/finally closed. The proposed sole nonprofit general patner of the for-profit mixed finance owner meets the statutoy definition. Also, the other funding sources needed to be disbursed faster than a pro rata disbursement would allow, and the capital advance funds will only be used to pay off the portion of the construction financing that strictly relate to capital advance eligible costs.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.205.

Project/Activity: Cornerstone Homes, New Orleans, LA, Project Number: 064–EE167/LA48–S041–005.

Nature of Requirement: Section 891.205 requires Section 202 project owners to have tax exemption status under Section 501(c)(3) or (c)(4) of the Internal Revenue Code.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 8, 2008.

Reason Waived: The required tax-exemption ruling from IRS was to be issued, but not in time for the scheduled initial closing of the project.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.205.

Project/Activity: Silvercrest Senior Housing, Briarwood, NY, Project Number: 012–EE349/NY36–S061–005.

Nature of Requirement: Section 891.205 requires Section 202 project owners to have tax exemption status under Section 501(c)(3) or (c)(4) of the Internal Revenue Code.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 25, 2008.

Reason Waived: The required tax-exemption ruling from IRS was to be

issued, but not in time for the scheduled initial closing of the project.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–708–3000.

• *Regulation:* 24 CFR 891.305.

Project/Activity: Community Options Eleanor, Howell Twp, NJ, Project Number: 031–HD148/NJ39–Q061–001.

Nature of Requirement: Section 891.305 requires Section 811 project owners to have tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.

Granted by: Brian D. Montgomergy, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 9, 2008.

Reason Waived: The required tax-exemption ruling from IRS was to be issued, but not in time for the scheduled initial closing of the project.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–798–3000.

• *Regulation:* 24 CFR 891.410(c).

Project/Activity: Omaha Care Senior Living, Macy, Nebraska—FHA Project Number 103-EE030. The property has been unable to achieve sustaining occupancy. The project owner is requesting permission to admit over-income applicants and lower the age limit to age 55.

Nature of Requirement: Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.205 defines elderly as ''a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.''

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 7, 2008.

Reason Waived: This regulatory waiver allowed the owner to stabilize the project's current financial status and prevent foreclosure. Waiver of this regulation permitted admission of applicants who meet the definition of low-income, near elderly, enabling them to rent up the 13 vacant units currently existing at the property and develop a waiting list. First priority is to be given to all qualified eligible applicants who meet the Section 202 very low-income guidelines.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–7000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 891.410(c).

Project/Activity: Cypress Knoll Apartments, Cave City, Arkansas—FHA Project Number 082–EE025. The owner/managing agent has requested waiver of the very low-income and elderly restriction to permit admission of lower-income, near-elderly applicants to alleviate current vacancy problems at the property.

Nature of Requirement: Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.205 defines elderly as ''a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.''

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 14, 2008.

Reason Waived: This regulatory waiver was granted to assist the property with its current vacancy problems by allowing the admission of near-elderly low-income persons. The project experienced 19% vacancy rate and exhausted cash reserves to support the operation of the property. The owner/managing agent continued to aggressively market the property with local housing authorities and news media without success. Waiving the very low-income and elderly restriction allowed the owner/managing agent flexibility in renting vacant units, thereby allowing the project to operate successfully and achieve full occupancy so that the project will not fail. First priority is to be given to all qualified applicants who meet the Section 202 very low-income guidelines.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410–7000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 891.410(c)

Project/Activity: Maplewood Estates, Stockton, Missouri—FHA Project Number 084-EE061. The project is experiencing difficulty leasing units to the very low-income elderly.

Nature of Requirement: Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.205 defines elderly as ''a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 25, 2008.

Reason Waived: The property had a 41% vacancy rate with no eligible applicants on the waiting list. This waiver allowed the managing agent to lease units to very low-income, near elderly applicants when there are no very low-income elderly applicants on the waiting list. The waiver allowed stabilization of the project's current financial status and prevent foreclosure of the property.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 891.410(c).

Project/Activity: Crestview Senior Housing, Gothenburg, Nebraska—FHA

Project Number 103-EE010. This property is experiencing difficulty in maintaining full occupancy. The owner/managing agent has requested waiver of the age and income requirements to assist in renting up vacant units.

Nature of Requirement: Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.205 defines elderly as ''a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 30, 2008.

Reason Waived: Waiver of this requirement allowed the owner/managing agent flexibility in renting vacant units. Despite aggressive outreach efforts, 4 units were vacant because of insufficient demand to fill the units with very low-income elderly applicants. Granting this waiver allowed admission of low-income, near elderly applicants thereby stabilizing the project's current financial status and prevent foreclosure.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 891.410(c).

Project/Activity: Doris Kohler Villa, Phillips, Wisconsin—FHA Project Number 075-EE102. The property is experiencing vacancy problems. The owner has requested waiver of the age and income requirement for this Supportive Housing for the Elderly project.

Nature of Requirement: Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.205 defines elderly as ''a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 5, 2008.

Reason Waived: Waiver of this regulation allowed the owner/managing agent to rent vacant units to applicants who are low-income and near-elderly. The owner/managing agent aggressively marketed the property with local housing authorities, news media, churches and various civic organizations. The property had 5 vacant units and no waiting list. Providing for a waiver of this requirement allowed the project to stabilize its current financial status and prevented foreclosure.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 891.410(c).

Project/Activity: Pioneer Place IV, Poynette, Wisconsin—FHA Project Number 075–EE021. Pioneer Place is a Supportive Housing for the Elderly project that is experiencing vacancy problems. Waiver of the age and income regulations is needed to improve occupancy and maintenance of the property.

Nature of Requirement: Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.205 defines elderly as ''a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.''

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: August 25, 2008.

Reason Waived: Waiver of the regulations governing age and income requirements was granted to permit admission of low-income, near elderly applicants. The owner/managing agent was unable to attract very low-income elderly persons despite aggressive marketing efforts with the local Central Wisconsin Action Council and news media. The property had 6 vacant units and no waiting list. This waiver allowed flexibility in renting units and allowed the project to operate successfully and achieve full occupancy.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 891.410(c).

Project/Activity: Ovidio Lamoso Coira, Ciales, Puerto Rico—FHA Project Number 056–EE007. This property is located in a rural area, and is experiencing problems in renting its vacant units.

Nature of Requirement: Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.205 defines elderly as ''a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.''

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 10, 2008.

Reason Waived: Waiver of the regulation governing age and income requirements was granted to alleviate the vacancy problems existing at the property. The project is located in a rural area and is a high rise with 93 assisted units. Despite the owner's

marketing efforts, the level of occupancy remained problematic. There were 10 vacant units with no waiting list but the owner qualified 15 low-income elderly families. This waiver allowed the project to rent to those qualified families, remain viable and to achieve full occupancy allowing the project to operate successfully.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 891.410(c).

Project/Activity: Joseph J. Vinopal Villa, Almena, Wisconsin—FHA Project Number 075–EE041. The project is experiencing difficulty leasing units to the very low-income elderly. The project is located in a rural area with few conveniences for senior citizens.

Nature of Requirement: Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.205 defines elderly as ''a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.''

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 25, 2008.

Reason Waived: Waiver of the regulations governing age and income requirements was granted to permit admission of low-income, near elderly applicants. The owner/managing agent was unable to attract very low-income elderly persons despite aggressive marketing efforts through the local Housing Authority. The property currently has 8 units with 2 vacancies. There was insufficient demand to fill units with very low-income elderly applicants. This waiver allowed flexibility in renting units and allowed the project to achieve full occupancy and operate successfully.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 891.410(c).

Project/Activity: Tom Woodman Villa, Richland Center, Wisconsin—FHA Project Number 075–EE126. The project is experiencing difficulty in maintaining sustaining occupancy.

Nature of Requirement: Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.205 defines elderly as ''a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.''

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 25, 2008.

Reason Waived: Waiver of the regulations governing age and income requirements, to allow the admission of near-elderly low-income persons, was granted to assist the project in reaching full occupancy. The management agent extensively marketed the property through advertising, open houses and through various civic organizations. However, there was little demand for these units, with only 5 of 19 units being occupied since the property opened in August 2007. The project could not continue to operate at this occupancy level. Providing this waiver allowed the owner/managing agent to stabilize the project's current financial status and prevented foreclosure.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 891.410(c).

Project/Activity: Greenridge Place Apartments, Meeker, Oklahoma—FHA Project Number 117–EE023. The property was unable to maintain sustaining occupancy.

Nature of Requirement: Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.205 defines elderly as ''a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.''

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 25, 2008.

Reason Waived: Waiver of the regulations governing age and income requirements, to allow the admission of near-elderly low-income persons, was granted to assist the project in obtaining full occupancy. The project is located in a small rural community with a population of 978. There is no grocery store or pharmacy so residents travel approximately 15 miles to Shawnee, Oklahoma, for basic needs. The management agent marketed the property through advertising in neighboring cities to no avail. The property had four vacant units with two very low-income applicants on the waiting list. Granting this waiver allowed the owner flexibility in renting vacant units and to achieve full occupancy so the project would not fail.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 891.410(c).

Project/Activity: Syringa Plaza, Burley, Idaho—FHA Project Number 124–EE005. The property is experiencing high vacancy rates.

Nature of Requirement: Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.410 relates to

admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.205 defines elderly as ''a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.''

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 25, 2008.

Reason Waived: Waiver of the regulations governing age and income requirements, to allow the admission of near-elderly low-income persons, was granted to assist the project in obtaining full occupancy. Syringa Plaza conducted extensive marketing outreach, including advertising, letters to churches, city officers, senior centers and the Chamber of Commerce and service area providers for seniors in the county to no avail. The property had 10 vacant units. Providing this waiver allowed the owner/managing agent to stabilize the project's current financial status and prevented foreclosure.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 891.410(c).

Project/Activity: Main Creek Villa, Conrath, Wisconsin—FHA Project Number 075–EE071. The project is experiencing difficulty leasing units to the very low-income elderly. The project is located in a rural area.

Nature of Requirement: Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.410 relates to admission of families to projects for elderly or handicapped families that receive reservations under Section 202 of the Housing Act of 1959, as amended by Section 801 of the National Affordable Housing Act of 1990. Section 891.410(c) limits occupancy to very low-income elderly persons. Section 891.205 defines elderly as ''a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: September 26, 2008.

Reason Waived: Waiver of the regulations governing age and income requirements, to allow the admission of near-elderly low-income persons, was granted to assist the project in obtaining full occupancy. Despite aggressive marketing efforts, the property continued to experience vacancy issues. The market analysis indicated there was insufficient demand to fill these units. Providing waiver of this regulation assisted the owner/managing agent in leasing vacant units and to achieve full occupancy so the project would not fail.

Contact: Beverly J. Miller, Director, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6160, Washington, DC 20410–8000, telephone number 202–708–3730.

• *Regulation:* 24 CFR 891.805.

Project/Activity: Newport Senior Housing, Newport, VT, Project Number: 024–EE101/VT36–S061–002.

Nature of Requirement: Section 891.805 requires that the general partner in the for-profit limitied partnership be a Private Nonprofit Organization.

Granted by: Brian D. Montgomery, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: July 8, 2008.

Reason Waived: The proposed sole nonprofit general partner of the for-profit mixed finance owner met the statutory definition.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 6130, Washington, DC 20410–8000, telephone number 202–798–3000.

III. Regulatory Waivers Granted by the Office of Public and Indian Housing

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 5.801

Project/Activity: Miami-Dade Housing Authority, (FL005), Miami, FL.

Nature of Requirement: Section 5.801 of HUD's regulations in 24 CFR part 5 establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the fiscal year end (FYE) of the housing authority (HA), in accordance with the Single Audit Act and OMB Circular A–133.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 16, 2008.

Reason Waived: The HA requested a waiver of its audited financial submission due date for the FYE September 30, 2007. The HA submitted that one of the terms of the settlement agreement between the Department and the HA was that the FY 2006 audit be re-performed. There had been a number of issues with the FY 2006 re-audits, which had only delayed the completion of the audit, but also delayed the completion of the FY 2007 audit. The waiver granted an extension to the audit deadline from June 30, 2008 to September 30, 2008.

Contact: Myra E. Newbill, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street, SW., Suite 100, Washington, DC 20410–5000, telephone number 202–475–8988.

• *Regulation:* 24 CFR 5.801

Project/Activity: Housing Authority of the City of Tallassee, (AL172), Tallassee, AL.

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the fiscal year end (FYE) of the housing authority (HA), in accordance with the Single Audit Act and OMB Circular A–133.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 16, 2008.

Reason Waived: The HA requested a waiver of its audited financial submission due date for FYE June 30, 2007. The HA submitted that its audited financial submission was twice rejected by REAC, and that the HA made the first correction and that the second rejection e-mail was not received by the HA. Consequently, the electronic submission was not received by REAC by the resubmission due date that resulted in the HA's receiving a Late Presumptive Failure score of zero. The waiver granted the additional time to submit its audited financial data.

Contact: Myra E. Newbill, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street, SW., Suite 100, Washington, DC 20410–5000, telephone number 202–475–8988.

• *Regulation:* 24 CFR 5.801.

Project/Activity: City of Platteville Housing Division, (WI208), Platteville, WI.

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the fiscal year end (FYE) of the housing authority (HA), in accordance with the Single Audit Act and OMB Circular A–133.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 21, 2008.

Reason Waived: The HA, a section 8 only entity, requested a waiver of the audited financial data reporting requirements due date for FYE September 30, 2007. The HA submitted that the City of Platteville's (Primary Government) FYE is December 31, 2007, and the HA's (Platteville Housing Division) FYE is September 30, 2007. The different FYEs resulted in a difference between the audited due dates. The waiver granted the HA to submit the audited data as soon as it is completed by the City of Platteville's Independent Accountant but no later than September 30, 2008. The HA was advised to contact their field office to change their FYE to coincide with the FYE of the Primary Government (City of Platteville).

Contact: Myra E. Newbill, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street, SW., Suite 100, Washington, DC 20410–5000, telephone number 202–475–8988.

• *Regulation:* 24 CFR 5.801.

Project /Activity: Housing Authority of Travis County, (TX480), Austin, TX.

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the fiscal year end (FYE) of the housing authority (HA), in accordance with the Single Audit Act and OMB Circular A–133.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 21, 2008.

Reason Waived: The HA requested a waiver of its audited financial submission due date for FYE June 30, 2007. The HA submitted that its audited financial submission was twice rejected by the REAC, and that the corrections were made for the first rejection. For the second rejection, corrections were made, however, the HA failed to ''click'' the submit button. As a result, the submission was not electronically submitted to the REAC by the resubmission due date and the HA received a Late Presumptive Failure (LPF) score of zero. The HA was granted a waiver of the resubmission due date. Additionally, the REAC's records indicate that the FY's 2005 and 2006 audited financial submissions have not been completed. The HA was advised to submit FYE 2005 and 2006 audited financial information within 30 days of receipt of the waiver letter.

Contact: Myra E. Newbill, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street, SW., Suite 100, Washington, DC 20410–5000, telephone number 202–475–8988.

• *Regulation:* 24 CFR 5.801.

Project/Activity: Fort Stockton Housing Authority, (TX500), Fort Stockton, TX.

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the fiscal year end (FYE) of the housing authority (HA), in accordance with the Single Audit Act and OMB Circular A–133.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 4, 2008.

Reason Waived: The HA, a section 8 only entity, requested additional time to submit its FYE September 30, 2007, audited financial submission. The HA submitted that the City of Fort Stockton's (Primary Government) auditor resigned prior to the audit being completed. The city retained the services of another firm. The HA was granted the waiver and was required to submit its audited financial date for FYE September 30, 2007, as soon as it is completed by the City of Fort Stockton's Independent Public Accountant.

Contact: Myra E. Newbill, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street, SW., Suite 100, Washington, DC 20410–5000, telephone number 202–475–8988.

• *Regulation:* 24 CFR 5.801.

Project/Activity: Lancaster Housing Agency, (TX437), Lancaster, TX.

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the fiscal year end (FYE) of the housing authority (HA), in accordance with the Single Audit Act and OMB Circular A–133.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 6, 2008.

Reason Waived: The HA, a Section 8 only entity, requested additional time to submit their FYE September 30, 2007, audited data. The HA submitted that it recently discovered evidence of fraudulent activity by a former employee that impacted the financial statements. The HA worked with local law enforcement and HUD's Office of Inspector General to quantify the loss and properly adjust the financial statements. The HA was granted a waiver that allowed it to submit the audited financial data as soon as the fraud investigation is completed.

Contact: Myra E. Newbill, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street, SW., Suite 100, Washington, DC 20410–5000, telephone number 202–475–8988.

• *Regulation:* 24 CFR 5.801.

Project/Activity: Arizona Department of Housing, (AZ901), Phoenix, AZ.

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the fiscal year end (FYE) of the housing authority (HA), in accordance with the Single Audit Act and OMB Circular A–133.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 13, 2008.

Reason Waived: The HA requested additional time to submit their FYE June 30, 2007, audit. Specifically, the HA request dated April 25, 2008, was approved as a result of a Single Audit extension to June 30, 2008, from the United States Department of Health and Human Services, the cognizant audit agency for the State of Arizona. The State of Arizona subsequently received another extension until August 31, 2008, from the cognizant audit agency. The HA was granted the waiver to submit its audited financial data for FYE June 30, 2007, by no later than September 12, 2008.

Contact: Myra E. Newbill, Program Manager, NASS, Real Estate Assessment

Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street, SW., Suite 100, Washington, DC 20410–5000, telephone number 202–475–8988.

• *Regulation:* 24 CFR 5.801.

Project/Activity: Rockville Center Housing Authority, (NY100), Rockville Center, NY.

Nature of Requirement: The regulation establishes certain reporting compliance dates. The audited financial statements are required to be submitted to the Real Estate Assessment Center (REAC) no later than nine months after the fiscal year end (FYE) of the housing authority (HA), in accordance with the Single Audit Act and OMB Circular A–133.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 18, 2008.

Reason Waived: The HA submitted its audited financial submission for FYE September 30, 2007, and it was rejected by REAC once on May 7, 2008, and again on May 29, 2008. The HA advised that the corrections were made on May 13, 2008, for the first rejection and that a minor rejection issue was overlooked and not corrected. The HA's financial submission was again rejected and the HA failed to make the necessary correction by the due date. The HA received a Late Presumptive Failure (LPF) score of zero. The waiver granted the HA a request to invalidate the LPF and resubmission of the audited financial data.

Contact: Myra E. Newbill, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street, SW., Suite 100, Washington, DC 20410–5000, telephone number 202–475–8988.

• *Regulation:* 24 CFR 902.20

Project/Activity: Housing Authority of the City of Fort Lauderdale, (FL010), Fort Lauderdale, FL.

Nature of Requirement: The objective of 24 CFR 902.20 is to determine whether a housing authority (HA) is meeting the standard of decent, safe, sanitary, and in good repair. The Real Estate Assessment Center (REAC) provides for an independent physical inspection of a HA's property of properties that includes a statistically valid sample of the units.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 1, 2008.

Reason Waived: The HA was granted a waiver of the physical inspection because of a fire that occurred on March 10, 2008, that resulted in damage to units, and unit doors and extensive water damage. Because the circumstances surrounding the waiver request were unusual and beyond the control of the HA, the HA was waived from PASS requirements for fiscal year end December 31, 2007.

Contact: Myra E. Newbill, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street, SW., Suite 100, Washington, DC 20410–5000, telephone number 202–475–8988.

• *Regulation:* 24 CFR 902.20 and 24 CFR 902.60 (d) and (e)

Project/Activity: Housing Authority of the City of Bay St. Louis, (MS064), Bay St. Louis, MS.

Nature of Requirement: The objective is to determine whether a housing authority (HA) is meeting the standard of decent, safe, sanitary, and in good repair. The Real Estate Assessment Center (REAC) provides for an independent physical inspection of a HA's property of properties that includes a statistically valid sample of the units. Management operations certification is required to be submitted within two months after the public housing agency fiscal year end. The Resident Service and Satisfaction Indicator is performed through the use of a survey. The HA is also responsible for completing the implementation plan activities and developing a follow-up plan.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 2, 2008.

Reason Waived: The Housing Authority of the City of Bay St. Louis suffered catastrophic losses as a result of Hurricane Katrina resulting in 100% loss of its housing stock. The losses had a devastating effect on the stability of the HA. The circumstances surrounding the waiver of these PHAS indicators for fiscal year ending December 31, 2008, were beyond the HA control.

Contact: Myra E. Newbill, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street, SW., Suite 100, Washington, DC 20410–5000, telephone number 202–475–8988.

• *Regulation:* 24 CFR 902.20, and 24 CFR 902.60(d) and (e).

Project/Activity: Delray Beach Housing Authority, (FL083), Delray Beach, FL.

Nature of Requirement: The objective is to determine whether a housing authority (HA) is meeting the standard of decent, safe, sanitary, and in good repair. The Real Estate Assessment Center (REAC) provides for an independent physical inspection of a HA's property of properties that includes a statistically valid sample of the units. Management operations certification is required to be submitted within two months after the public housing agency fiscal year end. The Resident Service and Satisfaction Indicator is performed through the use of a survey. The HA is also responsible for completing the implementation plan activities and developing a follow-up plan.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 26, 2008.

Reason Waived: The Delray Beach Housing Authority (HA) requested and was granted a waiver of the three Public Housing Assessment System (PHAS) Indicators for fiscal years ending March 31, 2007, and March 31, 2008, because of the destruction caused by Hurricane Wilma in October 2005 to the Carver Estates development. The Carver Estates was the only development in the HA's inventory and it has been vacant since November 2005. The residents were issued Tenant Protection Vouchers and were relocated in accordance with the Uniform Relocation Act. The units are expected to be totally demolished.

Contact: Myra E. Newbill, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street, SW., Suite 100, Washington, DC 20410–5000, telephone number 202–475–8988.

• *Regulation:* 24 CFR 902.23(a); 24 CFR 902.43; and 24 CFR 902.52.

Project/Activity: Waveland Housing Authority, (MS101), Waveland, MS.

Nature of Requirement: The referenced regulations establish requirements for (1) annual inspections (2) annual certification of management operations and (3) resident satisfaction surveys.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 3, 2008.

Reason Waived: The waiver exempted the HA from physical inspections and submission of the management operations certification and resident satisfaction survey under the Public Housing Assessment System (PHAS) for fiscal year ending June 30, 2008, because the HA suffered catastrophic losses as result of Hurricane Katrina. The losses included 100% loss of housing stock. Further, the losses had a

devastating effect on the stability of the HA that precludes the HA from meeting the PHAS requirements. The circumstances surrounding the waiver of these PHAS indicators were beyond the HA control.

Contact: Myra E. Newbill, Program Manager, NASS, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street, SW., Suite 100, Washington, DC 20410–5000, telephone number 202–475–8988.

- *Regulation:* 24 CFR 902.60(d) and (e).

Project/Activity: West Palm Beach Housing Authority, (FL009), West Palm Beach, FL.

Nature of Requirement: The Management operations certification is required to be submitted to the Real Estate Assessment Center (REAC) within two months after the public housing agency fiscal year end (FYE). The Resident Service and Satisfaction Indicator is performed through the use of a survey. The Housing Authority (HA) is also responsible for completing the implementation plan activities and developing a follow-up plan.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 1, 2008.

Reason Waived: On July 26, 2007, the West Palm Beach Housing Authority received a waiver from submitting their management operations certification and resident satisfaction survey to the REAC for FYE March 31, 2007, in order to enable the HA to have more resources to concentrate on organizational, procedural and software changes to convert to asset management. This waiver granted an extension for FYE March 31, 2008.

Contact: Gregory A. Byrne, Director, Financial Management Division, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th Street, SW., Suite 100, Washington, DC 20410–5000, telephone number 202–475–8632.

- *Regulation:* 24 CFR 906.15

Project/Activity: Montgomery County Housing Authority (MCHA), Norristown, PA purchase and renovation of an administrative office building using homeownership proceeds.

Nature of Requirement: Section 906.15 of HUD's regulations in 24 CFR part 906 provides that sales proceeds may be used in connection with low-income families at the discretion of the PHA and as stated in the HUD approved homeownership plan.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 15, 2008.

Reason Waived: MCHA requested a waiver of the applicable federal regulation to the extent that HUD determined that regulation prohibits MCHA from using homeownership proceeds to acquire and renovate an administrative office building. In its approved homeownership plan, MCHA did not include the purchase and renovation of an administrative office building as a use of proceeds. HUD initially found that MCHA's use of proceeds to purchase and renovate the administrative office building was not a permissible use of proceeds under 24 CFR 906.15. HUD subsequently determined that good cause exists based on accessibility, coordination of services and cost savings to allow MCHA to use proceeds from its approved homeownership plan to purchase, renovate, and now operate an administrative office building.

Contact: Dominique Blom, Deputy Assistant Secretary for the Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4130, Washington, DC 20140–5000, telephone number 202–402–4181.

- *Regulation:* 24 CFR 941.606(n)(1)(ii)(B).

Project/Activity: Housing Authority of Fulton County's (HAFC's), Georgia, Mixed-Finance Rental Project.

Nature of Requirement: Section 941.606(n)(1)(ii)(B) of HUD's regulation in 24 CFR part 941 states ''that if the partner and/or owner entity (or any other entity with an identity of interests with such parties) wants to serve as the general contractor for the project or development, it may award itself the construction contract only if it can demonstrate to HUD's satisfaction that its bid is the lowest bid submitted in response to a public request for bids.''

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing

Date Granted: July 3, 2008.

Reason Waived: HAFC submitted a certification by an independent third-party construction cost estimator and HUD reviewed the independent cost estimates and related budgets. HAFC demonstrated that the construction costs are reasonable and are within applicable HUD cost limits.

Contact: Dominique Blom, Deputy Assistant Secretary for the Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4130, Washington, DC 20140–5000, telephone number 202–402–4181.

- *Regulation:* 24 CFR 941.606(n)(l)(ii)(B).

Project/Activity: Detroit Housing Commission (DHC), MI, Gardenview Estates, Phase I Gardenview Estates HOPE VI.

Nature of Requirement: Section 941.606(n)(1)(ii)(B) of HUD's regulation in 24 CFR part 941 states ''that if the partner and/or owner entity (or any other entity with an identity of interests with such parties) wants to serve as the general contractor for the project or development, it may award itself the construction contract only if it can demonstrate to HUD's satisfaction that its bid is the lowest bid submitted in response to a public request for bids.''

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 11, 2008.

Reason Waived: DHC procured Norstar Development USA to redevelop the former Herman Gardens public housing. On June 22, 2007, Norstar Building Corporation and O'Brien Construction Company, Inc. entered into a Cooperation Agreement. As O'Brien Construction costs were within range of that of the independent cost estimates, HUD's condition was satisfied.

Contact: Dominique Blom, Deputy Assistant Secretary for the Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4130, Washington, DC 20140–5000, telephone number 202 402–4181.

- *Regulation:* 24 CFR 941.606(n)(l)(ii)(B).

Project/Activity: San Antonio Housing Authority (SAHA), TX, Victoria Courts, City View Apartments, Phase IIIA. HOPE VI grant:

Nature of Requirement: Section 941.606(n)(1)(ii)(B) of HUD's regulation in 24 CFR part 941 states ''that if the partner and/or owner entity (or any other entity with an identity of interests with such parties) wants to serve as the general contractor for the project or development, it may award itself the construction contract only if it can demonstrate to HUD's satisfaction that its bid is the lowest bid submitted in response to a public request for bids.''

Granted by: Paula O. Blunt, General Assistant Deputy Secretary for Public and Indian Housing.

Date Granted: September 17, 2008.

Reason Waived: The San Antonio Housing Authority (SAHA) procured

Carleton Development as the master developer for the City View Apartments site. Carleton's construction costs were below independent cost estimates, satisfying HUD's condition.

Contact: Dominique Blom, Deputy Assistant Secretary for the Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4130, Washington, DC 20140–5000, telephone number (202) 402–4181.

• *Regulation:* 24 CFR 982.503(d) and 982.505(c)(3).

Project/Activity: Adams Metropolitan Housing Authority (AMHA), Adams, OH. The AMHA requested a waiver of payment standard (PS) requirements.

Nature of Requirement: Section 982.503(d) of HUD regulations in 24 CFR part 982 provides that HUD may consider and approve a PHA's establishment of a payment standard lower than the basic range, but that HUD will not approve a lower payment standard if the family share for more than 40 percent of participants in the PHA's HCV program exceeds 30 percent of adjusted monthly income. Section 982.505(c)(3) provides that if the amount on the payment standard (PS) schedule is decreased during the term of the HAP contract, the lower PS amount generally must be used to calculate the monthly HAP for the family beginning at the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 11, 2008.

Reason Waived: The waiver of these regulatory sections was granted because these cost-saving measures enabled the AMHA to both manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.503(d) and 982.505(c)(3).

Project Activity: Dodge County Housing Authority (DCHA), Dodge County, WI. The DCHA requested a waiver of payment standard (PS) requirements.

Nature of Requirement: Section 982.503(d) of HUD regulations in 24 CFR part 982 provides that HUD may consider and approve a PHA's establishment of a payment standard lower than the basic range, but that HUD will not approve a lower payment standard if the family share for more than 40 percent of participants in the PHA's HCV program exceeds 30 percent of adjusted monthly income. Section 982.505(c)(3) provides that if the amount on the payment standard (PS) schedule is decreased during the term of the HAP contract, the lower PS amount generally must be used to calculate the monthly HAP for the family beginning at the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 11, 2008.

Reason Waived: The waiver of these regulatory sections was granted because these cost-saving measures enabled the DCHA to both manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Wadena Housing and Redevelopment Authority (WHRA), Wadena, MN. The WHRA requested a waiver of payment standard (PS) requirements.

Nature of Requirement: Section 982.505(c)(3) of HUD's regulations in 24 CFR part 982 provides that if the amount on the PS schedule is decreased during the term of the HAP contract, the lower PS amount generally must be used to calculate the monthly HAP for the family beginning at the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 3, 2008.

Reason Waived: The waiver was granted because this cost-saving measure enabled the WHRA to both manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: City of Virginia Beach Department of Housing and Neighborhood Preservation (CVB), Virginia Beach, VA. The CVB requested a waiver of payment standard (PS) requirements.

Nature of Requirement: Section 982.505(c)(3) of HUD's regulations in 24 CFR part 982 provides that if the amount on the PS schedule is decreased during the term of the HAP contract, the lower PS amount generally must be used to calculate the monthly HAP for the family beginning at the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 11, 2008.

Reason Waived: The waiver was granted because this cost-saving measure would enable the CVB to both manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Shelby Metropolitan Housing Authority (SMHA), Shelby, OH. The SMHA requested a waiver of payment standard (PS) requirements.

Nature of Requirement: Section 982.505(c)(3) of HUD's regulations in 24 CFR part 982 provides that if the amount on the PS schedule is decreased during the term of the HAP contract, the lower PS amount generally must be used to calculate the monthly HAP for the family beginning at the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 14, 2008.

Reason Waived: The waiver was granted because this cost-saving measure would enable the SMHA to both manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Todd County Housing and Redevelopment Agency (TCHRA), Todd County, MN. The TCHRA requested a waiver of payment standard (PS) requirements.

Nature of Requirement: Section 982.505(c)(3) of HUD's regulations in 24 CFR part 982 provides that if the amount on the PS schedule is decreased during the term of the HAP contract, the lower PS amount generally must be used to calculate the monthly HAP for the family beginning at the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 6, 2008.

Reason Waived: The waiver was granted because this cost-saving measure enabled the TCHRA to both manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Housing Authority of the County of DeKalb (HACD), DeKalb, IL. The HACD requested a waiver of payment standard (PS) requirements.

Nature of Requirement: Section 982.505(c)(3) of HUD's regulations in 24 CFR part 982 provides that if the amount on the PS schedule is decreased during the term of the HAP contract, the lower PS amount generally must be used to calculate the monthly HAP for the family beginning at the effective date of the family's second regular reexamination following the effective date of the decrease.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 4, 2008.

Reason Waived: The waiver was granted because this cost-saving measure enabled the HACD to both manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Housing Authority of the County of Los Angeles (HACoLA), Los Angeles County, CA. The HACoLA requested a waiver regarding exception payment standards.

Nature of Requirement: Section 982.505(d) of HUD's regulations in 24 CFR part 982 provides that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 7, 2008.

Reason Waived: The waiver was granted because the applicant, who is a person with severe depression and obsessive-compulsive disorder, needed to remain in her current unit to avoid exacerbating her illnesses. To provide a reasonable accommodation so that this applicant would pay no more than 40 percent of his adjusted income toward the family share, the HACoLA was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Stockbridge Housing Authority (SHA), Stockbridge, MA. The SHA requested a waiver regarding exception payment standards.

Nature of Requirement: Section 982.505(d) of HUD's regulations in 24 CFR part 982 provides that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 21, 2008.

Reason Waived: The waiver was granted because the applicant, who is a person recovering from drug and alcohol addiction, required a room in a supportive housing group home that provided a clean and sober environment with supportive services. To provide a reasonable accommodation so that this participant would pay no more than 40 percent of his adjusted income toward the family share, the SHA was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Housing Authority of the City of Los Angeles (HACLA), Los Angeles, CA. The HACLA requested a waiver regarding exception payment standards so that it could provide a reasonable accommodation to persons with disabilities.

Nature of Requirement: Section 982.505(d) of HUD's regulations in 24 CFR part 982 provides that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 21, 2008.

Reason Waived: The waiver was granted because the participant, who is an elderly person with cardiovascular and vision disabilities, would have significant hardship if required to move. She was paying approximately 85 percent of the family's adjusted income toward her share of the rent as a result of a large rent increase. To provide a

reasonable accommodation so that this participant would pay no more than 40 percent of her adjusted income toward the family share, the HACLA was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: San Francisco Housing Authority (SFHA), San Francisco, CA. The SFHA requested a waiver regarding exception payment standards.

Nature of Requirement: Section 982.505(d) of HUD's regulations in 24 CFR part 982 provides that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 21, 2008.

Reason Waived: The waiver was granted because the applicant is a disabled person who required a wheelchair-accessible unit and after a thorough housing search was only able to locate a unit that required an exception payment standard so that the applicant would pay no more than 40 percent of her adjusted income toward the family share. The SFHA was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Housing Authority of the City of Los Angeles (HACLA), Los Angeles, CA. The HACLA requested a waiver regarding exception payment standards so that it could provide a reasonable accommodation to persons with disabilities.

Nature of Requirement: Section 982.505(d) of HUD's regulations in 24 CFR part 982 provides that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 21, 2008.

Reason Waived: The waiver was granted because the participant, who is an elderly person with cardiovascular and vision disabilities, would have significant hardship if required to move. She was paying approximately 85 percent of the family's adjusted income toward her share of the rent as a result of a large rent increase. To provide a reasonable accommodation so that this participant would pay no more than 40 percent of her adjusted income toward the family share, the HACLA was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Housing Authority of the City of Los Angeles (HACLA), Los Angeles, CA. The HACLA requested a waiver regarding exception payment standards.

Nature of Requirement: Section 982.505(d) of HUD's regulations in 24 CFR part 982 provides that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 26, 2008.

Reason Waived: The waiver was granted because the participant, who is an elderly person with multiple medical problems, needed to remain in her current unit to be near her physician and due to the stress that moving to another unit would present. She was also paying approximately 75 percent of the family's adjusted income toward her share of the rent as a result of a large rent increase. To provide a reasonable accommodation so that this participant would pay no more than 40 percent of her adjusted income toward the family share, the HACLA was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Housing Authority of the County of Umatilla (HACU), Sioux Falls Housing and Redevelopment Commission (SFHRC), Umatilla County, Oregon. The HACU requested a waiver regarding exception payment standards.

Nature of Requirement: Section 982.505(d) of HUD's regulations in 24 CFR part 982 provides that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 5, 2008.

Reason Waived: The waiver was granted because the applicant, who suffers from post traumatic stress disorder, needed to remain in his unit in order to avoid the stress of moving. To provide a reasonable accommodation so that this participant would pay no more than 40 percent of his adjusted income toward the family share, the HACU was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Alaska Housing Finance Corporation (AHFC), Anchorage, AK. The AHFC requested a waiver regarding exception payment standards.

Nature of Requirement: Section 982.505(d) of HUD's regulations in 24 CFR part 982 provides that a public housing agency may only approve a higher payment standard for a family as

a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 8, 2008.

Reason Waived: The waiver was granted because the participant, who is a disabled person with multiple chemical sensitivity syndrome, needs to remain in her current unit which is a two-bedroom house with private laundry facilities. The participant was paying approximately 57 percent of the family's adjusted income toward her share of the rent. To provide a reasonable accommodation so that this participant would pay no more than 40 percent of her adjusted income toward the family share, the AHFC was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Sioux Falls Housing and Redevelopment Commission (SFHRC), Sioux Falls, South Dakota. The SRHRC requested a waiver regarding exception payment standards.

Nature of Requirement: Section 982.505(d) of HUD's regulations in 24 CFR part 982 provides that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 9, 2008.

Reason Waived: The waiver was granted because the participant is a disabled person who required a wheelchair-accessible unit that is in close proximity to the medical facility where she receives care. To provide a reasonable accommodation so that this participant would pay no more than 40 percent of her adjusted income toward the family share, the SFHRC was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Alaska Housing Finance Corporation (AHFC), Kodiak Island, AK. The AHFC requested a waiver regarding exception payment standards.

Nature of Requirement: Section 982.505(d) of HUD's regulations in 24 CFR part 982 provides that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 11, 2008.

Reason Waived: The waiver was granted because the applicant is a disabled person requiring a wheelchair-accessible unit close to family. A thorough housing search located a unit that required an exception payment standard so that the applicant would pay no more than 40 percent of adjusted income toward the family share. The AHFC was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Fall River Housing Authority (FRHA), Fall River, MA. The FRHA requested a waiver regarding exception payment standards.

Nature of Requirement: Section 982.505(d) of HUD's regulations in 24 CFR part 982 provides that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 11, 2008.

Reason Waived: The waiver was granted because the applicant is a disabled person who required a single-family home that required an exception payment standard so that the she would pay no more than 40 percent of her adjusted income toward the family share. The FRHA was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Housing Authority of the City of Los Angeles (HACLA), Los Angeles, CA. The HACLA requested a waiver regarding exception payment standards.

Nature of Requirement: Section 982.505(d) of HUD's regulations in 24 CFR part 982 provides that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 11, 2008.

Reason Waived: The waiver was granted because the participant, who is an elderly person with multiple significant medical problems and needs to remain near her various physicians and hospital, was paying approximately 96 percent of the family's adjusted income toward her share of the rent as a result of a large rent increase. To provide a reasonable accommodation so that this participant would pay no more than 40 percent of her adjusted income toward the family share, the HACLA was allowed to approve an exception payment standard that exceeded the basic range of 90 to 110 percent of the FMR.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 982.505(c)(3).

Project/Activity: Fort Walton Beach Housing Authority (FWBHA), Fort Walton Beach, FL. The FWBHA requested a waiver of payment standard (PS) requirements.

Nature of Requirement: Section 982.505(d) of HUD's regulations in 24 CFR part 982 provides that a public housing agency may only approve a higher payment standard for a family as a reasonable accommodation if the higher payment standard is within the basic range of 90 to 110 percent of the fair market rent (FMR) for the unit size.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 25, 2008.

Reason Waived: The waiver was granted because this cost-saving measure enabled the FWBHA to both manage its Housing Choice Voucher program within allocated budget authority and avoid the termination of HAP contracts due to insufficient funding.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 983.53(c) and 983.259(a).

Project/Activity: St. Louis Housing Authority (SLHA). St. Louis, MO. The SLHA requested waivers of project-based voucher (PBV) regulations to allow members of the Carr Square Tenant Management Corporation (CSTMC) to remain in their former public housing units.

Nature of Requirement: Section 983.53(c) of HUD's regulations in 24 CFR part 983 provides that the PHA may not attach or pay PBV assistance for a unit occupied by an owner of the housing. Section 983.259(a) generally states that families must be terminated if they occupy overcrowded, under-occupied or accessible units and don't accept the public housing agency's offer of continued housing assistance (e.g., tenant-based voucher assistance).

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: August 13, 2008.

Reasons Waived: A waiver of the first regulation was granted since the CSTMC is a 501(c)(3) non-profit entity and none of the individual members of the CSTMC (who are considered principals and/or interested parties) will have any ownership interest in the PBV units. The second regulation was also waived since many of the residents aged in place and appropriate-sized units were not available in the project for some of them. In addition, commitments were made under the HOPE I grant to allow these remaining members of tenant families to remain in the project.

Contact: Danielle Bastarache, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4210, Washington, DC 20410–5000, telephone number 202–708–0477.

• *Regulation:* 24 CFR 990.185(a).

Project/Activity: Washington County Housing Authority (WCHA), Washington County, Pennsylvania.

Nature of Requirement: The Energy Policy Act of 2005 amended section 9(e)(2)(C) of the Housing Act of 1937 by changing the contract period from 12 to 20 years. At the time of the request for a waiver, HUD's regulation in 24 CFR 990.185(a) had not yet been amended to conform to the statutory change and continued to present a maximum period of 12 years.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: July 7, 2008.

Reason Waived: The WCHA was undertaking an energy project and anticipated energy conservation measures whose life cycle expectations and costs would exceed the 12-year regulatory limitation in 24 CFR 990.185(a). Based upon the anticipated savings and benefits to WCHA and its residents, the waiver granted a longer payback period, contingent on HUD's provisions, including additional information and technical activity requirements. WCHA agreed to comply with all of HUD's provisions for the waiver to be effective.

Contact: Nicole Faison, Director, Office of Public Housing Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4226, Washington, DC 20410–5000, telephone number 202–708–0744.

• *Regulation:* 24 CFR 990.185(a).

Project/Activity: Lynn Housing Authority and Neighborhood Development (LHAND), Lynn, Massachusetts.

Nature of Requirement: The Energy Policy Act of 2005 amended section 9(e)(2)(C) of the Housing Act of 1937 by changing the contract period from 12 to 20 years. At the time of the request for a waiver, HUD's regulation in 24 CFR 990.185(a) had not yet been amended to conform to the statutory change and continued to present a maximum period of 12 years.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian housing.

Date Granted: July 31, 2008.

Reason Waived: The LHAND is undertaking an energy project and anticipates energy conservation measures whose life cycle expectations and costs will exceed the 12-year regulatory limitation in 24 CFR 990.185(a). Based upon the anticipated savings and benefits to LHAND and its residents, the waiver grants a longer payback period, contingent on HUD's provisions, including additional information and technical activity requirements. LHAND must comply with all of HUD's provisions for the waiver to be effective.

Contact: Nicole Faison, Director, Office of Public Housing Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4226, Washington, DC 20410–5000, telephone number 202–708–0744

• *Regulation:* 24 CFR 990.185(a).

Project/Activity: Kingsport Housing and Redevelopment Authority, (KHRA) Kingsport, Tennessee.

Nature of Requirement: The Energy Policy Act of 2005 amended section 9(e)(2)(C) of the Housing Act of 1937 by changing the contract period from 12 to 20 years. At the time of the request for a waiver, HUD's regulation in 24 CFR 990.185(a) had not yet been amended to conform to the statutory change and continued to present a maximum period of 12 years.

Granted by: Paula O. Blunt, General Deputy Assistant Secretary for Public and Indian Housing.

Date Granted: September 5, 2008.

Reason Waived: The KHRA was undertaking an energy project and anticipated energy conservation measures whose life cycle expectations and costs will exceed the 12-year regulatory limitation in 24 CFR 990.185(a). Based upon the anticipated savings and benefits to KHRA and its residents, the waiver granted a longer payback period, contingent on HUD's provisions, including additional information and technical activity requirements. KHRA agreed to comply with all of HUD's provisions for the waiver to be effective.

Contact: Nicole Faison, Director, Office of Public Housing Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4226, Washington, DC 20410–5000, telephone number 202–708–0744.

[FR Doc. E8–29308 Filed 12–11–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Gaming Compact Amendment.

SUMMARY: This notice publishes an Approval of the Third Amendment to the Wisconsin Winnebago Tribe, now known as the Ho-Chunk Nation and the State of Wisconsin Gaming Compact.

DATES: *Effective Date:* December 12, 2008.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Acting Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under Section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA), Public Law 100–497, 25 U.S.C. 2710, the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. This Amendment modifies the existing arbitration provision by requiring that the parties utilize a last best offer format; establishes a term of twenty-five years; provides for the renegotiation of the revenue sharing and allows both parties to propose amendments to the Compact every five years.

Dated: November 28, 2008.

George T. Skibine,

Acting Deputy Assistant Secretary for Policy and Economic Development.

[FR Doc. E8–29420 Filed 12–11–08; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Tribal-State Class III Gaming Compact Amendment taking effect.

SUMMARY: This notice publishes the Amendment to the Tribal-State Gaming Compact between the State of California and the Shingle Springs Band of Miwok Indians taking effect.

DATES: *Effective Date:* December 12, 2008.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Acting Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under Section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA), Public Law 100–497, 25 U.S.C. 2710, the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. This Amendment reduces the number of gaming establishments the Tribe may operate; increases the number of gaming machines; and extends the term of the Compact to December 31, 2029. This Amendment is considered to have been approved but only to the extent that the Amendment is consistent with the provisions of the Indian Gaming Regulatory Act.

Dated: November 28, 2008.

George T. Skibine,

Acting Deputy Assistant Secretary for Policy and Economic Development.

[FR Doc. E8–29500 Filed 12–11–08; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNML00000 L16100000.DP0000]

Notice of Intent To Prepare an Amendment to the Mimbres Resource Management Plan (RMPA), and Associated Environmental Assessment (EA), Las Cruces District Office, New Mexico

AGENCY: Bureau of Land Management (BLM), Interior.

ACTION: Notice of intent.

SUMMARY: The BLM Las Cruces District Office, New Mexico, intends to prepare an RMPA with an associated EA to analyze the possible disposal by either exchange or sale, of BLM-administered public lands in Grant County in southwestern New Mexico.

DATES: This Notice initiates the 30-day public scoping period to identify relevant issues. The scoping period will also be announced through local news media and on the BLM Web site (*http://www.blm.gov/nm*). The BLM will accept scoping comments for 30 days from the date of the publication of this Notice.

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

- *E-mail: nm_comments@nm.blm.gov.*
- *Fax:* 575–525–4412, Attention: Jennifer Montoya.
- *Mail or personal delivery:* District Manager, BLM Las Cruces District Office, 1800 Marquess Street, Las Cruces, NM 88005.

Documents pertinent to this proposal may be examined at the Las Cruces District Office at the above address.

FOR FURTHER INFORMATION CONTACT: Jennifer Montoya, Planning and Environmental Coordinator, at the Las Cruces District Office; Telephone 575–525–4316; or e-mail at *Jennifer_Montoya@nm.blm.gov.*

SUPPLEMENTARY INFORMATION: This document provides notice that the BLM Las Cruces District Office, Las Cruces, New Mexico, intends to prepare an RMPA with an associated EA for the Mimbres Planning Area and announces the beginning of the scoping process and seeks public input on issues and planning criteria.

The BLM is currently considering disposal of public lands in Grant County, New Mexico, and the exact acreage and legal descriptions will be determined by a Cadastral survey. The public lands proposed for disposal are currently identified for retention in Federal ownership in the 1993 Mimbres RMP. Therefore, the RMP must be amended to identify the public lands as suitable for exchange and/or sale. These public lands are a portion of and within the following areas:

New Mexico Principal Meridian

T. 17 S., R. 12 W.,
Secs. 3, 4, 9, 10, 15, 16, 20, 24 and 31.
T. 17 S., R. 11 W.,
Secs. 19 and 20.
T. 19 S., R. 15 W.,
Secs. 8, 16, 17, 21, 27 and 28.

The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the planning process. Preliminary issues for the planning area have been identified by the BLM personnel, other agencies, and in meetings with individuals and user groups. These issues are:

1. Should public lands adjacent to the Gila National Forest be identified for disposal? If so, which public lands?

2. What potential impacts would this proposed action have on the Gila National Forest?

3. What effects would this proposed action have on mining in the area?

Proposed planning criteria include the following:

1. The RMPA/EA process will be in compliance with the Federal Land

Policy and Management Act, the National Environmental Policy Act, and applicable laws, regulations, and policies.

2. The land use plan amendment process will be governed by the planning regulations at 43 CFR 1610 and the BLM Land Use Planning Handbook H–1601–1.

3. Lands affected by the proposed plan amendment only apply to public surface and mineral estate managed by the BLM. No decisions will be made relative to non-BLM-administered lands or non-Federal minerals.

4. Public participation will be an integral part of the planning process.

5. The plan amendment will recognize all valid existing rights.

6. The RMPA/EA will strive to be consistent with existing non-Federal plans and policies, provided the decisions in the existing plans are consistent with the purposes, policies, and programs of the BLM and other Federal laws. The RMPA will consider present and potential uses of public lands.

7. The RMPA will consider impacts of uses on adjacent or nearby non-Federal lands and on non-Federal land surface over Federally-owned minerals.

The public may submit comments on issues and planning criteria in writing directly to the BLM using one of the methods listed in the **ADDRESSES** section above. Comments should be submitted within 30 days from the date of the publication of this Notice. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, are available for public inspection in their entirety.

The BLM will evaluate identified issues to be addressed in the plan amendment and will place them into one of three categories:

1. Issues to be resolved in the plan amendment;

2. Issues to be resolved through policy or administrative action; or

3. Issues beyond the scope of this plan amendment.

The BLM will provide an explanation in the plan amendment as to why an issue was placed in category two or three. The public is also encouraged to help identify any management questions and concerns that should be addressed in the plan amendment.

The BLM will work collaboratively with interested parties to identify the management decisions that are best suited to local, regional, and national needs and concerns. The BLM will use an interdisciplinary approach to develop the plan amendment in order to consider the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in the planning process: minerals and geology, outdoor recreation, archaeology, paleontology, wildlife and fisheries, lands and realty, hydrology, soils, water and air.

Linda S.C. Rundell,

State Director.

[FR Doc. E8–29443 Filed 12–11–08; 8:45 am]

BILLING CODE 4310–VC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–060–01–1020–PG]

Notice of Public Meeting; Central Montana Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Central Montana Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meeting will be held January 14 & 15, 2009.

The meetings will be in the First State Bank of Malta conference room, 1 South 1st Street East, in Malta, Montana.

The January 14 meeting will begin at 10 a.m. with a 30-minute public comment period and will adjourn at 5 p.m.

The January 15 meeting will begin at 8 a.m. with a 30-minute public comment period and will adjourn at 3 p.m.

SUPPLEMENTARY INFORMATION: This 15-member council advises the Secretary of the Interior on a variety of management issues associated with public land management in Montana. During these meetings the council will participate in/discuss/act upon:

Administrative details (reviewing the council's charter, a briefing about the consensus process, the council's 2009 work plan, roles and responsibilities and the council's expectations);

Russian olive reduction efforts along the Upper Missouri River;

Field manager updates;

A review of BLM livestock grazing regulations;

A presentation from the Ranchers Stewardship Alliance;

A discussion of riparian information;

A report about the Limekiln Ruby Timber Blow-down;

A discussion of U.S. Forest Service fee proposals;

A presentation by the American Prairie Foundation; and administrative details (next meeting agenda, location, etc.).

All RAC meetings are open to the public. The public may present written comments to the RAC. Each formal RAC meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

FOR FURTHER INFORMATON CONTACT: Gary L. ''Stan'' Benes, Lewistown Field Manager, Lewistown Field Office, P.O. Box 1160, Lewistown, Montana 59457, 406/538–1900.

Dated: December 5, 2008.

Gary L. ''Stan'' Benes,

Lewistown Field Manager.

[FR Doc. E8–29417 Filed 12–11–08; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Continuation of Visitor Services

AGENCY: National Park Service, Interior.

ACTION: Public notice.

DATES: *Effective Date:* January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Concession Program Manager, National Park Service, Washington, DC 20240, Telephone, 202/513–7156.

SUMMARY: Pursuant to the terms of existing concession contracts, public notice is hereby given that the National Park Service intends to request a continuation of visitor services for a period not-to-exceed 1 year from the date of contract expiration.

SUPPLEMENTARY INFORMATION: The contracts listed below have been extended to maximum allowable under

36 CFR 51.23. Under the provisions of current concession contracts and pending the completion of the public solicitation of a prospectus for a new concession contract, the National Park Service authorizes continuation of visitor services for a period not-to-exceed 1 year under the terms and conditions of the current contract as amended. The continuation of operations does not affect any rights with respect to selection for award of a new concession contract.

Conc ID No.	Concessioner name	Park
GWMP00–03	Belle Haven Marina, Inc	George Washington Memorial Parkway.
FOMC001–96	Evelyn Hill Corporation	Fort McHenry National Monument and Historic Shrine.
STLI003–89	ARAMARK Sports & Entertainment Services, Inc	Statue of Liberty National Monument.
INDE001–94	Concepts by Staid, Ltd.	Independence National Historical Park.
SHEN001–85	ARAMARK Sports & Entertainment Services, Inc	Shenandoah National Park.
STLI002–88	Evelyn Hill, Inc	Statue of Liberty National Monument.
CHIS003–98	Truth Aquatics	Channel Islands National Park.
DEVA001–84	Xanterra Parks & Resorts, Inc	Death Valley National Monument.
DEVA002–81	Xanterra Parks & Resorts, Inc	Death Valley National Monument.
GOGA008–88	Demosthemes Hontalas, Thomas Hontalas & William Hontalas	Golden Gate National Recreation Area.
LAME001–73	Rex G. Maughan & Ruth G. Maughan	Lake Mead National Recreation Area.
LAME002–82	Lake Mead RV Village, LLC	Lake Mead National Recreation Area.
LAME005–97	Rex G. Maughan	Lake Mead National Recreation Area.
LAME006–74	Las Vegas Boat Harbor, Inc	Lake Mead National Recreation Area.
LAME007–84	Seven Resorts, Inc	Lake Mead National Recreation Area.
LAME009–88	Seven Resorts, Inc	Lake Mead National Recreation Area.
LAME010–71	Seven Resorts, Inc	Lake Mead National Recreation Area.
LAVO001–82	California Guest Services, Inc	Lassen Volcanic National Park.
MUWO001–85	ARAMARK Sports & Entertainment, Inc	Muir Woods National Monument.
OLYM001–78	ARAMARK Sports & Entertainment, Inc	Olympic National Park.
OLYM002–89	Log Cabin Resort, Inc	Olympic National Park.
OLYM005–87	Forever Resorts, LLC	Olympic National Park.
ROLA003–87	Ross Lake Resort, Inc	Ross Lake National Recreation Area.
YOSE001–98	Best's Studio, Inc	Yosemite National Park.
AMIS002–89	Rex Maughn	Amistad National Recreation Area.
AMIS003–87	Rough Canyon Marina	Amistad National Recreation Area.
BRCA003–84	Xanterra Parks & Resorts, Inc	Bryce Canyon National Park.
CACH001–84	White Dove Inc., dba Thunderbird Lodge	Canyon de Chelly National Monument.
GLAC001–89	Glacier Park Boat Company, Inc	Glacier National Park.
GLAC002–81	Glacier Park, Inc	Glacier National Park.
GLCA003–69	ARAMARK	Glen Canyon National Park.
GRCA004–88	Jerman-Mangum Enterprises, Inc	Grand Canyon National Park.
GRTE003–97	Rex G. and Ruth G. Maughan	Grand Teton National Park.
LAMR002–87	Rex Maughan	Lake Meredith National Recreation Area.
MEVE001–82	ARAMARK	Mesa Verde National Park.
PEF0001–85	Xanterra Parks & Resorts, LLC	Petrified Forest National Park.
Z10N003–85	Xanterra Parks & Resorts LLC	Zion National Park.
YELL001–03	Medcor Incorporated	Yellowstone National Park.
HOSP002–94	Buckstaff Bath House Company	Hot Springs National Park.
OZAR001–88	Shane and Kimberly Van Steenis (Alley Spring Canoe Rental)	Ozark National Scenic Riverway.
OZAR012–88	Akers Ferry Canoe Rental, Inc	Ozark National Scenic Riverway.
OZAR016–89	Carr's Grocery & Canoe Rental	Ozark National Scenic Riverway.
SLBE005–86	G. Michael Grosvenor (Manitou Island Transit)	Sleeping Bear Dunes National Landmark.
VOYA002–96	Kettle Falls Hotel	Voyageurs National Park.
BLRJ001–93	Southern Highland Handicraft Guild	Blue Ridge Parkway.
BLRI002–83	Northwest Trading Post, Inc	Blue Ridge Parkway.
BLRI007–82	Forever NPC Resorts, LLC	Blue Ridge Parkway.
CAHA001–98	Avon-Thornton Limited Partnership	Cape Hatteras National Seashore.
CAHA002–98	Cape Hatteras Fishing Pier, Inc	Cape Hatteras National Seashore.
CAHA004–98	Oregon Inlet Fishing Center, Inc	Cape Hatteras National Seashore.
CALO003–98	Morris Marina, Kabin Kamps & Ferry Service, Inc	Cape Lookout National Seashore.
EVER001–80	Xanterra Parks and Resorts, Inc	Everglades National Park.
MACA002–82	Forever Resorts, LLC/Forever Resorts, Inc	Mammoth Cave National Park.
VIIS001–71	Caneel Bay, Inc	Virgin Islands National Park.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Concession Program Manager, National Park Service, Washington, DC 20240, Telephone 202/513–7156.

Dated: October 20, 2008.

Katherine H. Stevenson,

Assistant Director, Business Services.

[FR Doc. E8–29324 Filed 12–11–08; 8:45 am]

BILLING CODE 4312–53–M

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Extension of Concession Contracts

AGENCY: National Park Service, Interior.

ACTION: Public notice.

DATES: *Effective Date:* January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Concession Program Manager, National Park Service, Washington, DC 20240, Telephone 202/513–7156.

SUMMARY: Pursuant to 36 CFR 51.23, public notice is hereby given that the National Park Service proposes to extend the following expiring concession contracts for a period of up to 1 year, or until such time as a new contract is executed, whichever occurs sooner.

SUPPLEMENTARY INFORMATION: All of the listed concession authorizations will expire by their terms on or before December 31, 2008. The National Park Service has determined that the proposed short-term extensions are necessary in order to avoid interruption of visitor services and has taken all reasonable and appropriate steps to consider alternatives to avoid such interruption.

Conc. ID No.	Concessioner name	Park
GRTE004–98	Triangle X Ranch, LLP	Grand Teton National Park.
GRTE006–02	Barker Ewing Scenic Tours, Inc	Grand Teton National Park.
GRTE008–02	Jack H. Dennis Jr.	Grand Teton National Park.
GRTE010–02	Will Dorman	Grand Teton National Park.
GRTE011–02	Heart Six Ranch	Grand Teton National Park.
GRTE014–02	Countryside, LLC	Grand Teton National Park.
GRTE015–02	Triangle X Ranch, LLP	Grand Teton National Park.
GRTE017–02	O.A.R.S. Inc	Grand Teton National Park.
GRTE020–02	Solitude Float Trips, Inc	Grand Teton National Park.
GRTE040–02	Lost Creek Ranch	Grand Teton National Park.
GRTE043–02	Great Salt Lake Council, Inc	Grand Teton National Park.
GRTE045–02	C-H Ranch Corporation	Grand Teton National Park.
NACC001–89	Golf Course Specialist, Inc	National Capital Parks—Central.
BLRI004–88	Virginia Peaks of Otter	Blue Ridge Parkway.
EVER004–99	TRF Concession Specialists of Florida, Inc	Everglades National Park.
HAV0001–89	Ken Direction Corporation	Hawaii Volcanoes National Park.
CHIS001–98	Island Packers, Inc	Channel Islands National Park.
PORE003–98	Golden Gate Council of American Youth Hostels	Point Reyes National Seashore.
ISR0002–82	Forever NPC Resorts, LLC	Isle Royale National Park.
ACAD014–02	Carriages in the Park, Inc	Acadia National Park.
CAC0002–04	The Benz Corporation	Cape Cod National Seashore.
FIIS003–98	Sayville Ferry Service, Inc	Fire Island National Seashore.
FIIS004–02	Davis Park Ferry Company, Inc	Fire Island National Seashore.
GATE003–98	Marinas of the Future, Inc	Gateway National Recreation Area.

FOR FURTHER INFORMATION CONTACT: Jo A. Pendry, Concession Program Manager, National Park Service, Washington, DC 20240, Telephone 202/513–7156.

Dated: October 20, 2008.

Katherine H. Stevenson,

Assistant Director, Business Services.

[FR Doc. E8–29321 Filed 12–11–08; 8:45 am]

BILLING CODE 4310–70–M

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

California Bay-Delta Public Advisory Committee Charter Renewal

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of renewal.

SUMMARY: This notice is published in accordance with Section 9(a)(2) of the Federal Advisory Committee Act of 1972 (Pub. L. 92–463). Following consultation with the General Services Administration, notice is hereby given that the Secretary of the Interior (Secretary) is renewing the charter for the California Bay-Delta Public Advisory Committee (Committee). The purpose of the Committee is to provide advice and recommendations to the Secretary on implementation of the CALFED Bay-Delta Program (Program) as described in the Programmatic Record of Decision which outlines the long-term comprehensive solution for addressing the problems affecting the San Francisco Bay-Sacramento-San Joaquin Delta Estuary, Public Law 108–361, and other applicable law. Specific responsibilities of the Committee include: (1) Making recommendations on annual priorities and coordination of Program actions to achieve balanced implementation of the Program elements; (2) providing recommendations on effective integration of Program elements to provide continuous, balanced improvement of each of the Program objectives (ecosystem restoration, water quality, levee system integrity, and water supply reliability); (3) evaluating implementation of Program actions, including assessment of Program area performance; (4) reviewing and making recommendations on Program Plans and Annual Reports describing implementation of Program elements as set forth in the ROD to the Secretary; (5) recommending Program actions taking into account recommendations from the Committee's subcommittees; and (6) liaison between the Committee's subcommittees, the State and Federal agencies, the Secretary and the Governor.

The Committee consists of 20 to 30 members who are appointed by the

Secretary, in consultation with the Governor.

FOR FURTHER INFORMATION CONTACT: Diane Buzzard, CALFED Program Manager, Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95821–1898, telephone 916–978–5525.

The certification of Charter renewal is published below:

Certification

I hereby certify that Charter renewal of the California Bay-Delta Public Advisory Committee is in the public interest in connection with the performance of duties imposed on the Department of the Interior.

Dirk Kempthorne,

Secretary of the Interior.

[FR Doc. E8–29267 Filed 12–11–08; 8:45 am]

BILLING CODE 4310–MN–M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–615]

In the Matter of Certain Ground Fault Circuit Interrupters and Products Containing Same; Notice of Commission Determination To Review in Part a Final Determination on Violation of Section 337; Schedule for Briefing on the Issues on Review and on Remedy, Public Interest, and Bonding; Denial of Motion for Leave To File a Reply

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the final initial determination (''ID'') issued by the presiding administrative law judge (''ALJ'') in the above-captioned investigation finding a violation of 19 U.S.C. 1337 (''section 337'') in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain ground fault circuit interrupters and products containing same by reason of infringement of one or more of claims 1, 7, and 8 of U.S. Patent No. 5,594,398 (''the '398 patent''); claims 14, 18, and 30 of U.S. Patent No. 7,283,340 (''the '340 patent''); claim 1 of U.S. Patent No. 7,212,386 (''the '386 patent''); claims 1 and 15 of U.S. Patent No. 7,164,564 (''the '564 patent''); claim 1 of U.S. Patent No. 7,256,973 (''the '973 patent''); and claim 52 of U.S. Patent No. 7,154,718 (''the '718 patent'').

FOR FURTHER INFORMATION CONTACT: Paul M. Bartkowski, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–5432. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: This investigation was instituted on September 18, 2007, based on a complaint filed by Pass & Seymour, Inc. (''P&S'') of Syracuse, New York. The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain ground fault circuit interrupters and products containing the same by reason of infringement of certain claims of certain United States patents. The complaint named 15 respondents: General Protecht Group, Inc. (''GPG'') of Zhejiang, China; General Protecht Group U.S., Inc. of Atlanta, Georgia; Shanghai ELE Manufacturing Corporation (''ELE'') of Shanghai, China; Shanghai Meihao Electric, Inc. (''Meihao'') of Shanghai, China; Wenzhou Trimone Company (''Trimone'') of Zhejiang, China; Cheetah USA Corp. (''Cheetah'') of Sandy, Utah; GX Electric (''GX'') of Pompano Beach, Florida; Nicor Inc. (''Nicor'') of Albuquerque, New Mexico; Orbit Industries, Inc. (''Orbit'') of Los Angeles, California; The Designer's Edge (''TDE'') of Bellevue, Washington; Universal Security Instruments, Inc. (''USI'') of Owings Mills, Maryland; Colacino Electric Supply, Inc. (''Colacino'') of Newark, New York; Ingram Products, Inc. (''Ingram'') of Jacksonville, Florida; Lunar Industrial & Electrical, Inc. (''Lunar'') of Miami, Florida; and Quality Distributing, LLC. (''Quality'') of Hillsboro, Oregon.

After institution of the investigation, by separate initial determinations, each of which the Commission determined not to review, respondents Lunar, GX, Ingram, Quality, General Protecht Group U.S., Inc., and USI were terminated from the investigation; the '340 patent was added to the investigation; P&S's motion for summary determination that it satisfied the economic prong of the domestic industry requirement was granted with respect to all asserted patents; and the investigation was terminated with respect to all claims except claims 1, 7, and 8 of the '398 patent, claim 1 of the '386 patent, claims 14, 18, and 30 of the '340 patent, claims 1 and 15 of the '564 patent; claims 1, 2, 5, and 6 of the '973 patent; and claim 52 of the '718 patent.

On September 24, 2008, the ALJ issued his final ID, finding a violation with respect to each patent by each remaining respondent. Respondents ELE (in a joint brief with its respondent customers Cheetah, Colacino, Orbit, and Nicor), Meihao (in a joint brief with its respondent customer TDE), GPG, and Trimone each filed a petition for review of the ID. P&S and the Commission investigative attorney (''IA'') each filed a response to the respondents' petitions for review. Meihao filed a motion for leave to file a reply to P&S's response, along with a proposed reply submission.

Having examined the record of this investigation, including the ALJ's final ID and the submissions of the parties, the Commission has determined to deny Meihao's motion for leave to file a reply, and has determined to review the final ID in part. Specifically, the Commission has determined to review (1) The ALJ's construction of ''unitary, electrically conducting member carrying a pair of spaced electrical contacts'' in the asserted claims of the '398 patent and related issues of infringement, domestic industry, and validity; (2) the ALJ's construction of ''mounting means'' in the asserted claims of the '398 patent and related issues of infringement, domestic industry, and validity; (3) the ALJ's construction of ''latching means'' in the '398 patent and related issues of infringement, domestic industry, and validity; (4) the ALJ's conclusion that the asserted claims of the '340 patent are not invalid; (5) the ALJ's construction of ''an actuator assembly configured to provide an actuator signal in response to the fault detection or the wiring state detection signal'' in claim 1 of the '386 patent and related issues of infringement, domestic industry, and validity; (6) the ALJ's construction of ''the circuit interrupter being configured to disconnect the first conductive path from the second conductive path in response to the actuator signal in the reset state'' in claim 1 of the '386 patent and related issues of infringement,

domestic industry, and validity; (7) the ALJ's determination that claim 1 of the '386 patent is not invalid; (8) the ALJ's determination of infringement of claim 1 of the '973 patent regarding ELE's 2006 GFCIs; and (9) the ALJ's construction of ''cantilever'' in claim 52 of the '718 patent and related issues of infringement, domestic industry, and validity. The Commission requests briefing based on the evidentiary record on these topics. The Commission is particularly interested in responses to the following questions:

Regarding the '398 patent:

(1) How would modifying the construction to more clearly provide meaning to the terms ''unitary'' and ''carrying'' affect the determinations of infringement, validity, and domestic industry, if at all?

(2) Please specifically address the statement made in reference to the Doyle and Van Haaren patents in CX–9, PS–ITC 336699, referenced in P&S's response to the petitions for review, in your response to question (1).

(3) Is ''mounting'' a required function of the claimed ''mounting means''? If so, what structure from the '398 patent performs the function of ''mounting''?

(4) How would modifying the structure identified as corresponding to the ''latching means'' to include the ''latch member'' disclosed in the '398 patent affect the determinations of infringement, validity, and domestic industry?

(5) Does the structure in Trimone's 2006 GFCIs accused of meeting the ''mounting means'' limitation permit movement to a ''second position, wherein both of said pair of contacts are in spaced, circuit-breaking relation to said pair of terminals''?

Regarding the '340 patent:

(1) Does the DiSalvo patent's statement that ''[c]losing the reset contacts activates the operation of the circuit by, for example simulating a ground fault * * *'' constitute a disclosure of ''a predetermined signal not simulating a fault condition''? If so, are the asserted claims of the '340 patent obvious over the DiSalvo patent?

(2) Does the Neiger patent's disclosure of a circuit that detects a miswire condition constitute a disclosure of ''at least one detection circuit * * * configured to generate a predetermined signal in response to detecting a proper wiring condition,'' under the ALJ's construction of ''detection''? If so, are the asserted claims of the '340 patent obvious over the Neiger patent?

(3) Please address any remaining arguments, that were previously raised, in favor of obviousness/nonobviousness of the asserted claims of the '340 patent that were not discussed in response to questions (1) and (2).

Regarding the '386 Patent:

(1) What effect would a construction that recognizes that the ''configured to disconnect'' limitation requires the device to trip in response to an actuator signal—whether that actuator signal is generated in response to either a fault detection signal or a wiring state detection signal—in the reset state have on infringement, domestic industry, and validity? Please provide record evidence supporting your conclusions under such a construction.

(2) Please provide specific limitations of claim 1 of the '386 patent that are not disclosed in the DiSalvo patent, and supporting evidentiary citations.

Regarding the '973 patent:

In what way is the ''user-accessible housing feature'' in ELE's device, that is, the hole, in communication with the switch element?

Regarding the '718 patent:

What effect would modifying the ALJ's construction of ''cantilever'' to adopt Meihao's proposed construction have on the determinations of infringement, validity, and domestic industry regarding the '718 patent?

Furthermore, in connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease-and-desist orders that could result in the respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, s*ee In the Matter of Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease-and-desist orders would have on (1) The public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: The parties to the investigation are requested to file written submissions on the issues under review. The submissions should be concise and thoroughly referenced to the record in this investigation, including references to exhibits and testimony. Additionally, parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding. Further, regarding the potential issuance of a general exclusion order, the Commission requests briefing specific to whether the statutory criteria set forth in section 337(d)(2) are met in this investigation. Complainants and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the dates that the patents expire and the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on December 22, 2008. Reply submissions must be filed no later than the close of business on December 31, 2008. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has

already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

By order of the Commission.

Issued: December 8, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–29454 Filed 12–11–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1150 (Final)]

Circular Welded Carbon Quality Steel Line Pipe From Korea

AGENCY: United States International Trade Commission.

ACTION: Termination of investigation.

SUMMARY: On November 25, 2008, the Commission received a letter from the Department of Commerce stating that, having received a letter from petitioners in the subject investigation (Maverick Tube Corp., United States Steel Corp., Tex-Tube Corp., and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC) withdrawing its petition, Commerce was terminating its antidumping investigation on circular welded carbon quality steel line pipe from Korea. Accordingly, pursuant to section 207.40(a) of the Commission's Rules of Practice and Procedure (19 CFR 207.40(a)), the subject investigation is terminated.

DATES: *Effective Date:* November 25, 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 individuals are advised that information on this matter can be obtained 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 this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

Authority: This investigation is being terminated under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.40 of the Commission's rules (19 CFR 207.40).

By order of the Commission.

Issued: December 8, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–29452 Filed 12–11–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–455 and 731–TA–1149 (Final)]

Circular Welded Carbon Quality Steel Line Pipe From China

AGENCY: United States International Trade Commission.

ACTION: Additional scheduling date for the subject investigations.

DATES: *Effective Date:* December 5, 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 investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION: Effective September 9, 2008, the Commission established a schedule for the conduct of the final phase of the subject investigations (73 FR 54618, September 22, 2008). Although the Department of Commerce (''Commerce'') had not yet made its preliminary less than fair value (''LTFV'') determination, the Commission, for purposes of efficiency, included the antidumping duty investigation in the schedule for the countervailing duty investigation. On November 6, 2008, Commerce issued its preliminary antidumping duty determination and postponed its final antidumping duty determination (73 FR 66012). Accordingly, the Commission is issuing the additional scheduling date with respect to the antidumping duty investigation as follows: A supplemental brief addressing only Commerce's final antidumping duty determination is due on March 31, 2009. The brief may not exceed five (5) pages in length.

For further information concerning these investigations see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

Issued: December 8, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–29453 Filed 12–11–08; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–288]

Ethyl Alcohol for Fuel Use: Determination of the Base Quantity of Imports

AGENCY: United States International Trade Commission.

ACTION: Notice of determination.

SUMMARY: Section 423(c) of the Tax Reform Act of 1986, as amended (19 U.S.C. 2703 note), requires the United States International Trade Commission to determine annually the amount (expressed in gallons) that is equal to 7 percent of the U.S. domestic market for fuel ethyl alcohol during the 12-month period ending on the preceding September 30. This determination is to be used to establish the ''base quantity'' of imports of fuel ethyl alcohol with a zero percent local feedstock requirement that can be imported from U.S. insular possessions or CBERA-beneficiary countries. The base quantity to be used by U.S. Customs and Border Protection

in the administration of the law is the greater of 60 million gallons or 7 percent of U.S. consumption, as determined by the Commission.

For the 12-month period ending September 30, 2008, the Commission has determined the level of U.S. consumption of fuel ethyl alcohol to be 8.88 billion gallons; 7 percent of this amount is 621.5 million gallons (these figures have been rounded). Therefore, the base quantity for 2009 should be 621.5 million gallons.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street, SW., Washington, DC. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street, SW., Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://www.usitc.gov/secretary/edis.htm*.

FOR FURTHER INFORMATION CONTACT: For information specific to this investigation, contact project leader Douglas Newman (202) 205–3328, *douglas.newman@usitc.gov*, in the Commission's Office of Industries. For information on legal aspects of the investigation contact William Gearhart, *william.gearhart@usitc.gov*, of the Commission's Office of the General Counsel at (202) 205–3091. The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). 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.

Background: Section 423(c) of the Tax Reform Act of 1986, as amended, which concerns local feedstock requirements for fuel ethyl alcohol imported by the United States from U.S. insular possessions or CBERA-beneficiary countries, requires that the Commission determine annually the amount that is equal to 7 percent of the U.S. domestic market for fuel ethyl alcohol. The Commission published its notice instituting this investigation in the **Federal Register** of March 21, 1990 (55 FR 10512), and published its most recent previous determination for the 2008 amount in the **Federal Register** of December 28, 2007 (72 FR 73883). The Commission uses official statistics of the U.S. Department of Energy to make these determinations, as well as the PIERS database of the *Journal of Commerce*, which is based on U.S. export declarations.

By order of the Commission.

Issued: December 9, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8–29455 Filed 12–11–08; 8:45 am]

BILLING CODE 7020–02–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Meeting of the Judicial Conference Advisory Committee on Rules of Bankruptcy Procedure

AGENCY: Judicial Conference of the United States Advisory Committee on Rules of Bankruptcy Procedure.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Rules of Bankruptcy Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation.

DATES: March 26–27, 2009.

Time: 8:30 a.m. to 5 p.m.

ADDRESSES: Estancia La Jolla Hotel, 9700 N Torrey Pines Road, La Jolla, CA 92037–1102.

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: December 8, 2008.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. E8–29480 Filed 12–11–08; 8:45 am]

BILLING CODE 2210–55–M

JUDICIAL CONFERENCE OF THE UNITED STATES

Meeting of the Judicial Conference Committee on Rules of Practice and Procedure

AGENCY: Judicial Conference of the United States Committee on Rules of Practice and Procedure.

ACTION: Notice of open meeting.

SUMMARY: The Committee on Rules of Practice and Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation.

DATES: January 12–13, 2009.

Time: 8:30 a.m. to 5 p.m.

ADDRESSES: St. Mary's University School of Law, 1 Camino Santa Maria Street, San Antonio, TX 78228–5433.

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: December 8, 2008.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. E8–29488 Filed 12–11–08; 8:45 am]

BILLING CODE 2210–55–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Interchangeable Virtual Instruments Foundation, Inc.

Notice is hereby given that, on November 3, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq*. (''the Act''), Interchangeable Virtual Instruments Foundation, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Honeywell Technology Solutions, Bangalore, INDIA; Easbeacon Test Systems Ltd., Beijing, PEOPLE'S REPUBLIC OF CHINA; The Boeing Company, St. Louis, St. Louis, MO; and Raytheon Missile Systems, Tucson, AZ have withdrawn as parties to this venture. In addition, Xantrex Technology, Inc. has changed its name to Ametek Programmable Power, San Diego, CA.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Interchangeable Virtual Instruments Foundation, Inc. intends to file additional written notifications disclosing all changes in membership.

On May 29, 2001, Interchangeable Virtual Instruments Foundation, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 30, 2001 (66 FR 39336).

The last notification was filed with the Department on June 2, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 11, 2008 (73 FR 39987).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. E8–29296 Filed 12–11–08; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—International Electronics Manufacturing Initiative

Notice is hereby given that, on November 4, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 *et seq.* (''the Act''), International Electronics Manufacturing Initiative (''iNEMI'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ASSET InterTech, Inc., Richardson, TX; Corelis, Cerritos, CA; Dell, Inc., Round Rock, TX; Doosan Corp. ElectroMaterials BG, Kyunggi-do, REPUBLIC OF KOREA; Elite Material Co., Ltd., Tao-Yuan Hsien, TAIWAN; Industrial Technology Research Institute (ITRI), Hsinchu, TAIWAN; IST-Integrated Service Technology, Inc., Hsinchu City, TAIWAN; ITEQ Corporation, Taoyuan Hsien, TAIWAN; and Nan Ya Plastics Corporation, Taipei, TAIWAN have been added as parties to this venture.

Also, Analogic, Peabody, MA; Kester, Des Plaines, IL; Parametric Technology Corporation (PTC), Needham, MA; E2open, Redwood City, CA; Dassault Systems, Lowell, MA; and UGS, Milford, MA have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and iNEMI intends to file additional written notifications disclosing all changes in membership.

On June 6, 1996, iNEMI filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 28, 1996 (61 FR 33774).

The last notification was filed with the Department on December 27, 2007. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on February 11, 2008 (73 FR 7762).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. E8–29295 Filed 12–11–08; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Coopepative Research and Production Act of 1993—OPENSAF Foundation

Notice is hereby given that, on November 6, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), OpenSAF Foundation has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ENEA AB, Chandler, AZ has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and OpenSAF Foundation intends to file additional written notifications disclosing all changes in membership.

On April 8, 2008, OpenSAF Foundation filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on May 16, 2008 (73 FR 28508).

The last notification was filed with the Department on June 6, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 21, 2008 (73 FR 42367).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. E8–29291 Filed 12–11–08; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—PXI Systems Alliance, Inc.

Notice is hereby given that, on November 3, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), PXI Systems Alliance, Inc., has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Beijing Control Industrial Computer Corp., Beijing, People's Republic of China; Elektrobit Austria GmbH, Vienna, Austria; and LeCroy Corporation, Chestnut Ridge, NY, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and PXI Systems Alliance, Inc., intends to file additional written notifications disclosing all changes in membership.

On November 22, 2000, PXI Systems Alliance, Inc., filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 8, 2001 (66 FR 13971).

The last notification was filed with the Department on August 20, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 18, 2008 (73 FR 54169).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. E8–29292 Filed 12–11–08; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Semiconductor Test Consortium, Inc.

Notice is hereby given that, on November 3, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993,

15 U.S.C. 4301 *et seq.* (''the Act''), Semiconductor Test Consortium, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership.

The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Aeroflex Test Solutions, Stevenage, Hertfordshire, United Kingdom; and Geotest-Marvin Test Systems, Irvine, CA have been added as parties to this venture. Also, Stefan Thurmaier (individual member), Bad Aibling, Germany; Macquaire Electronics, Inc., San Diego, CA; and Billy Antheunisse (individual member), Dallas, TX have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Semiconductor Test Consortium, Inc. intends to file additional written notifications disclosing all changes in membership.

On May 27, 2003, Semiconductor Test Consortium, Inc. filed its original notification pursuant to Section 6(a) of the Act.

The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 17, 2003 (68 FR 35913).

The last notification was filed with the Department on August 20, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 18, 2008 (73 FR 54169)

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. E8–29293 Filed 12–11–08; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 08–35]

Hicham K. Riba, D.D.S.; Revocation of Registration

On February 1, 2008, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Hicham K. Riba, D.D.S. (Respondent), of Chicago, Illinois. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, BR5325091, as a practitioner, on the ground that ''as a result of [disciplinary] action by the Illinois Department of Financial and Professional Regulation,'' Respondent is ''currently without authority to handle controlled substances in * * * Illinois, the [S]tate in which [he is] registered with DEA,'' and is therefore not entitled to maintain his registration. Show Cause Order at 1.

Respondent requested a hearing on the allegation; the matter was assigned to Administrative Law Judge (ALJ) Mary Ellen Bittner. Thereafter, the Government moved for summary disposition and to stay further proceedings. Motion for Sum. Disp. at 1–2. The basis for the Government's motion was that on September 29, 2006, the Illinois Department of Professional Regulation suspended Respondent's dental license ''due to gross malpractice, professional incompetence, and dishonorable, unethical or unprofessional conduct.'' *Id.* at 1. Because Respondent lacks authority under Illinois law to dispense controlled substances and was therefore without authority to hold a DEA registration in Illinois, the Government maintained that his registration must be revoked. *Id.* at 1–2.

Respondent opposed the Government's motion. Respondent contended that he was denied a fair hearing in the state proceeding because a member of the Illinois House of Representatives had written the Director of the Illinois Department of Financial and Professional Regulation and urged that Respondent ''should never have his dental license re-instated,'' and ''that this Dentist [should] never be allowed to practice in the State of Illinois * * * again.'' Response to Mot. for Sum. Disp. at 1. Respondent further argued that the letter was an improper *ex parte* communication, which was not made a part of the record as required by state law and which was not disclosed until the Director issued the final decision in the case, in which he rejected the recommendation of the state board that a lesser sanction be imposed. *Id.* at 1–2. Respondent further noted other cases in which dentists who had committed similar acts had received less harsh sanctions and contends that there is ''a reasonable inference that the Director was improperly influenced by the *ex parte* communication and that the [state] proceeding * * * was not fair.'' *Id.* at 3. Finally, Respondent maintained that the authorities cited by the Government in support of its motion were distinguishable because ''those cases did not discuss the issue of improper *ex parte* communication having prejudiced the proceeding of the state licensing agency.'' *Id.* at 4.[1]

The ALJ was not persuaded. The ALJ noted that there was no dispute that Respondent was without authority to dispense controlled substances in Illinois, and that under agency precedent, he was not entitled to a stay of this proceeding during the pendency of his appeal of the state proceeding. ALJ Dec. at 3–4 (citing *Wingfield Drugs, Inc.*, 52 FR 27,070, 27,071 (1987)). The ALJ thus concluded that further delay in ruling on the Government's motion was unwarranted, granted the Government's motion for summary disposition, and recommended that Respondent's registration be revoked and that ''any pending applications be denied.'' *Id* at 4–5. The record was then forwarded to me for final agency action.

Thereafter, Respondent filed exceptions to the ALJ's decision. Respondent's principal argument is that the ALJ's decision was overly broad because it recommended the denial of any pending applications and thus ''goes beyond the scope of this proceeding'' because he had moved to Tennessee and ''was granted a license to practice dentistry in'' that State. Resp. Exceptions at 2–3.

Having considered the entire record in this matter, including Respondent's exceptions, I adopt the ALJ's decision in its entirety. I find that Respondent currently holds DEA Certificate of Registration, BR5325091, which authorizes him to dispense controlled substances in schedules II through V as a practitioner, at the registered location of Little Angel Dental Clinic, 3915 W. 26th Street, Chicago, Illinois. Respondent's registration does not expire until April 30, 2009.

I further find that on September 29, 2006, the Illinois Division of Professional Regulation suspended Respondent's state dental license ''due to gross malpractice, professional incompetence, and dishonorable, unethical or unprofessional conduct.'' Exh. A. to Gov. Motion for Summary Disp. Moreover, I take official notice of the online records of the Illinois Division of Professional Regulation, which indicate that both Respondent's state dental license and his controlled substance license remain suspended.[2]

[1] Respondent further asserted that the proceeding should be stayed pending the resolution of his state appeal.

[2] An agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947). In accordance with the Administrative

Continued

Under the Controlled Substances Act (CSA), ''[a] separate registration [is] required at each principal place of * * * professional practice where the [registrant] dispenses controlled substances,'' 21 U.S.C. 822(e), and a practitioner must be currently authorized to handle controlled substances in ''the jurisdiction in which he practices'' in order to maintain a DEA registration. *See* 21 U.S.C. 802(21) (''[t]he term 'practitioner' means a physician * * * licensed, registered, or otherwise permitted, by * * * the jurisdiction in which he practices * * * to distribute, dispense, [or] administer * * * a controlled substance in the course of professional practice''). *See also id.* § 823(f) (''The Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.''). As these provisions make plain, possessing authority to dispense a controlled substance under the laws of the State in which a dentist practices is an essential condition for holding a DEA registration.

Accordingly, DEA has repeatedly held that the CSA requires the revocation of a registration issued to a practitioner whose state license has been suspended or revoked. *See Sheran Arden Yeates,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci,* 58 FR 51104, 51105 (1993); *Bobby Watts,* 53 FR 11919, 11920 (1988). *See also* 21 U.S.C. 824(a)(3)(authorizing the revocation of a registration ''upon a finding that the registrant * * * has had his State license or registration suspended [or] revoked * * * and is no longer authorized by State law to engage in the * * * distribution [or] dispensing of controlled substances'').

Moreover, DEA has repeatedly held ''that a registrant cannot collaterally attack the results of a state criminal or administrative proceeding in a proceeding under section 304 of the CSA.'' *Brenton D. Glisson, M.D.,* 72 FR 54296, 54297 (2007) (quoting *Sunil Bhasin; M.D.,* 72 FR 5082, 5083 (2007)); *see also Shahid Musud Siddiqui,* 61 FR 14818 (1996); *Robert A. Leslie,* 60 FR 14004 (1995)). Respondent's contention that the state proceeding was fundamentally unfair because the Director was improperly influenced by an *ex parte* communication from a member of the Illinois House of Representatives is not addressable in this forum.

Moreover, while it appears that Respondent is seeking judicial review of the state proceeding in the Illinois courts, the suspension nonetheless remains in effect. Respondent therefore remains without authority under Illinois law to dispense controlled substances in the State in which he is registered. Because possessing authority under state law is an essential condition for holding a registration under the CSA, *see* 21 U.S.C. 802(21) & 823(f), and Respondent's Illinois controlled substance license remains suspended, he is not entitled to a stay of this proceeding. *See Wingfield Drugs,* 52 FR at 27071.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b) & 0.104, I hereby order that DEA Certificate of Registration, BR5325091, issued to Hicham K. Riba, D.D.S., be, and it hereby is, revoked. I further order that any pending application of Hicham K. Riba, D.D.S., to renew this registration be, and it hereby is, denied.[3] This order is effective January 12, 2009.

December 2, 2008.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E8–29406 Filed 12–11–08; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Your Druggist Pharmacy; Revocation of Registration

On May 28, 2008, I, the Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration to Your Druggist Pharmacy (Respondent), of Coral Springs, Florida. The Order immediately suspended Respondent's DEA Certificate of Registration, AY1916103, which authorizes it to dispense controlled substances as a retail pharmacy, on the grounds that Stanley Dyen, its owner and pharmacist-in-charge, as well as two of its employees, Ira Friedberg, a pharmacist, and Jennifer Lee-Richards, a pharmacy technician, were diverting large quantities of oxycodone, a schedule II controlled substance, and that Respondent's continued registration during the pendency of the proceedings ''constitutes an imminent danger to public health and safety.'' Show Cause Order at 1–2 (citing 21 U.S.C. 824(d) & 841(a)). The Order also proposed the revocation of Respondent's registration, and the denial of any pending applications to renew or modify its registration, on the ground that Respondent's ''continued registration is inconsistent with the public interest.'' Order at 1 (citing 21 U.S.C. 823(f)).

More specifically, the Show Cause Order alleged that between March and June 2007, pharmacy technician Lee-Richards had ''diverted at least 5,900 dosage units of oxycodone, and at least 500 dosage units of alprazolam.'' *Id.* (citing 21 U.S.C. 841(a)(1)). With respect to pharmacist Friedberg, the Order alleged that in February 2008, he had ''diverted at least 7,500 dosage units of oxycodone.'' *Id.* (citing 21 U.S.C. 841(a)(1)).

As to Stanley Dyen, the Order alleged that in February 2008, he had ''diverted at least 500 dosage units of hydrocodone and at least 500 dosage units of alprazolam,'' and that ''[o]n February 18, 2008, [he] was arrested for trafficking in hydrocodone and delivery of alprazolam.'' *Id.* at 1–2. The Order further alleged that notwithstanding Stanley Dyen's arrest, he ''continues to serve on a daily basis as'' Respondent's pharmacist, and that ''[t]he majority of the time, [he] is the sole pharmacist * * * and operates without the supervision of any other pharmacist or employee.'' *Id.* at 2. Finally, the Order alleged that on March 4, 2008, Stanley Dyen had ''transferred ownership of [Respondent] to * * * his wife, without complying with the requirements of 21 CFR 1301.52.'' *Id.*

On June 2, 2008, DEA Investigators went to Respondent and served the Order by handing it to Stanley Dyen. On June 12, 2008, Respondent requested a hearing on the allegations, and the matter was assigned to an Administrative Law Judge (ALJ), who proceeded to conduct pre-hearing procedures. On July 21, 2008, however, Respondent withdrew its request for a hearing. That same day, the ALJ issued an order terminating the proceeding.

Thereafter, the case file was forwarded to me for final agency action pursuant to 21 CFR 1301.43(e). Based on the letter from Respondent's counsel withdrawing its request for a hearing, I

Procedure Act and DEA's regulation, Respondent is ''entitled on timely request to an opportunity to show to the contrary.'' 5 U.S.C. 556(e); *see also* 21 CFR 1316.59(e). Accordingly, Respondent may file a motion for reconsideration within fifteen days of service of this order which shall commence with the mailing of the order.

[3] There is no evidence in the record as to whether Respondent has applied for a registration in Tennessee. Nor is there any evidence that Respondent requested a modification of his registered location from Illinois to Tennessee. Because this proceeding was based solely on Respondent's loss of authority under Illinois law, it is not *res judicata* on the question of whether granting Respondent a registration to dispense controlled substances in Tennessee would be consistent with the public interest.

find that Respondent has waived its right to a hearing. I therefore issue this Decision and Final Order without a hearing based on relevant material contained in the investigative file, *see id.,* and make the following findings.

Findings

Respondent is the holder of DEA Certificate of Registration, AY1916103, which authorized it to dispense controlled substances in schedule II through V as a retail pharmacy at the registered location of 8091 West Sample Road, Coral Springs, Florida. Respondent's registration does not expire until May 31, 2009.

In June 2007, a DEA Task Force Officer (TFO) received an anonymous complaint that Respondent was engaged in the unlawful distribution of controlled substances. Thereafter, investigators observed Jennifer Lee-Richards, a pharmacy technician employed by Respondent, leave the pharmacy carrying a bag which contained several small containers. Local police stopped Lee-Richards and found that she had in her possession 5800 tablets of oxycodone 30 mg., and 100 tablets of Oxycontin 80 mg., both of which are schedule II controlled substances, 21 CFR 1308.12(b)(1), as well as 500 tablets of alprazolam 2 mg., a schedule IV controlled substance. *Id.* 1308.14(c). During an interview, Lee-Richards admitted that she had been taking controlled substances from Respondent for approximately two months and was giving them to her son (Twane Lee), who sold them.

In an interview, Twane Lee admitted that he was selling various controlled substances which he obtained from his mother. Both Lee-Richards and Twane Lee were subsequently indicted by a Federal Grand Jury and charged with conspiracy to possess oxycodone with the intent to distribute.

On February 8, 2008, local police observed C.P. leaving Respondent carrying a white plastic bag which contained several cardboard boxes. The police followed C.P. and initiated a traffic stop, during which they found that C.P. had in his possession 7500 tablets of oxycodone 30 mg., 200 tablets of alprazolam 2 mg., and 100 tablets of oxycodone 80 mg. C.P. told the police he had just purchased the drugs from Ira Friedberg, who worked as a pharmacist at Respondent. C.P. also related that he had paid Friedberg $8000 for the drugs.

C.P. cooperated with the authorities and agreed to attempt to purchase additional drugs from Friedberg. On February 12, 2008, Friedberg agreed to sell C.P. 7500 tablets of oxycodone 30 mg., in exchange for $7,500. Friedberg gave C.P. 7500 tablets and his car keys and told C.P. to place $7500 in his car's center console. Friedberg also gave C.P. an additional 5000 tablets of oxycodone (which Friedberg was to deliver to L.H., a third party) and told C.P. to place it on the passenger side floorboard of Friedberg's car.

Shortly thereafter, Friedberg left Respondent, entered his car, and drove away. The police conducted a traffic stop and recovered the 5000 oxycodone tablets. A TFO told Friedberg that he was aware that the tablets were to be delivered to L.H.; Friedberg then agreed to cooperate and wear a recording device.

Friedberg then met L.H. After a conversation, L.H. went back to his car and retrieved approximately $5000. Friedberg and L.H. then went to the former's car, opened the passenger-side door, and placed the money on the front seat. The police immediately arrested both Friedberg and L.H., and recovered both the drugs and the money. Thereafter, a Federal Grand Jury indicted both Friedberg and L.H., charging each with conspiracy to possess oxycodone with the intent to distribute.

The following day, a confidential source (CS) told the investigators that he had previously bought hydrocodone and alprazolam from Stanley Dyen without a valid prescription. The CS agreed to make a controlled buy of 500 tablets of hydrocodone/apap (10/650 mg.) and 500 tablets of alprazolam 2 mg. from Dyen.

On February 18, the CS was provided $600 of marked currency and went to Respondent. Upon his arrival, the CS entered Respondent and paid the $600 to Dyen, who then gave 500 tablets of hydrocodone/apap (10/650 mg.) and 500 tablets of alprazolam 2 mg. to the CS.

Thereafter, detectives observed Dyen leave Respondent and conducted a traffic stop. Dyen was arrested; during a search incident to his arrest, Dyen was found to have in his possession the $600 of marked currency. Dyen was subsequently charged under state law with trafficking in hydrocodone and delivery of alprazolam.

On March 14, 2008, a state search warrant was executed at Respondent. During the search, investigators interviewed Dyen, who related that his wife owned the pharmacy. Investigators subsequently determined that following his arrest, Dyen had transferred ownership of Respondent to his wife, who was now listed (with the Florida Secretary of State) as Respondent's President.

Investigators subsequently determined that Respondent was the largest purchaser of oxycodone in the State of Florida, with its purchases totaling nearly 754,000 tablets between January 1 and March 22, 2008. Moreover, during the service of the Immediate Suspension Order, investigators received information that Respondent has a large number of out-of-town customers, who had typically traveled from Kentucky to fill prescriptions for such drugs as oxycodone, alprazolam, and carisoprodol.[1] The customers would not show up until after 5 p.m., and the pharmacy would fill the prescriptions even if its employees were unable to verify the prescriptions' legitimacy with the prescribing practitioners because their offices were closed.

Discussion

Section 304(a) of the Controlled Substance Act provides that ''[a] registration * * * to * * * dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a). With respect to a practitioner (which includes a retail pharmacy), the Act directs that the Attorney General consider the following factors in making the public interest determination:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id. § 823(f).

''[T]hese factors are considered in the disjunctive.'' *Robert A. Leslie, M.D.*, 68 FR 15227, 15230 (2003). I ''may rely on any one or a combination of factors, and may give each factor the weight [I] deem[] appropriate in determining whether a registration should be revoked.'' *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir.

[1]While carisoprodol is not controlled under Federal law, it is controlled under various state laws and is highly popular with drug abusers, especially when taken as part of a drug cocktail that includes an opiate and a benzodiazepine.

2005). Finally, where the Government has made out its *prima facie case,* the burden shifts to the Respondent to show why its continued registration would be consistent with the public interest. *See, e.g., Theodore Neujahr,* 65 FR 5680, 5682 (2000); *Service Pharmacy, Inc.,* 61 FR10791, 10795 (1996).

In this case, having considered all of the factors, I conclude that the evidence with respect to factors two and four establishes a *prima facie* case that Respondent's continued registration is ''inconsistent with the public interest.'' 21 U.S.C. 823(f). Accordingly, Respondent's registration will be revoked and any pending application for renewal of its registration will be denied.

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substances and Its Record of Compliance With Applicable Controlled Substance Laws

As found above, the evidence in this matter establishes that Respondent was a supply source for the illicit drug market in such highly abused prescription drugs as oxycodone, a schedule II controlled substance, and alprazolam, a schedule IV controlled substance. As the record shows, at least three individuals including Respondent's owner unlawfully distributed prescription controlled substances which had been obtained by the pharmacy. *See* 21 U.S.C. 841(a)(1).

Even if it was the case that Lee-Richards (the pharmacy technician) and Friedberg (the pharmacist) had stolen the drugs they were distributing, the criminal acts of Stanley Dyen, Respondent's owner and pharmacist-in-charge, in distributing hydrocodone and alprazolam, provide ample support to conclude that its continued registration is ''inconsistent with the public interest.'' *See VI Pharmacy, Rushdi Z. Salem,* 69 FR 5584, 5585 (2004) (''It is well settled that a pharmacy operates under the control of owners, stockholders, pharmacists, * * * and if any such person is convicted of a felony offense related to controlled substances, grounds exists to revoke the pharmacy's registration.''); *Charles J. Gartland, R.Ph., d.b.a. Manoa Pharmacy,* 48 FR 28760, 28761 (1983) (''Pharmacies must operate through the agency of natural persons, owners or stockholders, or other key employees. When such persons misuse the pharmacy's registration by diverting controlled substances obtained there under, and when those individuals are convicted as a result of that diversion, the pharmacy's registration becomes subject to revocation under 21 U.S.C. 824, just as if the pharmacy itself had been convicted.'').

Nor is this rule limited to those instances in which a pharmacy's owner or key employee has been formally convicted of a crime. As explained above, under Federal law, a registration is subject to revocation when a registrant commits acts which render its registration ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). Where a pharmacy's owner/key employee commits criminal acts, the Agency is not required to wait for the judicial process to work its course before revoking a registration. I therefore conclude that Respondent's continued registration ''is inconsistent with the public interest,'' 21 U.S.C. 823(f), and that its registration should be revoked.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a)(4), as well as 28 CFR 0.100(b) & 0.104, I hereby order that DEA Certificate of Registration, AY1916103, issued to Your Druggist Pharmacy, be, and it hereby is, revoked. I further order that any pending applications to renew or modify the registration be, and they hereby are, denied. This Order is effective immediately.

Dated: December 2, 2008.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E8–29407 Filed 12–11–08; 8:45 am]

BILLING CODE 4410–09–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Arts Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that two meetings of the Arts Advisory Panel to the National Council on the Arts will be held at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506 as follows (ending times are approximate):

State & Regional/Arts Education (State Arts Agency Partnership Agreements/Arts Education review): January 6–7, 2009 in Room 730. This meeting, from 9 a.m. 10:15 a.m. and from 12:30 p.m. to 5:30 p.m. on January 6th and from 9 a.m. to 2:30 p.m. on January 7th, will be open.

Folk & Traditional Arts/National Heritage Fellowships (review of nominations): January 6–9, 2009 in Room 716. This meeting, from 9 a.m. to 6:30 p.m. on January 6th and 7th, 9 a.m. to 5:30 p.m. on January 8th, and 9 a.m. to 3:30 p.m. on January 9th, will be closed.

The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of February 28, 2008, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels that are open to the public, and if time allows, may be permitted to participate in the panel's discussions at the discretion of the panel chairman. If you need special accommodations due to a disability, please contact the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682–5532, TDY–TDD 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to these meetings can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5691.

Dated: December 9, 2008.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. E8–29431 Filed 12–11–08; 8:45 am]

BILLING CODE 7537–01–P

NUCLEAR REGULATORY COMMISSION

Licensing Support System Advisory Review Panel

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of renewal of the Charter of the Licensing Support Network Advisory Review Panel (LSNARP).

SUMMARY: The Licensing Support System Advisory Review Panel was established by the U.S. Nuclear Regulatory Commission as a Federal Advisory Committee in 1989. Its purpose was to provide advice on the fundamental issues of design and development of an electronic information management system to be used to store and retrieve documents relating to the licensing of a geologic repository for the disposal of high-level radioactive waste, and on the operation

and maintenance of the system. This electronic information management system was known as the Licensing Support System (LSS). In November, 1998 the Commission approved amendments to 10 CFR Part 2 that renamed the Licensing Support System Advisory Review Panel as the Licensing Support Network Advisory Review Panel. The Licensing Support Network (LSN) became available for use in 2004 and it is anticipated that a hardware and software refresh program will be initiated in 2009–2010.

Membership on the Panel will continue to be drawn from those interests that will be affected by the use of the LSN, including the Department of Energy, the NRC, the State of Nevada, the National Congress of American Indians, affected units of local governments in Nevada, the Nevada Nuclear Waste Task Force, and a coalition of nuclear industry groups. Federal agencies with expertise and experience in electronic information management systems may also participate on the Panel.

The Nuclear Regulatory Commission has determined that renewal of the charter for the LSNARP until December 5, 2010, is in the public interest in connection with duties imposed on the Commission by law. This action is being taken in accordance with the Federal Advisory Committee Act after consultation with the Committee Management Secretariat, General Services Administration.

FOR FURTHER INFORMATION CONTACT: Andrew L. Bates, Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555: Telephone 301–415–1963.

Dated: December 8, 2008.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. E8–29449 Filed 12–11–08; 8:45 am]

BILLING CODE 7590–01–P

PRESIDIO TRUST

Presidio Trust Management Plan Main Post Update Supplemental Environmental Impact Statement

AGENCY: The Presidio Trust.

ACTION: Notice of Intent to Prepare a Supplement to a Draft Environmental Impact Statement.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*) and in response to public comment, the Presidio Trust (Trust) is notifying interested parties that it will supplement the June 2008 Draft Supplemental Environmental Impact Statement (SEIS) for the Presidio Trust Management Plan (PTMP) Main Post Update. The supplement will identify and discuss the environmental impacts of a preferred alternative that combines elements of alternatives previously analyzed in the draft SEIS.

SUPPLEMENTARY INFORMATION: The Trust is updating the planning concept for the Main Post district of the Presidio of San Francisco (Presidio) in order to take into account several proposals, including the Contemporary Art Museum at the Presidio (CAMP), the Main Post Lodge and the Presidio Theatre, that were not fully contemplated in the 2002 PTMP and its final environmental impact statement. The updated planning concept for the Main Post was evaluated as the proposed action in the draft SEIS that was circulated on June 13, 2008 (73 FR 33814).

Concurrent with the draft SEIS analyses, the Trust is also providing for the review of the proposals under other federal environmental laws. Chief among these is the consultation process required by section 106 of the National Historic Preservation Act (NHPA). This process identifies the historic resources that may be affected by an undertaking, assesses the effects on historic resources through a Finding of Effect (FOE), and then explores ways to ''avoid, minimize, or mitigate'' the effects identified in the FOE. The draft FOE was circulated for comment on August 8, 2008. The draft SEIS and draft FOE are available at *http://www.Presidio.gov* in the Major Projects section.

Following the release of the draft SEIS and the draft FOE, the Trust has been working with the National Park Service, the State Historic Preservation Officer, and the Advisory Council on Historic Preservation to develop approaches that would avoid, minimize, or mitigate effects from the various proposals on the National Historic Landmark District. These approaches include ways to reduce building size, scale, and mass; ways to orient the buildings to the site; and ways to articulate the buildings with architectural features. The Trust shared the results of this work with the consulting parties in the NHPA consultation and the proponents' respective design teams, and also held a public workshop on November 19, 2008 to communicate these conforming strategies to interested individuals. The information, presented as a series of matrices, is available for public review on the Trust Web site at *http://library.presidio.gov/archive/documents/StandardsEvaluationMatrix.pdf*.

Additionally, the Trust conducted a series of three workshops with the public on September 25, September 28 and October 2, 2008 that focused on the development of a preferred alternative. Through this public process, the Trust has identified a preferred alternative that combines elements of the previously analyzed alternatives, and which will be the subject of the supplement. The Trust has elected to address the preferred alternative in a supplement to the draft SEIS to best integrate and satisfy its NEPA and NHPA requirements. Additional information on the preferred alternative is available at *http://www.Presidio.gov* (click on Presidio Trust Identifies a Preferred Alternative). Interested parties wishing to provide comments on the previously analyzed alternatives or the merits of the draft SEIS may continue to do so, or wait until the supplement is made available.

The Trust will file the supplement as a draft and will circulate it at the same time that a revised draft FOE will be circulated through the parallel NHPA section 106 consultation process. The availability of the supplement (expected to occur in early 2009) for public and agency review and comment will be announced through an EPA-published notice in the **Federal Register**, in the Trust's regular electronic newsletter (Presidio E-news), on the Trust web site, as well as direct mailing to the project mailing list and other appropriate means. Both the draft supplement and the revised draft FOE will be considered in a final SEIS before the Trust Board of Directors takes any action (no earlier than 30 days after release of the final SEIS).

FOR FURTHER INFORMATION CONTACT: John Pelka, 415.561.5300.

Dated: December 8, 2008.

Karen A. Cook,

General Counsel.

[FR Doc. E8–29447 Filed 12–11–08; 8:45 am]

BILLING CODE 4310–4R–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59061; File No. SR–MSRB–2008–05]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Establishment of a Continuing Disclosure Service of the Electronic Municipal Market Access System (EMMA)

December 5, 2008.

I. Introduction

On July 29, 2008, the Municipal Securities Rulemaking Board (''MSRB'' or ''Board'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish a continuing disclosure service (the ''continuing disclosure service'') of the MSRB's Electronic Municipal Market Access system (''EMMA''). The proposed rule change was published for comment in the **Federal Register** on August 7, 2008.[3] The Commission received eighteen comment letters regarding the MSRB's proposed rule change.[4] On November 5, 2008, the MSRB filed Amendment No. 1 to the proposed rule change.[5] The text of Amendment No. 1 is available on the MSRB's Web site (*http://www.msrb.org*), at the MSRB's principal office, and at the Commission's Public Reference Room. On November 24, 2008, the MSRB submitted a letter responding to the comment letters.[6] This order provides notice of the proposed rule change as modified by Amendment No. 1 and approves the proposed rule change, as amended, on an accelerated basis.[7]

II. Description of the Proposed Rule Change

Under Rule 15c2–12(b)(5), an underwriter for a primary offering of municipal securities subject to the Rule currently is prohibited from underwriting the offering unless the underwriter has determined that the issuer or an obligated person[8] for whom financial information or operating data is presented in the final official statement has undertaken in writing to provide certain items of information to the marketplace.[9] Rule 15c2–12(b)(5) provides that such items include: (A) Annual financial information concerning obligated persons;[10] (B) audited financial statements for obligated persons if available and if not included in the annual financial information; (C) notices of certain events, if material;[11] and (D) notices of failures to provide annual financial information on or before the date specified in the written undertaking.[12] Annual filings, material event notices, and failure to file notices generally are referred to as ''continuing disclosure documents.''

The proposed rule change would establish, as a component of EMMA, the continuing disclosure service for the receipt of, and for making available to the public, continuing disclosure documents and related information to be submitted by issuers, obligated persons and their agents pursuant to continuing disclosure undertakings entered into consistent with Rule 15c2–12.[13] As proposed, all continuing

---

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58256 (July 30, 2008), 73 FR 46161 (August 7, 2008) (''Release No. 34–58256'').

[4] Exhibit A contains the citation key to the comments noted herein. Copies of the comment letters received by the Commission are available on the Commission's Internet Web site, located at *http://www.sec.gov/comments/sr–msrb–2008–05/msrb200805.shtml* and in the Commission's Public Reference Room at its Washington, DC headquarters.

[5] In Amendment No. 1, the MSRB proposed to establish as the operative date of the continuing disclosure service the later of July 1, 2009 or the effective date of any amendments to Rule 15c2–12 under the Act (''Rule 15c2–12'' or ''Rule''), 17 CFR 240.15c2–12, that provide for the MSRB to serve as the sole repository for continuing disclosure documents, and to establish January 1, 2010 as the date on which submitters to the continuing disclosure service would be required to submit documents as word-searchable portable document format (PDF) files.

[6] *See* Letter from Ernesto A. Lanza, General Counsel, MSRB, to Florence E. Harmon, Acting Secretary, Commission, dated November 24, 2008 (''MSRB Response Letter'').

[7] On August 7, 2008, the Commission published for comment in the **Federal Register** proposed amendments to Rule 15c2–12 that relate to the MSRB's implementation of the continuing disclosure service. *See* Securities Exchange Act Release No. 58255 (July 30, 2008), 73 FR 46138 (August 7, 2008) (''Release No. 34–58255''). In a separate release issued today, the Commission is approving its proposed amendments to Rule 15c2–12 (''Rule 15c2–12 Amendments''). *See* Securities Exchange Act Release No. 59062 (December 5, 2008) (''Rule 15c2–12 Amendments Adopting Release'').

[8] Rule 15c2–12(f)(10) defines ''obligated person'' as any person, including an issuer of municipal securities, who is either generally or through an enterprise, fund, or account of such person committed by contract or other arrangement to support payment of all or part of the obligations on the municipal securities sold in a primary offering (other than providers of bond insurance, letters of credit, or other liquidity facilities).

[9] *See also* Rule 15c2–12(d)(2), which provides for an exemption from the requirements of paragraph (b)(5) of Rule 15c2–12.

[10] Rule 15c2–12(f)(9) defines ''annual financial information'' as financial information or operating data, provided at least annually, of the type included in the final official statement with respect to an obligated person, or in the case where no financial information or operating data was provided in the final official statement with respect to such obligated person, of the type included in the final official statement with respect to those obligated persons that meet the objective criteria applied to select the persons for which financial information or operating data will be provided on an annual basis.

[11] Under Rule 15c2–12(b)(5)(C), such events currently consist of principal and interest payment delinquencies; non-payment related defaults; unscheduled draws on debt service reserves reflecting financial difficulties; unscheduled draws on credit enhancements reflecting financial difficulties; substitution of credit or liquidity providers, or their failure to perform; adverse tax opinions or events affecting the tax-exempt status of the security; modifications to rights of security holders; bond calls; defeasances; release, substitution, or sale of property securing repayment of the securities; and rating changes.

[12] Under current Rule 15c2–12(b)(5)(i), participating underwriters must reasonably determine whether the issuer has undertaken to send annual filings to all existing nationally recognized municipal securities information repositories (''NRMSIRs'') and any applicable state information depositories (''SIDs''), while the undertaking with respect to material event notices and failure to file notices must provide that they be sent to all existing NRMSIRs or to the MSRB, as well as to any applicable SID. Under the Rule 15c2–12 Amendments adopted today, participating underwriters must reasonably determine whether the issuer has undertaken to send continuing disclosure documents to the MSRB. *See* Rule 15c2–12 Amendments Adopting Release, *supra* note 7. The MSRB, which currently operates CDINet to process and disseminate notices of material events submitted to the MSRB, previously petitioned the Commission to amend Rule 15c2–12 to remove the MSRB as a recipient of material event notices due to the very limited level of submissions received by the MSRB, constituting a negligible percentage of material event notices currently provided to the marketplace. *See* Letter from Diane G. Klinke, General Counsel, MSRB, to Jonathan G. Katz, Secretary, Commission, dated September 8, 2005. In 2006, the Commission published proposed amendments to Rule 15c2–12 to eliminate the MSRB as a repository for material event notices. *See* Exchange Act Release No. 54863 (December 4, 2006), 71 FR 71109 (December 8, 2006) (''2006 Proposed Rule 15c2–12 Amendments''). In light of the Rule 15c2–12 Amendments and this proposal, the MSRB has determined to withdraw its petition and has requested that the Commission withdraw the 2006 Proposed Rule 15c2–12 Amendments. *See* Letter from Ernesto A. Lanza, General Counsel, MSRB to Florence E. Harmon, Acting Secretary, Commission, dated October 22, 2008. In this letter, the MSRB also noted its intention to file a proposed rule change with the Commission to discontinue CDINet since its functions would be replaced by the continuing disclosure component of EMMA.

[13] EMMA was originally established, and began operation on March 31, 2008, as a complementary pilot facility of the MSRB's existing Official Statement and Advance Refunding Document (OS/ARD) system of the Municipal Securities Information Library (MSIL) system. *See* Securities Exchange Act Release No. 57577 (March 28, 2008), 73 FR 18022 (April 2, 2008) (File No. SR–MSRB–2007–06) (approving operation of the EMMA pilot to provide free public access to the MSRB's Municipal Securities Information Library (MSIL) system collection of official statements and advance refunding documents and to the MSRB's Real-Time Transaction Reporting System (RTRS) historical and

disclosure documents and related information would be submitted to the MSRB, free of charge, through an Internet-based electronic submitter interface or electronic computer-to-computer data connection, at the election of the submitter, and public access to the documents and information would be provided through the continuing disclosure service on the Internet (''EMMA portal'') at no charge, as well as through a fee-based real-time data stream subscription service.[14]

As proposed, the continuing disclosure service would accept submissions of (i) continuing disclosure documents as described in Rule 15c2–12, and (ii) other disclosure documents specified in continuing disclosure undertakings entered into consistent with Rule 15c2–12 but not specifically described in Rule 15c2–12. In connection with documents submitted to the continuing disclosure service, the submitter would provide, at the time of submission, information necessary to accurately identify: (i) The category of information being provided; (ii) the period covered by any annual financial information, financial statements or other financial information or operating data; (iii) the issues or specific securities to which such document is related or otherwise material (including CUSIP number, issuer name, state, issue description/securities name, dated date, maturity date, and/or coupon rate); (iv) the name of any obligated person other than the issuer; (v) the name and date of the document; and (vi) contact information for the submitter. Submitters would be responsible for the accuracy and completeness of all documents and information submitted to EMMA.

The MSRB proposed that submissions to the continuing disclosure service be made as portable document format (PDF) files configured to permit documents to be saved, viewed, printed and retransmitted by electronic means. If the submitted file is a reproduction of the original document, the submitted file must maintain the graphical and textual integrity of the original document. In addition, as of January 1, 2010, the MSRB would require that such PDF files must be word-searchable (that is, allowing the user to search for specific terms used within the document through a search or find function available in most standard software packages), provided that diagrams, images and other non-textual elements would not be required to be word-searchable due to current technical hurdles to uniformly producing such elements in word-searchable form without incurring undue costs.[15] Although the MSRB would strongly encourage submitters to immediately begin making submissions as word-searchable PDF files (preferably as native PDF or PDF normal files, which generally produce smaller and more easily downloadable files as compared to scanned PDF files), implementation of this requirement would be deferred as noted above to provide issuers, obligated persons and their agents with sufficient time to adapt their processes and systems to provide for the routine creation or conversion of continuing disclosure documents as word-searchable PDF files.

All submissions to the continuing disclosure service pursuant to this proposal would be made through password-protected accounts on EMMA by: (i) Issuers, which may submit any documents with respect to their municipal securities; (ii) obligated persons, which may submit any documents with respect to any municipal securities for which they are obligated; and (iii) designated agents, which may be designated by issuers or obligated persons to make submissions on their behalf. Issuers and obligated persons would be permitted under the proposal to designate agents to submit documents and information on their behalf, and would be able to revoke the designation of any such agents, through the EMMA on-line account management utility. Such designated agents would be required to register to obtain password-protected accounts on EMMA in order to make submissions on behalf of the designating issuers or obligated persons. Any party identified in a continuing disclosure undertaking as a dissemination agent or other party responsible for disseminating continuing disclosure documents on behalf of an issuer or obligated person would be permitted to act as a designated agent for such issuer or obligated person, without a designation being made by the issuer or obligated person as described above, if such party certifies through the EMMA on-line account management utility that it is authorized to disseminate continuing disclosure documents on behalf of the issuer or obligated person under the continuing disclosure undertaking. The issuer or obligated person, through the EMMA on-line account management utility, would be able to revoke the authority of such party to act as a designated agent.

The MSRB proposed that electronic submissions of continuing disclosure documents through the continuing disclosure service would be made by issuers, obligated persons and their agents, at no charge, through secured, password-protected interfaces. Continuing disclosure submitters would have a choice of making submissions to the proposed continuing disclosure service either through a Web-based electronic submission interface or through electronic computer-to-computer data connections with EMMA that would be designed to receive submissions on a bulk or continuous basis.

All documents and information submitted through the continuing disclosure service would be available to the public at no charge through the EMMA portal on the Internet, with documents made available for the life of the securities as PDF files for viewing, printing and downloading. As proposed, the EMMA portal would provide on-line search functions to enable users to readily identify and access documents that relate to specific municipal securities based on a broad range of search parameters. In addition, as noted above, the MSRB proposes that real-time data stream subscriptions to continuing disclosure documents submitted to EMMA would be made available for a fee.[16] The MSRB would not be responsible for the content of the information or documents submitted by submitters displayed on the EMMA portal or distributed to subscribers through the continuing disclosure subscription service.

According to the MSRB, it has designed EMMA, including the EMMA portal, as a scalable system with sufficient current capacity and the ability to add further capacity to meet foreseeable usage levels based on reasonable estimates of expected usage, and the MSRB would monitor usage levels in order to assure continued capacity in the future.

The MSRB may restrict or terminate malicious, illegal or abusive usage for such periods as may be necessary and appropriate to ensure continuous and efficient access to the EMMA portal and to maintain the integrity of EMMA and its operational components. Such usage may include, without limitation, usage

real-time transaction price data) (''pilot EMMA portal''). The pilot EMMA portal currently is accessible at *http://emma.msrb.org.*

[14] We note that the MSRB is required to file with the Commission a proposed rule change under Section 19(b) of the Act with respect to any fees it intends to charge subscribers in connection with a real-time data stream subscription service.

[15] *See* Amendment No. 1, *supra* note 5.

[16] We note that the MSRB is required to file with the Commission a proposed rule change under Section 19(b) of the Act with respect to any fees it intends to charge subscribers in connection with a real-time data stream subscription service.

intended to cause the EMMA portal to become inaccessible by other users; to cause the EMMA database or operational components to become corrupted or otherwise unusable; to alter the appearance or functionality of the EMMA portal; or to hyperlink to or otherwise use the EMMA portal or the information provided through the EMMA portal in furtherance of fraudulent or other illegal activities (such as, for example, creating any inference of MSRB complicity with or approval of such fraudulent or illegal activities or creating a false impression that information used to further such fraudulent or illegal activities has been obtained from the MSRB or EMMA). Measures taken by the MSRB in response to such unacceptable usage would be designed to minimize any potentially negative impact on the ability to access the EMMA portal.

The Commission received eighteen comment letters regarding the proposed rule change.[17] Fifteen commenters generally supported the proposed rule change[18] and many of these commenters also provided various observations and suggestions. Two commenters, both of which are NRMSIRs, opposed the proposed rule change and suggested alternative approaches to achieving the Commission's objectives.[19] One commenter neither supported nor opposed the proposal and addressed CUSIP licensing issues.[20] The Commission also received the MSRB's response to the comment letters.[21] These comment letters, as well as the MSRB's response to the comment letters, are more fully discussed below.

III. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, the comment letters received, and the MSRB's response to the comment letters and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB[22] and, in particular, the requirements of Section 15B(b)(2)(C) of the Act[23] and the rules and regulations thereunder. In particular, the Commission finds that the proposal to establish the continuing disclosure service will remove impediments to and help perfect the mechanisms of a free and open market in municipal securities, assist in preventing fraudulent and manipulative acts and practices, and, in general, will protect investors and the public interest by improving access to continuing disclosure documents by investors and market participants, enabling them to make informed investment decisions regarding municipal securities.

The Commission believes that the MSRB's proposed continuing disclosure service will serve as an additional mechanism to remove impediments to and help perfect the mechanisms of a free and open market in municipal securities. The continuing disclosure service will help make information more easily available to all participants in the municipal securities market on an equal basis and without charge through a centralized, searchable Internet-based repository, thereby removing potential barriers to obtaining such information. Broad availability of continuing disclosure documents through the continuing disclosure service should assist in preventing fraudulent and manipulative acts and practices by improving the opportunity for investors to obtain information about issuers and their securities, and help investors make informed investment decisions.

The continuing disclosure service also should reduce the effort necessary for issuers and obligated persons to comply with their continuing disclosure undertakings because submissions will be made to a single venue[24] through use of an electronic submission process. Similarly, a single centralized and searchable venue that provides for free public access to disclosure information should promote a more fair and efficient municipal securities market in which transactions are effected on the basis of information available to all parties to such transactions, which should assist investors in having a more complete understanding of the terms of the securities and the potential investment risks. Access to this information without charge, which was previously available in most cases only through paid subscription services or on a per-document fee basis, also should help reduce informational costs for broker-dealers and municipal securities dealers, as well as other market participants, analysts, retail and institutional investors and the public generally. These changes are expected to further the objectives of Rule 15c2–12 of reducing the potential for fraud in the municipal securities market.

Indeed, we anticipate that the accessibility of documents through the repository will greatly benefit dealers in satisfying their obligation to have a reasonable basis for investment recommendations and other regulatory responsibilities, in addition to investors and other market participants who seek information about municipal securities. This conclusion is supported by various commenters.

As noted above, commenters generally supported the proposed rule change. In particular, one commenter expressed the opinion that allowing issuers, obligated parties and dissemination agents to submit information to one location,[25] electronically and free of charge in order to meet the obligations of Rule 15c2–12, is very useful to the state and local government community[26] and several commenters remarked that allowing investors to retrieve information from this location would be advantageous to the marketplace and investors.[27] Commenters believed that the single filing location would make the filing process easier for filers submitting filings and more efficient for investors accessing documents.[28] One commenter also remarked that the availability of continuing disclosure documents in one venue as a component of EMMA, where there will also be posted the final official statement (or similar primary

[17] *See supra* note 4.

[18] *See* Busby Letter, DAC Letter, Vanguard Letter, GFOA Letter, e-certus Letter, SIFMA Letter, NABL Letter, Treasurer of the State of Connecticut Letter, Texas MAC Letter, OMAC Letter, ICI Letter, NAHEFFA Letter, EDGAR Online Letter, MSRB Letter, and NFMA Letter.

[19] *See* SPSE Letter and DPC DATA Letter.

[20] *See* ABA Letter.

[21] *See* MSRB Response Letter. A copy of the MSRB Response Letter is available on the Commission's Internet Web site at *http://www.sec.gov/comments/sr-msrb-2008-05/msrb200805.shtml* and in the Commission's Public Reference Room at its Washington, DC headquarters.

[22] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[23] 15 U.S.C. 78*o*–4(b)(2)(C). Section 15B(b)(2)(C) of the Act requires, among other things, that the MSRB's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest; and not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

[24] Some states may require issuers and/or obligated persons to submit disclosure information to state information depositories (''SIDs'') or other venues pursuant to state law. However, under the Rule 15c2–12 Amendments, participating underwriters no longer need to reasonably determine that issuers and/or obligated persons have undertaken to provide continuing disclosure documents to SIDs. *See* Rule 15c2–12 Amendments Adopting Release, *supra* note 7.

[25] *See id.*

[26] *See* GFOA Letter.

[27] *See, e.g.*, GFOA Letter, SIFMA Letter, Vanguard Letter, Treasurer of the State of Connecticut Letter, ICI Letter.

[28] *Id.*

market disclosure document), and pricing information, will provide readers the benefit of the proper context for reviewing the continuing disclosure.[29] Others expressed support for the MSRB's proposal to make the continuing disclosure service a free service for both issuers and other obligated persons [30] submitting documents as well as for investors and other market participants [31] accessing continuing disclosure information. One commenter expressed a belief that the proposed rule change would be a means of removing impediments to and helping to perfect the mechanisms of a free and open market in municipal securities within the meaning of the Act.[32]

One commenter recommended that the Commission maintain close oversight of EMMA, ensure proper testing of the system, and revisit this matter in two to three years.[33] A second commenter also expressed a belief that the Commission should establish rigorous ongoing inspection and oversight of EMMA.[34] We note that, because the MSRB is a self-regulatory organization (''SRO''), the Commission has, and exercises, oversight authority over the MSRB. The MSRB must file proposed rule changes with the Commission under Section 19(b) of the Act, including any changes to the EMMA system and any fees relating to the EMMA system. In addition, the MSRB is subject to the recordkeeping requirements of 17(a) of the Act [35] and is subject to the Commission's examination authority under Section 17(b) of the Act.[36] Through the Commission's recordkeeping requirements and examination and rule filing processes, the Commission oversees the MSRB and will ascertain whether the MSRB is implementing EMMA appropriately and meeting EMMA's stated objectives, as well as complying with all of its legal obligations under the Act.

Eleven commenters that supported the proposed rule change also believed that EMMA submissions should be accompanied by identifying information.[37] Several of these commenters suggested various specific types of identifiers that were sometimes different from, or in addition to, those set forth in the proposed rule change. In this regard, specific identifiers that were suggested by commenters included: The identification of obligated persons other than issuers and successor parties; [38] the issuer's investor contact information; [39] a link to issuer's Web site; [40] the CUSIP numbers for all primary and secondary market debt covered by relevant information; [41] the use of electronic ''cover sheets;'' [42] the pre-registration of identifying information; [43] a mechanism to readily locate CUSIP numbers by the issuer's six digit prefix and at the same time list by nine digit CUSIPs in certain circumstances; [44] and a CUSIP catalog.[45] In its response letter, the MSRB noted that the use of accurate identifiers for continuing disclosure submissions in EMMA is vitally important to ensure correct indexing and access to continuing disclosure documents.[46] The MSRB indicated that, except as noted below,[47] documents provided to it are required to be accompanied by identifying information relating to the nature of the document, the securities and entities to which it applies, and the entity making the submission, as prescribed by the MSRB. In connection with EMMA submissions, the MSRB noted that the submitter will be required to provide, at the time of submission, information necessary to correctly identify the following: The category of information being provided; the period covered by any financial information; the issues or specific securities to which such document is related or otherwise material (including CUSIP number, issuer name, state issue description, securities name, dated date, maturity date and/or coupon rate); the name of any obligated person other than the issuer; the name and date of the document; and the contact information for the submitter.[48] According to the MSRB, since all continuing disclosure documents submitted to EMMA will be made through a unique, password protected accounts by issuers, obligated persons and their designated agents, once the indexing information is provided, the EMMA system will match each document with the appropriate identifying information for the submitter. The MSRB believes that these processes will adequately address issues relating to the use of identifiers for the submission process. The MSRB also believes that the use of these identifiers ensures both that the submission process is not unduly burdensome and that standardized market identifiers commonly used in the municipal marketplace serve as the basis on which EMMA users would be able to conduct document searches. Furthermore, while the MSRB believes that the identifiers it proposed are appropriate and cover most of the identifying elements recommended by the commenters, the MSRB also will consider whether any additional identifiers would be appropriate. The Commission believes that it is appropriate for the MSRB to incorporate without change in the continuing disclosure service the indexing information that the MSRB initially had proposed. The Commission believes that the MSRB has provided valid reasons for not incorporating at this time the additional indexing information that commenters suggested. As the MSRB noted, the proposed identifiers are standardized market identifiers used in the municipal marketplace, which should help ensure that the transition to the continuing disclosure service will not be unduly burdensome for submitters. We note, however, that the MSRB indicated that it will consider additional identifiers in the future.[49]

One commenter, who neither supported nor opposed the proposal, questioned whether the MSRB would seek appropriate licensing for its use of the commenter's intellectual property rights with respect to the CUSIP

[29] *See* SIFMA Letter.

[30] *See* GFOA Letter.

[31] *See, e.g.*, GFOA Letter, Busby Letter, NFMA Letter, DAC Letter, Vanguard Letter, and EDGAR Online Letter.

[32] *See* SIFMA Letter.

[33] *See* Treasurer of the State of Connecticut Letter.

[34] *See* DAC Letter.

[35] 15 U.S.C. 78q(a).

[36] 15 U.S.C. 78q(b).

[37] *See* NFMA Letter, DAC Letter, GFOA Letter, Vanguard Letter, SIFMA Letter, NABL Letter, Treasurer of the State of Connecticut Letter, Texas MAC Letter, OMAC Letter, ICI Letter, and EDGAR Online Letter.

[38] *See* GFOA Letter, Treasurer of the State of Connecticut Letter, Vanguard Letter, and ICI Letter.

[39] *See* NFMA Letter.

[40] *Id.*

[41] *Id.*

[42] *See* GFOA Letter.

[43] *See* Treasurer of the State of Connecticut Letter.

[44] *Id.*

[45] *See* NFMA Letter.

[46] *See* MSRB Response Letter.

[47] *See infra* note 48.

[48] As the Commission noted in its adopting release for amendments to Rule 15c2–12 [Release No. 34–59062; File No. S7–21–08, December 5, 2008], the commitment by an issuer to provide identifying information exists only if it were included in a continuing disclosure agreement. As a result, issuers submitting continuing disclosure documents pursuant to the terms of undertakings that were entered into prior to the effective date of the final amendments and that did not require identifying information will be able to submit documents without supplying identifying information. In its response, the MSRB indicated that the submitter making a submission pursuant to a continuing disclosure undertaking entered into prior to the effective date of the proposed Rule 15c2–12 amendments who seeks to make such submission without providing identifying information could do so.

[49] We note that the MSRB is required to file with the Commission a proposed rule change under Section 19(b) of the Act with respect to any additional indexing information that it may propose to prescribe.

database.[50] The MSRB stated in its response letter that it is continuing its discussions with the appropriate parties relating to the use of CUSIP data and expects that all necessary arrangements will be in place to operate the continuing disclosure service as anticipated by the July 1, 2009 implementation date.[51] If there are any unanticipated and unresolved issues in connection with the use of the CUSIP data, the MSRB stated that it will consult with the Commission and, if necessary, make any filings to modify data usage by EMMA or to adjust the implementation date. In light of the MSRB's assurances that this issue is expected to be resolved in advance of the continuing disclosure service's proposed implementation date of July 1, 2009, the Commission does not believe that it is necessary to delay its approval of the proposed rule change. Nonetheless, we will continue to monitor the progress of EMMA, including the issue relating to licensing rights to the CUSIP database, prior to EMMA's implementation.

Some commenters expressed their belief that EMMA should have a simple user interface and intuitive search functionality.[52] One commenter noted that ''[a]s demonstrated, we believe that there are ample ways for the public to locate particular documents, either through a CUSIP number or an entity's name. It is imperative for these fields to be applied to all securities and for the MSRB to determine the most efficient way to do so.'' [53] The MSRB stated its belief that its pilot of the primary market service of the EMMA portal is user-friendly and that the continuing disclosure service of EMMA will also be user-friendly, in part, because the continuing disclosure service will provide the same accessibility to information to municipal market participants and easy-to-use identifiers for submissions as currently provided by the pilot of the primary market service of the EMMA portal. For example, if users have a CUSIP number, they will be able to go directly to the related documents on the EMMA system and, similarly, a user can go to the market activity page and see all the disclosures that were posted on a certain date.[54] The MSRB also noted its intention to continue to make improvements to the system.[55] The Commission believes the MSRB has proposed a reasonably efficient way to apply identifying fields to the continuing disclosure documents submitted to the EMMA system and expects that the MSRB will continue to monitor the EMMA portal to ensure that document submission is easy and document access is efficient on an ongoing basis and that the MSRB will propose rule changes to the continuing disclosure service pursuant to Section 19(b) of the Act as changes are needed.[56]

Some commenters expressed concerns that access to previous filings made with NRMSIRs may no longer be available.[57] Nothing in the MSRB's proposal will prevent the NRMSIRs from continuing to make historical information available. We recognize, however, that the NRMSIRs may decide not to do so. The MSRB stated in its response letter that while it does not have the authority to mandate the submission of historical data by issuers, issuers, obligated persons and their agents will be free to submit to EMMA continuing disclosure documents and related information previously submitted to the NRMSIRs.[58] The MSRB also stated that it is willing to communicate with the NRMSIRs on the continued availability of historical documents and related information and believes that such communication will be fruitful.[59] As a practical matter, we believe that this is largely a transitional issue until EMMA has collected documents for a number of years and anticipate that requests for such documents from the NRMSIRs by those persons who are not already subscribers to their services may be expected to decline over time.

Several commenters also made observations and suggestions regarding the access and security features of the continuing disclosure service.[60] One commenter suggested that the MSRB should distinguish between the responsibilities of obligated persons and submitters.[61] Two commenters recommended a special methodology for conduit borrowers to access EMMA.[62] Three commenters stated that issuers and obligated persons should have the ability to verify information submitted to EMMA by third parties and to correct errors either by accessing the system directly or by reporting any errors to a ''hotline.'' [63]

The MSRB noted in its response letter that its proposal does not change the obligations of issuers or obligated persons and their designated agents, which are established pursuant to the terms of continuing disclosure agreements, and that all persons, including issuers, obligated persons and designated agents will be able to access filings on EMMA to verify their availability and the accuracy of their indexing. The MSRB also noted that all submission methods will provide appropriate feedback to submitters for error correction and submission confirmation purposes. The MSRB also provides a Web site that allows submitters to provide questions and comments associated with submissions, as well as a help desk with dedicated personnel during MSRB business hours. Furthermore, the proposal will allow issuers and obligated persons to maintain control over those persons who may submit filings on their behalf. The MSRB will permit only those persons identified as designated agents in continuing disclosure agreements to submit documents without advance approval through EMMA and will notify issuers of the identity of those persons who submit documents on their behalf. Issuers and obligated persons also will be able to revoke self-certification of dissemination agents through the EMMA on-line account management utility at any time.

With respect to conduit financings,[64] two commenters [65] expressed concern that EMMA does not appropriately accommodate issues relating to the real parties in interest in such financings. In conduit financings, the bond issuing authority (*e.g.*, a state or local government) may issue tax exempt bonds on behalf of certain entities (*e.g.*, not-for profit organizations). Under these arrangements, the entity for which the tax exempt bonds were issued may be regarded as the real obligated party with the responsibility of submitting continuing disclosure documents and ensuring that such submissions are

[50] *See* ABA Letter.

[51] *See* MSRB Response Letter.

[52] *See* EDGAR Online Letter, NFMA Letter and GFOA Letter.

[53] *See* GFOA Letter.

[54] *See* MSRB Response Letter.

[55] *Id.*

[56] We note that the MSRB is required to file with the Commission a proposed rule change under Section 19(b) of the Act with respect to the operation of the continuing disclosure service and with respect to any changes to the continuing disclosure service.

[57] *See, e.g.*, Vanguard Letter and ICI Letter.

[58] *See* MSRB Response Letter.

[59] As discussed more fully in the Rule 15c2–12 Amendments Adopting Release, the Commission believes that the current NRMSIRs could decide it is in their commercial interest to make historical information available.

[60] *See* NABL Letter, NAHEFFA Letter, GFOA Letter, and NFMA Letter.

[61] *See* NABL Letter.

[62] *See* NAHEFFA Letter and GFOA Letter.

[63] *See* NAHEFFA Letter, GFOA Letter, NFMA Letter.

[64] Conduit financings are financings in which authorities with bond issuing authority issue tax-exempt bonds on behalf of certain entities, including not-for profit organizations.

[65] *See* NAHEFFA Letter and NFMA Letter.

accurate. Accordingly, these commenters expressed concern that EMMA will not appropriately discriminate whether the bond issuing authority, or the certain entity on behalf of which the tax-exempt bonds are issued, is responsible for the continuing disclosure submissions. The MSRB responded that the proposal establishes, through the account opening process, a mechanism that would permit, on an optional basis, issuers of conduit financings to identify obligated persons and the securities for which such persons are obligated.[66] Furthermore, the MSRB plans to establish methods for submitters to contact it with questions and to report any problems submitters may discover with filings they electronically send to the EMMA system.[67] The Commission believes that the MSRB has established appropriate measures with respect to security and controls for the submission of documents to the continuing disclosure service.

Some commenters that supported the proposed rule change suggested incorporation of an interactive data standard (*i.e.*, XBRL).[68] The MSRB responded that it will take all such suggestions under consideration for future revisions to the continuing disclosure service. The MSRB noted, however, that documents need not be created in any particular manner in order to be saved or scanned into a PDF format. The MSRB indicated that it does not view establishing XBRL as a data standard for EMMA submissions as appropriate at this time, although it noted that it continues to be interested in working with the municipal market in the future on interactive data initiatives. The Commission believes that, in the future, access to continuing disclosure documents through the EMMA system could be enhanced by improved methods for the electronic presentation of information, but believes that the MSRB's technology choices for EMMA are appropriate at this time.

Seven of the commenters that supported the proposed rule change indicated that EMMA should have the capability to accept voluntary and non-periodic disclosures in addition to Rule 15c2–12 disclosures[69] or recommended the addition of features such as information regarding late or missing filings.[70] In its response letter, the MSRB stated that although the continuing disclosure service will not allow for the submission of continuing disclosure documents beyond those currently set forth in Rule 15c2–12 or those documents identified in an undertaking by the issuer or obligated person, the MSRB expects to propose in a future filing to accept submissions of a broader scope.[71] The Commission believes that limiting the scope of the documents to be submitted through the continuing disclosure service to those referenced in continuing disclosure agreements will fulfill the intended purpose of Rule 15c2–12 and thus is reasonable at this time.

One commenter expressed support for the dissemination of information in a bulk format.[72] Some commenters expressed concerns regarding fees to be charged by the MSRB for subscriptions to the real-time data feed and whether the transfer of documents through the data feed would be delayed.[73] In addition, three commenters suggested that the MSRB should provide SIDs with a data feed of filing information and one of these commenters stated that this data feed should be provided free of charge.[74] Further, one commenter expressed concern that broker-dealers would pass on fees to their customers to support the EMMA system.[75]

In its response letter, the MSRB stated that in addition to providing access to continuing disclosure documents through the EMMA portal without charge to all persons on an equal basis on its Internet website, the MSRB also will offer real-time subscriptions to EMMA's continuing disclosure documents and information as they are submitted and processed.[76] According to the MSRB, its goal is to ensure an efficient process for making available real-time data subscription products at a reasonable cost.[77] The MSRB also stated that it will work with the SIDs to ensure that they will have reasonable access to the documents submitted for issues in their respective states and will not incur costs related to the entire EMMA subscription product.[78]

The Commission notes that fees relating to the EMMA system, such as subscription fees for a data feed for access to documents submitted to the continuing disclosure service, also must be filed with the Commission as a proposed rule change under Section 19(b) of the Act. Accordingly, any fees relating to the continuing disclosure service would be published for public comment by the Commission and interested persons would have the opportunity to offer their views on them.

With respect to the comment that broker-dealers would pass on fees to their customers to support the EMMA system, the Commission again notes that the MSRB, as an SRO, would have to file any fees relating to the support or use of the continuing disclosure service with the Commission under Section 19(b) of the Exchange Act, to the extent such fees are not already covered by the MSRB's current fee schedule. The Commission further notes that broker-dealers currently are charged fees for access to disclosure documents obtained from the NRMSIRs that they currently may or may not pass on to their customers. According to the MSRB, it presently anticipates no increase in fees on brokers, dealers, and municipal securities dealers that effect transactions in municipal securities to establish and operate the EMMA system.[79] The MSRB has stated that it has funds on hand that, together with amounts it will collect in the future under its current fee schedule, it believes will be sufficient to establish and operate the continuing disclosure service of the EMMA system.[80]

Two commenters opposed the proposal and suggested alternative approaches to greater access to continuing disclosure documents by investors and others.[81] They believed that the MSRB's proposal would not improve the overall continuing disclosure regime and that it does not address the core problems with the current system, such as the significant level of delinquent filings. One of these commenters stated that the proposal imposes restrictions on filing formats (*i.e.*, single-electronic) and technology and misstates important attributes of the current municipal disclosure regime. This commenter urged enforcement of existing provisions of Rule 15c2–12 and otherwise working within the existing disclosure system. The other commenter believed that a ''central post office'' approach is preferable.[82]

[66] *See* MSRB Response Letter.

[67] *Id.*

[68] *See, e.g.*, GFOA Letter, e-certus Letter, and EDGAR Online Letter.

[69] *See* ICI Letter, NFMA Letter, NABL Letter, GFOA Letter, Vanguard Letter and SIFMA Letter, Treasurer of the State of Connecticut Letter.

[70] *See, e.g.*, ICI Letter.

[71] *See* MSRB Response Letter.

[72] *See, e.g.*, EDGAR Online Letter.

[73] *See* DPC DATA Letter, NFMA Letter and GFOA Letter.

[74] *See* Texas Mac Letter, OMAC Letter, and GFOA Letter.

[75] *See* SPSE Letter.

[76] *See* MSRB Response Letter.

[77] *Id.*

[78] *Id.*

[79] *See* MSRB Response Letter.

[80] *Id.*

[81] *See* DPC DATA Letter and SPSE Letter.

[82] Under a central post office approach, issuers and obligors would file documents through a single electronic venue in a standardized format. The central post office would then forward the

Continued

In its response letter, the MSRB expressed its belief that the establishment of single submission and dissemination venue through EMMA's continuing disclosure service would significantly improve upon the current municipal disclosure system.[83] The MSRB believed that a simple, secure and centralized system will simplify issuers' submissions. According to the MSRB, for example, the fact that continuing disclosure documents will be publicly available for free through a searchable Web site in which all filings for a particular issue are displayed as a single collection will serve, for the first time, to make it easy for issuers, investors and others to determine whether or not filings are missing, whether due to an issuer failing to make a filing or otherwise.

While the Commission acknowledges that the MSRB's proposal does not address all of the information challenges of the municipal market, the Commission continues to believe that the MSRB's proposal is a significant step forward in facilitating the submission of, and access to, secondary market municipal disclosures. As noted previously, a large majority of the commenters supported the MSRB's proposal and believed that it will improve the overall continuing disclosure regime. The Commission also believes that this will be the case. We anticipate that public access to all continuing disclosure documents on the Internet, as provided by the proposal, will promote market efficiency and help deter fraud and manipulation in the municipal securities market by improving the availability of information to all investors. With respect to one commenter's concern that the proposal would impose restrictions on filing formats, impose technology requirements that do not exist under the current system and provide no appreciable benefit, the Commission notes that the availability of continuing disclosure documents at a single repository that can be readily accessed and easily searched through electronic means will provide significant benefits that are not available under the current NRMSIR system. The Commission notes that the submission of continuing disclosure documents in an electronic format will allow the information to be posted and disseminated promptly. The Commission also notes that the MSRB's proposed filing format and choice of technology will eliminate the need for manual handling of paper documents, which is less efficient and more costly, and will increase the potential for a more complete record of continuing disclosure documents that otherwise might be misfiled or lost under a manual system. Furthermore, the Commission believes that submissions in an electronic format will not be burdensome on issuers or obligated persons since many documents are now routinely created in an electronic format and can be readily transmitted by electronic means. With respect to the comment that the existing disclosure system should be retained and the existing provisions of the Rule 15c2–12 enforced, the Commission believes that enforcement of the provisions of Rule 15c2–12 is an important mechanism for the protection of municipal securities investors and the efficient operation of the marketplace. However, the Commission also believes that the quality, timing, and availability of disclosure in the municipal securities markets will be substantially improved by the MSRB's proposal.

With respect to the comment favoring a ''central post office,'' the Commission believes that this approach is less likely to make access to continuing disclosure documents as efficient as the MSRB's continuing disclosure service and therefore would not achieve the goal. For example, with a central post office there would continue to be no single location to which investors, particularly individuals, could turn for free access to information regarding municipal securities. Instead, individuals or entities that wish to obtain such information would find it necessary first to access the central post office to find out what documents might be available from NRMSIRs and SIDs and then to contact one or more NRMSIRs or SIDs and pay their fees to obtain the document or documents they seek. This would be a less efficient process than the MSRB's proposal, in which interested persons could directly access, view and print for free continuing disclosure documents from one place—the MSRB's Internet site.

Moreover, a ''central post office'' would not, to the same extent as the MSRB's EMMA system, simplify compliance with regulatory requirements by, and reduce compliance costs of, broker-dealers, municipal securities dealers, and others. This is because they would have to first access the ''central post office'' to determine what documents are available and then contact one or more NRMSIRs or SIDs to obtain these documents for a fee or subscribe to commercial services to do so on their behalf. We believe that greater benefits will be achieved by providing public access to all continuing disclosure documents on the Internet, as provided by the proposal. We anticipate that access to all continuing disclosure documents without charge through the MSRB's Internet site will better promote market efficiency and help deter fraud and manipulation in the municipal securities market by improving the availability of information to all investors.

Two commenters, both of which are NRMSIRs, also raised concerns about the potential adverse effects on competition and raised issues about the proposal's consistency with Congressional intent regarding the regulation of municipal securities.[84] Both of these commenters believed that the proposal is contrary to Section 15B(d) of the Act,[85] commonly referred to as the Tower Amendment. One of these commenters also expressed its belief that the proposal would reduce current value-added products and services provided by existing NRMSIRs and other vendors; narrow competing information services regarding municipal securities; and result in a loss of innovation in offering competing information services regarding municipal securities.[86] This commenter also expressed its belief that the proposal is anti-competitive and would unfairly displace private vendors that have made significant investment under the current system with a ''quasi-governmental organization'' that is subsidized and could provide value-added services for free.[87] The other commenter expressed a belief that the proposal places the MSRB in direct competition with commercial vendors.[88]

With respect to their comments regarding competition, the MSRB responded that it did not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.[89] The MSRB expressed its belief that existing vendors would continue to have rapid access to all of the same documents they previously received, now accompanied by consistent indexing information, and would fully be able to provide value added products based on such documents. Additionally, the MSRB responded that it believed that the availability of continuing disclosure

centrally-filed documents in real time to the NRMSIRs. *See also* SPSE Letter, at 3–5.

[83] *See* MSRB Response Letter.

[84] *See* DPC DATA Letter and SPSE Letter.

[85] 15 U.S.C. 78*o*–4(d).

[86] *See* SPSE Letter.

[87] *Id.*

[88] *See* DPC DATA Letter.

[89] *See* MSRB Response Letter.

documents through the EMMA portal and the continuing disclosure subscription service would promote competition among private data vendors and other enterprises engaged in, or interested in becoming engaged in, the market for information services by eliminating existing barriers to new entrants into the market for municipal securities information. The MSRB added that none of the functionalities of the continuing disclosure service constitute value-added services that compete inappropriately with the private sector. Rather, the MSRB noted that these functionalities are critical for the continuing disclosure services operation as a free, centralized source of information for retail investors that provides investors with the necessary tools to find the information for which they are searching and to understand such information once it is found. Furthermore, the MSRB expressed its belief that its operation of the continuing disclosure service would serve as a basis on which private enterprises could themselves concentrate more of their resources on developing and marketing value-added services. In the MSRB's opinion, the shift in the flow of continuing disclosure documents from the current NRMSIRs to EMMA (from which such entities and others could still obtain documents on a real-time basis accompanied by indexing information) would represent only a temporary dislocation in the processes by which current vendors that produce value-added services obtain the raw documents on which these services are based.

Moreover, the MSRB expressed its belief that the proposal will prove to be of long-term benefit to such vendors. The MSRB noted that much of the impact of the proposed rule change on commercial enterprises will result from increased competition in the marketplace resulting from the entry of additional commercial enterprises to compete with existing market vendors for value-added services, rather than from the operation of the continuing disclosure service. Furthermore, the MSRB stated its belief that the benefits realized by the investing public from the broader and easier availability of disclosure information about municipal securities justifies any potential negative impact on existing enterprises resulting from the operation of EMMA. The MSRB emphasized that its activities are subject to the supervision of the Commission and that any changes to EMMA and related systems must be filed with the Commission. The MSRB further commented that it has worked closely with all of the marketplace's key constituencies, including issuers, bond attorneys, financial advisers, and others in the development of EMMA and represented that it will continue to do so as EMMA becomes fully operational.

The Commission believes that the proposal will modernize the method of availability of continuing disclosure documents by issuers and, by making use of the Internet, will make these documents readily accessible to investors and others at no charge. The continuing disclosure service will not alter the availability of such documents to commercial vendors or their ability to disseminate such information, together with whatever value-added products they may wish to provide. The Commission notes that the MSRB has represented that documents provided through EMMA will be available to all persons on an equal basis and that the MSRB will continue to make the full collection of documents available by subscription on an equal basis, without imposing restrictions on subscribers from re-disseminating such documents or from otherwise offering value-added service and products, based on such documents on terms determined by each subscriber.[90] Further, the Commission notes that the MSRB has represented that EMMA will be designed to provide real-time access to documents and information as they are submitted and processed [91] and that all continuing disclosures received by the MSRB will be available through a data-stream subscription simultaneously with posting on the EMMA portal.[92]

The Commission believes that the proposed rule change will encourage, rather than restrict, competition in the municipal securities information marketplace. The Commission further believes that any burdens on competition that may result from the proposed rule change are more than justified by the benefits that will flow from ready and free availability of municipal disclosure documents to broker-dealers, municipal securities dealers, mutual funds, analysts, retail and institutional investors, and the public generally. Both existing private vendors and new market entrants seeking to provide value-added products and services will be able to access all available continuing disclosure documents from EMMA for free, or for a subscription fee if they elect to receive a real-time data feed. Consequently, existing vendors and potential new market entrants no longer will have to pay multiple subscription fees or document charges to multiple NRMSIRs to access the continuing disclosure information that is necessary for value-added products and services. The MSRB's proposal is designed to help spur innovation and competition for value-added products and services and is expected to reduce barriers to entry for new market participants. The Commission also notes that because continuing disclosure information will be available at the MSRB, existing vendors and new market entrants can conserve resources that otherwise would be utilized to obtain a full complement of available continuing disclosure information that is spread out across multiple NRMSIRs. In addition, while the Commission acknowledges that some existing vendors may need to make some adjustments to their line of business or services offered, these vendors and others may determine that they no longer need to invest in the infrastructure and facilities necessary to collect and store continuing disclosure information. The Commission believes that the proposed rule change likely will have a net benefit on the competitive landscape for municipal securities disclosure information services and further the purposes of the Act by deterring the potential for fraud in the municipal securities market.

With respect to concerns that the MSRB could control private vendors' access to information through unfair fee structures and biased dissemination of information for the purpose of conditioning the market to use EMMA and the MSRB's own services,[93] the Commission notes that the MSRB is required to file its fee changes and rule proposals relating to the EMMA system with the Commission under Section 19(b) of the Act. Thus, interested parties will have the opportunity to comment on any such proposal and bring to the Commission's attention any potential issues. The Commission has carefully considered the comments of the two NRMSIRs regarding competition, and the MSRB's response letter, and 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. To the contrary, as discussed above, the Commission believes that any competitive impact that may result from the proposed rule change is justified by the benefits that will be provided to investors, broker-dealers, mutual funds, vendors of municipal information, municipal

[90] *See* MSRB Response Letter.

[91] *See* MSRB Response Letter.

[92] *See* Release No. 34–58256, *supra* note 3.

[93] *See* DPC DATA Letter.

security analysts, other market professionals and the market generally.

With respect to the comments of the two NRMSIRs regarding the Tower Amendment, the MSRB responded that it believes its proposal to create a continuing disclosure service is consistent with the MSRB's statutory authority under Section 15B(d) of the Act, *i.e.*, the Tower Amendment.[94] The MSRB believes that the continuing disclosure service of EMMA will serve as a necessary step to better facilitate the free and timely public access to continuing disclosure documents and related information. The service will remove impediments to and help perfect the mechanisms of a free and open market in municipal securities thereby, effectively, promoting investor protections and the public interest by ensuring equal access for all market participants to the critical disclosure information needed by investors in the municipal securities market. The MSRB believes that all of the continuing disclosure service's functionalities relate to the core mission of the MSRB and such functionalities are not inconsistent with any statutory limitations placed on MSRB activities. The MSRB believes that municipal securities disclosure documents should be made more readily and promptly available to the public and that all investors should have better access to important market information.

The Commission also does not believe that the proposed rule change is inconsistent with the Tower Amendment. The Tower Amendment prohibits the MSRB from directly or indirectly requiring an issuer of municipal securities to file with it any documents relating to the issuance, sale or distribution of such securities before such securities are sold.[95] The Tower Amendment also prohibits the MSRB from directly or indirectly requiring an issuer of municipal securities, directly or indirectly through a municipal securities broker or dealer or otherwise, to furnish to it documents relating to the issuer, unless such information is available from a source other than the issuer.[96] The MSRB's proposed rule change does not implicate Section 15B(d)(1) or (2) of the Act because it imposes no requirements on issuers. Instead, through the establishment of the continuing disclosure service of EMMA as an information venue, the proposed rule change enhances access to continuing disclosure information provided to the MSRB subsequent to the sale of municipal securities as a consequence of continuing disclosure agreements entered into consistent with a rule of the Commission's Rule 15c2–12, which is designed to deter fraud in the municipal securities market. The proposed rule change does not alter market participants' existing obligations, but rather it enhances the system for the receipt of, and for making available to the public of, the continuing disclosure documents. For these reasons, the Commission does not believe that the proposed rule change is contrary to Section 15B(d) of the Act.

Several commenters that supported the proposed rule change also made suggestions regarding the transition to the proposed system.[97] For example, one commenter believed that there should be a three- to six-month transition period for submissions to EMMA and a twelve-month transition period for the submissions of searchable PDFs.[98] Another commenter believed that there should be a nine-month transition period to a word searchable format.[99] Another commenter believed that parties who have made paper filings in the past should be allowed additional time to transition to electronic filings.[100] A fourth commenter noted that issuers and obligated persons may be confused as to where they should file continuing disclosure documents during the period of transition and suggested that these concerns could be addressed during a short transition period.[101] The MSRB responded that, in view of the comments it received and discussions it has had with industry participants, and to further ensure a smooth transition for submitters and end users of continuing disclosures, it has filed Amendment No. 1 to delay the effectiveness of the continuing disclosure service until the later of July 1, 2009 or the effective date of the Rule 15c2–12 Amendments and to extend the transition to a word-searchable format until January 1, 2010. Furthermore, the MSRB stated that it expects to file with the Commission to establish a pilot program for the continuing disclosure service that would allow for system testing through voluntary submissions of continuing disclosures prior to the effectiveness of the amendments to Rule 15c2–12 and the launch of the permanent continuing disclosure service.

IV. Order Granting Accelerated Approval of Proposed Rule Change

As noted above, the MSRB now seeks pursuant to Amendment No. 1 to commence operation of the EMMA portal for continuing disclosure documents on July 1, 2009,[102] which is commensurate with the effective date of the Rule 15c2–12 Amendments that we also are adopting today.[103] In addition, Amendment No. 1 requests that the Commission delay the effectiveness of the provision of the proposed rule change relating to word searchable PDF files until January 1, 2010. The MSRB requests that the Commission find good cause, pursuant to Section 19(b)(2) of the Act, for approving Amendment No. 1 prior to the thirtieth day after publication of notice of filing of Amendment No. 1 in the **Federal Register**. The MSRB believes that the Commission has good cause for granting accelerated approval of the proposed rule change because the amendment does not substantively alter the original proposed rule change other than changing two effective dates to allow more time for implementation.

The Commission finds good cause to approve the proposed rule change on an accelerated basis. The proposed rule change was published in the **Federal Register** on August 7, 2008.[104] The Commission believes that the proposal includes an appropriate transition period and believes that parties that have made paper filings in the past or that do not presently use word searchable formats will have sufficient time to transition to electronic filings as of July 1, 2009 and to a word searchable

[94] Section 15B(d) of the Exchange Act states as follows: (1) Neither the Commission nor the Board is authorized under this title, by rule or regulation, to require any issuer of municipal securities, directly or indirectly through a purchaser or prospective purchaser of securities from the issuer, to file with the Commission or the Board prior to the sale of such securities by the issuer any application, report, or document in connection with the issuance, sale, or distribution of such securities. (2) The Board is not authorized under this title to require any issuer of municipal securities, directly or indirectly through a municipal securities broker or municipal securities dealer or otherwise, to furnish to the Board or to a purchaser or a prospective purchaser of such securities any application, report, document, or information with respect to such issuer: Provided, however, That the Board may require municipal securities brokers and municipal securities dealers to furnish to the Board or purchasers or prospective purchasers of municipal securities applications, reports, documents, and information with respect to the issuer thereof which is generally available from a source other than such issuer. Nothing in this paragraph shall be construed to impair or limit the power of the Commission under any provision of this title. 15 U.S.C. 78*o*–4(d)(1) and (2).

[95] 15 U.S.C. 78*o*–4(d)(1).

[96] 15 U.S.C. 78*o*–4(d)(2).

[97] *See, e.g.*, GFOA Letter, e-certus Letter, Treasurer of the State of Connecticut Letter, and NABL Letter.

[98] *See* GFOA Letter.

[99] *See* Treasurer of the State of Connecticut Letter.

[100] *See* NABL Letter.

[101] *See* Vanguard Letter.

[102] *See* Amendment No. 1, *supra* note 5.

[103] *See* Rule 15c2–12 Amendments Adopting Release, *supra* note 7.

[104] *See* Release No. 34–58256, *supra* note 3.

PDF format as of January 1, 2010, respectively.

V. 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–MSRB–2008–05 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–MSRB–2008–05. 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 MSRB. 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–MSRB–2008–05 and should be submitted on or before January 2, 2009.

VI. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 15B(b)(2)(C) of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[105] that the proposed rule change (SR–MSRB–2008–05), as modified by Amendment No. 1, be, and it hereby is, approved on an accelerated basis.

By the Commission.

Florence E. Harmon,

Acting Secretary.

Exhibit A

Key to Comment Letters Cited in Order Relating to the Establishment of a Continuing Disclosure Service of the Electronic Municipal Market Access System (EMMA) (File No. SR–MSRB–2008–05)

1. Letter from Fran Busby, to 21st Century Disclosure Initiative, Commission, dated October 7, 2008 (''Busby Letter'').
2. Letter from Paula Stuart, Chief Executive Officer, Digital Assurance Certification, L.L.C. (''DAC''), to Florence E. Harmon, Acting Secretary, Commission, dated September 25, 2008 (''DAC Letter'').
3. Letter from Christopher Alwine, Head of Municipal Money Market and Bond Groups, The Vanguard Group, Inc. (''Vanguard''), to Florence E. Harmon, Acting Secretary, Commission, dated September 24, 2008 (''Vanguard Letter'').
4. Letter from Susan A. Gaffney, Director, Federal Liaison Center, Government Finance Officers Association (''GFOA''), to Florence E. Harmon, Acting Secretary, Commission, dated September 24, 2008 (''GFOA Letter'').
5. Letter from Louis V. Eccleston, President, Standard & Poor's Securities Evaluations, Inc. (''SPSE''), to Florence E. Harmon, Acting Secretary, Commission, dated September 22, 2008 (''SPSE Letter'').
6. Letter from R.T. McNamar, CEO, e-certus, Inc. (''e-certus''), to Christopher Cox, Chairman, Commission, and Ernesto A. Lanza, Senior Associate General Counsel, MSRB, dated September 22, 2008 (''e-certus Letter'').
7. Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (''SIFMA''), to Florence E. Harmon, Acting Secretary, Commission, dated September 22, 2008 (''SIFMA Letter'').
8. Letter from William A. Holby, President, National Association of Bond Lawyers (''NABL''), to Florence E. Harmon, Acting Secretary, Commission, dated September 22, 2008 (''NABL Letter'').
9. Letter from Denise L. Nappier, Treasurer, State of Connecticut, to Christopher Cox, Chairman, Commission, dated September 22, 2008 (''Treasurer of the State of Connecticut Letter'').
10. Letter from J. Douglas Adamson, Executive Vice President, Technical Services Division, American Bankers Association (''ABA''), to Florence E. Harmon, Acting Secretary, Commission, dated September 22, 2008 (''ABA Letter'').
11. Letter from Laura Slaughter, Executive Director, Municipal Advisory Council of Texas (''Texas MAC''), to Christopher Cox, Chairman, Commission, and Ernesto A. Lanza, Senior Associate General Counsel, MSRB, dated September 22, 2008 (''Texas MAC Letter'').
12. Letter from K.W. Gurney, Director, Ohio Municipal Advisory Council (''OMAC''), to Christopher Cox, Chairman, Commission, and Ernesto A. Lanza, Senior Associate General Counsel, MSRB, dated September 22, 2008 (''OMAC Letter'').
13. Letter from Karrie McMillan, General Counsel, Investment Company Institute (''ICI''), to Florence E. Harmon, Acting Secretary, Commission, dated September 22, 2008 (''ICI Letter'').
14. Letter from Robert Donovan, Executive Director, Rhode Island Health and Educational Building Corporation and Steven Fillebrown, Director of Research, Investor Relations and Compliance, New Jersey Healthcare Financing Authority, on behalf of the National Association of Health and Educational Facilities Finance Authorities (''NAHEFFA''), to Florence E. Harmon, Acting Secretary, Commission, dated September 22, 2008 (''NAHEFFA Letter'').
15. Letter from Peter J. Schmitt, CEO, DPC DATA Inc. (''DPC DATA''), to Florence E. Harmon, Acting Secretary, Commission, dated September 18, 2008 (''DPC DATA Letter'').
16. Letter from Philip D. Moyer, CEO & President, EDGAR Online (''EDGAR Online''), to Christopher Cox, Chairman, Commission, and Ernesto A. Lanza, Senior Associate General Counsel, MSRB, dated September 9, 2008 (''EDGAR Online Letter'').
17. Letter from Lynette Kelly Hotchkiss, Executive Director, MSRB, to Christopher Cox, Chairman, and James L. Eastman, Counsel, Commission, dated September 8, 2008 (''MSRB Letter'').
18. Letter from Rob Yolland, Chairman, National Federation of Municipal Analysts (NFMA), to Ernesto A. Lanza, Senior Associate General Counsel, MSRB, Commission, dated March 10, 2008 (''NFMA Letter'').

[FR Doc. E8–29376 Filed 12–11–08; 8:45 am]

BILLING CODE 8011–01–P

[105] 15 U.S.C. 78s(b)(2).

DEPARTMENT OF STATE

[Public Notice 6449]

Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals: Youth Programs Academic Year Disability Components

Announcement Type: New Grant.

Funding Opportunity Number: ECA/PE/C/PY–09–05.

Catalog of Federal Domestic Assistance Number: 00.000.

Key Dates: June 2009–August 2010.

Application Deadline: February 6, 2009.

Executive Summary: The Office of Citizen Exchanges, Youth Programs Division, of the Bureau of Educational and Cultural Affairs announces an open competition for the management of the Disability Components for two Academic Year programs. This includes conducting a five-day summer Preparatory Workshop and a two-day spring Leadership and Reentry Workshop for Students with Disabilities from Eurasia participating in the Future Leaders Exchange (FLEX) Program and from countries with significant Muslim populations participating in the Youth Exchange and Study (YES) Program, as well as providing support services to these students throughout the year by assisting grantee placement organizations and maintaining regular communication with each student, as needed. Approximately 30 high school-aged students will participate in the Disability Component Program.

I. Funding Opportunity Description

Authority: Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is ''to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * *and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world.'' The funding authority for the program above is provided through legislation.

Purpose: It is Bureau policy that recruitment of people with disabilities at every level should be a priority in all sponsored programming. It is ECA's goal to provide each student with a disability participating in the FLEX or YES Program with an integrated three-phase program designed to enhance their experience in the United States. This will include providing a Preparatory Workshop upon the students' arrival in the U.S. and developing an action plan with each student for the coming year. The grantee organization will then continue to support each of these students and work with their placement organizations to assist the students in taking advantage of local opportunities for people with disabilities. Finally, the process will include implementing the Leadership and Reentry Workshop to assist the students in discussing their year's experience and preparing for their return home as individuals with disabilities.

Background: The Future Leaders Exchange (FLEX) and Youth Exchange and Study (YES) programs bring secondary school students from Eurasia and countries with significant Muslim populations to the United States for an academic year. During their time in the United States, these students live with American host families and attend U.S. high schools. Since 1995, the FLEX program has included a component for students with disabilities. In Eurasia, young people with disabilities may be treated differently than they are in the United States. These young people with disabilities may be more sheltered from mainstream society or attend special schools or institutions. Students may not be familiar with the technology, tools, and services available for people with disabilities in the United States, and may need extra assistance in learning to use the resources available. A similar situation exists in the countries from which the YES students come, with obstacles for full inclusion in society compared to people without disabilities. Therefore, the Disabilities Components program was expanded in 2006 to include YES students.

The program should be designed to support the following specific activities/components:

1. Preparatory Workshop for Students With Disabilities

Generally, FLEX and YES participants with disabilities adjust well to American life and culture and realize the same positive effects as non-disabled participants. The grantee organization will assess the students' abilities and special needs and provide information to placement organizations (POs) on accommodations that each student may require, as well as assist each PO in identifying resources to support the student in the host community. The Preparatory Workshop will also introduce and guide students' expectations and skills for the U.S. academic year as individuals with disabilities. The grantee organization will focus on identifying local activities and resources to prepare each student to incorporate disability-related themes into their FLEX or YES program objectives of participation in community service and enhancement activities designed to involve them in civic education, democracy building, and mutual understanding.

2. Ongoing Support and Academic Year Programming: Placement organizations have varying levels of experience working with students with disabilities and often lack resources and counseling expertise. Providing such support services during the year will undoubtedly offer students with disabilities access to opportunities that they may not be aware of as well as enhance their experiences in their American host communities. However, in addition to providing for the physical and emotional support of students with disabilities, POs also need guidance in identifying appropriate disability-related local community service and enhancement opportunities to provide for the programmatic aspects of the students' FLEX or YES experience. Your organization's expertise and knowledge of resources around the country will provide valuable assistance to POs in planning meaningful activities that can enhance and enrich the students' experiences while in the United States, and they will be well-prepared to use their new knowledge and skills in their home countries.

3. *Leadership and Reentry Workshop for Students With Disabilities:* After having enjoyed the accessibility and other disability support that exists in the U.S., FLEX and YES students with disabilities are often not well prepared to return to the less disability-friendly environments of their home countries. It is important to adequately prepare program participants with disabilities for the reverse culture shock that may occur when they return home. Therefore, this workshop should focus solely on the readjustment of each student as a person with a disability, as the students will also be attending other reentry workshops conducted for all FLEX and YES students by their respective placement organizations at the end of the program year. These other workshops will provide more general training for readjustment to the students' home cultures. Additional goals of the Leadership and Reentry workshop are to conduct activities to further develop leadership skills, team building, and empowerment skills to assist students in returning to their home countries.

II. Award Information

Type of Award: Grant Agreement.

Fiscal Year Funds: 2009.

Approximate Total Funding: Up to $220,000, pending availability of funds.

Approximate Number of Awards: One.

Anticipated Award Date: Pending availability of funds, April 2009.

Anticipated Project Completion Date: August 2010.

Additional Information: Pending successful implementation of this program and the availability of funds in subsequent fiscal years, it is ECA's intent to renew this grant for two additional fiscal years, before openly competing it again.

III. Eligibility Information

III.1. Eligible Applicants: Applications may be submitted by public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

III.2. Cost Sharing or Matching Funds: There is no minimum or maximum percentage required for this competition. However, the Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved grant agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, you must maintain written records to support all costs which are claimed as your contribution, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event you do not provide the minimum amount of cost sharing as stipulated in the approved budget, ECA's contribution will be reduced in like proportion.

III.3. Other Eligibility Requirements: Bureau grant guidelines require that organizations with less than four years experience in conducting international exchanges be limited to $60,000 in Bureau funding. ECA anticipates making one award, in an amount up to $220,000 to support program and administrative costs required to implement this exchange program. Therefore, organizations with less than four years experience in conducting international exchanges are ineligible to apply under this competition. The Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

IV. Application and Submission Information

Note: Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1. Contact Information To Request an Application Package: Please contact Amy Schulz in the Youth Programs Division, ECA/PE/C/PY, Room Number 220, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547, phone: (202) 453–8158, fax (202) 453–8169, or e-mail *SchulzAJ@state.gov* to request a Solicitation Package.

Please refer to the Funding Opportunity Number located at the top of this announcement when making your request. Alternatively, an electronic application package may be obtained from grants.gov. Please see section IV.3f for further information.

The Solicitation Package contains the Proposal Submission Instruction (PSI) document which consists of required application forms, and standard guidelines for proposal preparation. It also contains the Project Objectives, Goals and Implementation (POGI) document, which provides specific information, award criteria and budget instructions tailored to this competition.

Please specify Bureau Program Officer Amy Schulz and refer to the Funding Opportunity Number (ECA/PE/C/PY–09–05) located at the top of this announcement on all other inquiries and correspondence.

IV.2. To Download a Solicitation Package Via Internet: The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/education/rfgps/menu.htm* or from the Grants.gov Web site at *http://www.grants.gov.* Please read all information before downloading.

IV.3. Content and Form of Submission: Applicants must follow all instructions in the Solicitation Package. The application should be submitted per the instructions under IV.3f. ''Application Deadline and Methods of Submission'' section below.

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. Please ensure that your DUNS number is included in the appropriate box of the SF–424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget.

Please Refer to the Solicitation Package. It contains the mandatory Proposal Submission Instructions (PSI) document and the Project Objectives, Goals and Implementation (POGI) document for additional formatting and technical requirements.

IV.3c. You must have nonprofit status with the IRS at the time of application.

Please note: Effective March 14, 2008, all applicants for ECA federal assistance awards must include with their application, a copy of page 5, Part V–A, ''Current Officers, Directors, Trustees, and Key Employees'' of their most recent Internal Revenue Service (IRS) Form 990, ''Return of Organization Exempt From Income Tax.'' If an applicant does not file an IRS Form 990, but instead files Schedule A (Form 990 or 990–EZ)—''Organization Exempt Under Section 501(c)(3),'' applicants must include with their application a copy of Page 1, Part 1, ''Compensation of the Five Highest Paid Employees Other Than Officers, Directors and Trustees,'' of their most recent Internal Revenue Service (IRS) Form—Schedule A (Form 990 or 990–EZ).

If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1. Adherence to All Regulations Governing the J Visa: The Office of Citizen Exchanges of the Bureau of Educational and Cultural Affairs is the official program sponsor of the exchange program covered by this RFGP, and an employee of the Bureau will be the ''Responsible Officer'' for the program under the terms of 22 CFR part 62, which covers the administration of the Exchange Visitor Program (J visa program). Under the terms of 22 CFR part 62, organizations receiving awards (either a grant or cooperative agreement) under this RFGP will be third parties ''cooperating with or assisting the sponsor in the conduct of the sponsor's program.'' The actions of recipient organizations shall be ''imputed to the sponsor in evaluating the sponsor's compliance with'' 22 CFR part 62. Therefore, the Bureau expects that any organization receiving an award under

this competition will render all assistance necessary to enable the Bureau to fully comply with 22 CFR part 62 *et seq.*

The Bureau of Educational and Cultural Affairs places critically important emphases on the secure and proper administration of Exchange Visitor (J visa) Programs and adherence by recipient organizations and program participants to all regulations governing the J visa program status. Therefore, proposals should explicitly state in writing that the applicant is prepared to assist the Bureau in meeting all requirements governing the administration of Exchange Visitor Programs as set forth in 22 CFR part 62. If your organization has experience as a designated Exchange Visitor Program Sponsor, the applicant should discuss their record of compliance with 22 CFR part 62 *et seq.,* including the oversight of their Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements.

The Office of Citizen Exchanges of ECA will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: United States Department of State, Office of Exchange Coordination and Designation, ECA/EC/ECD—SA–44, Room 734, 301 4th Street, SW., Washington, DC 20547, Telephone: (202) 203–5029, FAX: (202) 453–8640.

IV.3d.2 Diversity, Freedom and Democracy Guidelines: Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. ''Diversity'' should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the ''Support for Diversity'' section for specific suggestions on incorporating diversity into your proposal. Public Law 104–319 provides that ''in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy,'' the Bureau ''shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries.'' Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

IV.3d.3. Program Monitoring and Evaluation: Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives. The Bureau expects that the grantee will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your project's objectives, your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are ''smart'' (specific, measurable, attainable, results-oriented, and placed in a reasonable timeframe), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the goals of the program described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between program outputs and outcomes. Outputs are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. *Outcomes,* in contrast, represent specific results a project is intended to achieve and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. *Participant satisfaction* with the program and exchange experience.

2. *Participant learning,* such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.

3. *Participant behavior,* concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.

4. *Institutional changes,* such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) Specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (i.e., surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

Recipient organizations will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV.3d.4. For informational and planning purposes, we are informing all potential applicants that ECA is in the process of developing comprehensive approaches to alumni programming, Web portal development supported through ECA assistance awards (grants/cooperative agreements) and the expansion of private/public partnerships to increase the reach of ECA's exchange programs. In the event your proposal is recommended for funding, you may receive additional guidance/information related to these

topics during the negotiation stage of the approval process.

In addition, all recipients of ECA grants or cooperative agreements should be prepared to state in any announcement or publicity where it is not inappropriate, that activities are assisted financially by the Bureau of Educational and Cultural Affairs of the United States Department of State under the authority of the Fulbright-Hays Act of 1961, as amended. Award recipients are strongly encouraged to use the Department seal on all promotional and related materials for ECA funded programs which support the commemoration of special occasions or events, but only after first obtaining written permission from the ECA program office(r) assigned to the project.

IV.3e. Please take the following information into consideration when preparing your budget:

IV.3e.1. Applicants must submit SF–424A—''Budget Information—Non-Construction Programs'' along with a comprehensive budget for the entire program. Budget requests may not exceed $220,000. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification.

IV.3e.2. Allowable costs for the program include the following:

(1) Round-trip transportation for participants from their host communities to/from the Leadership and Reentry workshop site.

(2) Daily travel at workshop site location as necessary.

(3) Accommodations and meals for participants during the time of the workshop.

(4) Rental of facilities and equipment.

(5) Fees for relevant excursions and cultural activities.

(6) Honoraria for speakers/trainers, as appropriate.

(7) Necessary reasonable accommodations.

(8) Materials development.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

IV.3f. Application Deadline and Methods of Submission:

Application Deadline Date: Friday, February 6, 2009.

Reference Number: ECA/PE/C/PY–09–05.

Methods of Submission: Applications may be submitted in one of two ways:

(1) In hard-copy, via a nationally recognized overnight delivery service (i.e., DHL, Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, etc.), or

(2) Electronically through *http://www.grants.gov.* Along with the Program Title, all applicants must enter the above Reference Number in Box 11 on the SF–424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3f.1. Submitting Printed Applications: Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will not notify you upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages may not be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Important note: When preparing your submission please make sure to include one extra copy of the completed SF–424 form and place it in an envelope addressed to ''ECA/EX/PM''.

The original and seven copies of the application should be sent to: U.S. Department of State, SA–44, Bureau of Educational and Cultural Affairs, Ref: ECA/PE/C/PY–09–05, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

IV.3f.2. Submitting Electronic Applications: Applicants have the option of submitting proposals electronically through Grants.gov (*http://www.grants.gov*). Complete solicitation packages are available at Grants.gov in the ''Find'' portion of the system. Please follow the instructions available in the ''Get Started'' portion of the site (*http://www.grants.gov/GetStarted*).

Several of the steps in the Grants.gov registration process could take several weeks. Therefore, applicants should check with appropriate staff within their organizations immediately after reviewing this RFGP to confirm or determine their registration status with Grants.gov.

Once registered, the amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your internet connection. In addition, validation of an electronic submission via Grants.gov can take up to two business days.

Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.

The Grants.gov Web site includes extensive information on all phases/aspects of the Grants.gov process, including an extensive section on frequently asked questions, located under the ''For Applicants'' section of the Web site. ECA strongly recommends that all potential applicants review thoroughly the Grants.gov Web site, well in advance of submitting a proposal through the Grants.gov system. ECA bears no responsibility for data errors resulting from transmission or conversion processes.

Direct all questions regarding Grants.gov registration and submission to: Grants.gov Customer Support, Contact Center Phone: 800–518–4726, Business Hours: Monday–Friday, 7 a.m.–9 p.m. Eastern Time, E-mail: *support@grants.gov.*

Applicants have until midnight (12 a.m.), Washington, DC time of the closing date to ensure that their entire application has been uploaded to the Grants.gov site. There are no exceptions to the above deadline. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the grants.gov system, and will be technically ineligible.

Please refer to the Grants.gov Web site, for definitions of various ''application statuses'' and the difference between a submission receipt and a submission validation. Applicants will receive a validation e-mail from grants.gov upon the successful submission of an application. Again, validation of an electronic submission via Grants.gov can take up to two business days. Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov. ECA will not notify you upon receipt of electronic applications.

It is the responsibility of all applicants submitting proposals via the Grants.gov Web portal to ensure that proposals have been received by Grants.gov in their entirety, and ECA bears no responsibility for data errors

resulting from transmission or conversion processes.

IV.3g. Intergovernmental Review of Applications: Executive Order 12372 does not apply to this program.

V. Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for grants assistance awards resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. Program planning: Detailed agenda and relevant work plan should demonstrate substantive undertakings and logistical capacity. Agenda and plan should adhere to the program overview and guidelines described above.

2. Ability to achieve program objectives: Objectives should be reasonable, feasible, and flexible. Proposals should clearly demonstrate how the institution will meet the program's objectives and plan.

3. Support of Diversity: Proposals should demonstrate substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration (selection of participants, program venue and program evaluation) and program content (orientation and wrap-up sessions, program meetings, and resource materials).

4. Institutional Capacity: Proposed personnel and institutional resources should be adequate and appropriate to achieve the program or project's goals.

5. Institution's Record/Ability: Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Bureau awards (grants or cooperative agreements) as determined by Bureau Grants Staff. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants.

6. Project Evaluation: Proposals should include a plan to evaluate the activity's success, both as the activities unfold and at the end of the program. A draft survey questionnaire or other technique plus description of a methodology to use to link outcomes to original project objectives is recommended.

7. Cost-effectiveness and Cost-sharing: The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Proposals should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

VI. Award Administration Information

VI.1a. Award Notices

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive a Federal Assistance Award (FAA) from the Bureau's Grants Office. The FAA and the original proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The FAA will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

VI.2. Administrative and National Policy Requirements

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A–122, ''Cost Principles for Nonprofit Organizations.''

Office of Management and Budget Circular A–21, ''Cost Principles for Educational Institutions.''

OMB Circular A–87, ''Cost Principles for State, Local and Indian Governments''.

OMB Circular No. A–110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.

OMB Circular No. A–102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A–133, Audits of States, Local Government, and Non-profit Organizations.

Please reference the following Web sites for additional information: *http://www.whitehouse.gov/omb/grants. http://fa.statebuy.state.gov.*

VI.3. Reporting Requirements: You must provide ECA with a hard copy original plus two copies of the following reports:

(1.) A final program and financial report no more than 90 days after the expiration of the award;

(2.) A concise, one-page final program report summarizing program outcomes no more than 90 days after the expiration of the award. This one-page report will be transmitted to OMB, and be made available to the public via OMB's USAspending.gov Web site—as part of ECA's Federal Funding Accountability and Transparency Act (FFATA) reporting requirements.

(3.) A SF–PPR, ''Performance Progress Report'' Cover Sheet with all program reports.

Award recipients will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. (Please refer to IV. Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

VII. Agency Contact

For questions about this announcement, contact: Amy Schulz, Program Officer, Office of Citizen Exchanges, ECA/PE/C/PY, Room 220, Reference Number ECA/PE/C/PY–09–05, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547, phone: (202) 453–8158 and fax (202) 453–8169, E-mail: *SchulzAJ@state.gov.*

All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/PE/C/PY–09–05.

Please read the complete announcement before sending inquiries

or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Dated: December 2, 2008.

Goli Ameri,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–29366 Filed 12–11–08; 8:45 am]

BILLING CODE 4710–05–P

TENNESSEE VALLEY AUTHORITY

Renewal of the Regional Resource Stewardship Council

Pursuant to the Federal Advisory Committee Act (FACA) and 41 CFR 102–3.65, and following consultation with the Committee Management Secretariat, General Services Administration (GSA), notice is hereby given that the Regional Resource Stewardship Council (Council) has been renewed for a two-year period beginning February 2, 2009. The Council will provide advice to the Tennessee Valley Authority (TVA) on issues affecting natural resource stewardship activities.

Numerous public and private entities are traditionally involved in the stewardship of the natural resources of the Tennessee Valley region. It has been determined that the Council continues to be needed to provide an additional mechanism for public input regarding stewardship issues.

Further information regarding this advisory committee can be obtained from Beth A. Keel, 400 West Summit Hill Drive, WT 11B–K, Knoxville, Tennessee 37902–1499, (865) 632–6113.

Anda A. Ray,

Senior Vice President, Office of Environment and Research, Tennessee Valley Authority.

[FR Doc. E8–29437 Filed 12–11–08; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2008–0336]

Agency Information Collection Activities; New Information Collection: Annual Commercial Vehicle Driver Survey: Work and Compensation

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. The purpose of this information collection is to acquire general information regarding the commercial motor vehicle driving population and specific information on driver work history, work scheduling, and compensation. This information is needed in many different types of analyses conducted by the FMCSA and would benefit the FMCSA in assessing the impacts of proposed rules and the improvement of its safety programs.

DATES: We must receive your comments on or before February 10, 2009.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket Number FMCSA–2008–0336 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001 between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov*, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgement that we received your comments, please include a self-addressed, stamped envelope or post card or print the acknowledgement page that appears after submitting online.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** on April 11, 2000 (65 FR 19476). This information is also available at *http://docketsinfo.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Dr. Mindy Shalaby, Economist, Analysis Division, Office of Analysis, Research and Technology, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave., SE., Washington, DC 20590. *Telephone:* (202) 493–0304; e-mail *Mindy.Shalaby@dot.gov*. Requests for additional information or copies of the information collection instrument and instructions should be directed to Dr. Michelle Yeh, Engineering Psychologist, Human Factors Division, Volpe National Transportation Systems Center, 55 Broadway, Cambridge, MA 02124. *Telephone:* (617) 494–3459; e-mail *Michelle.Yeh@dot.gov*. Office hours are from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background: The Federal Motor Carrier Safety Administration (FMCSA) needs a better understanding of the commercial motor vehicle (CMV) driving population. Driver-related factors are an important consideration in CMV crashes, but there is no central nationwide source of information describing the population of drivers operating CMVs in the United States (US). Estimates of the number of commercial drivers and particular subsets of drivers (e.g., local, short-haul, and long-haul) are needed and would benefit FMCSA in assessing the impacts of proposed rules and the improvement of its safety programs. In particular, information on driver work history, work schedule, and compensation is needed in many different types of analyses conducted by the FMCSA.

Driver work history addresses how long a CMV driver has been working in the industry, his/her level of experience, and his/her type of experience. These items include questions regarding driver tenure with his/her current employer and the number of past employers to provide information regarding the driver turnover rate. Items also collect information about driver training to understand how drivers learned to operate their CMVs and the amount of training that is ongoing in the industry. Driver work schedule examines the issue of how much drivers work and the activities in which they are engaged when they work (e.g., driving time, loading time, waiting time). FMCSA is interested in understanding whether drivers' work schedules are tracked and how they are tracked (e.g., with paper log books or Electronic On-Board Recorders (EOBRs). Finally, driver compensation collects information on how much drivers earn and how they are paid (e.g., salary, by hour, or by mile). This data will allow FMCSA to estimate an average wage rate, which can be used to understand the cost imposed on drivers by current and proposed regulations.

The goals of this survey are to acquire general demographic information regarding the commercial motor vehicle driving population, and specific information on driver work history, work scheduling, and compensation. Data for this project will be collected via driver interviews. The results of the information collection will be summarized in a report for the FMCSA and made available to the public.

Title: Annual Commercial Vehicle Driver Survey: Work and Compensation.

OMB Control Number: 2126–XXXX.

Type of Request: New collection.

Respondents: Commercial motor vehicle drivers.

Estimated Number of Respondents: 576 commercial motor vehicle drivers.

Estimated Time per Response: 15 minutes per response.

Expiration Date: N/A.

Frequency of Response: Once.

Estimated Total Annual Burden: 144 hours [576 respondents × 15 minutes/60 minutes per response = 144].

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued on: December 5, 2008.

Terry Shelton,

Associate Administrator for Research and Information Technology.

[FR Doc. E8–29414 Filed 12–11–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket ID FMCSA–2008–0341]

Qualification of Drivers; Exemption Applications; Diabetes

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice of applications for exemptions from the diabetes standard; request for comments.

SUMMARY: FMCSA announces receipt of applications from 84 individuals for exemptions from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate commercial motor vehicles in interstate commerce.

DATES: Comments must be received on or before January 12, 2009.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2007–0341 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket ID for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov*, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476). This information is also available at *http://Docketinfo.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statutes also allow the Agency to renew exemptions at the end of the 2-year period. The 84 individuals listed in this notice have recently requested an exemption from the diabetes prohibition in 49 CFR 391.41(b) (3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

Qualifications of Applicants

Edwin K. Anderson

Mr. Anderson, age 57, has had ITDM since 2007. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another

person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Anderson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A Commercial Driver's License (CDL) from Wisconsin.

Robert S. Althouse

Mr. Althouse, 53, has had ITDM since 2001. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Althouse meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Pennsylvania.

James G. Arnoldussen, Sr.

Mr. Arnoldussen, 49, has had ITDM since 1978. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Arnoldussen meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he has stable non-proliferative diabetic retinopathy. He holds a Class A CDL from Wisconsin.

William B. Bailor

Mr. Bailor, 59, has had ITDM since 1977. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bailor meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he has stable non-proliferative diabetic retinopathy. He holds a Class D operator's license from New York.

Kenneth E. Benoit

Mr. Benoit, 66, has had ITDM since 2005. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Benoit meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Connecticut.

Thomas S. Benson

Mr. Benson, 32, has had ITDM since 2005. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Benson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Carolina.

Dennis A. Boelens

Mr. Boelens, 56, has had ITDM since 1994. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Boelens meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Illinois.

Melvin J. Boney

Mr. Boney, 58, has had ITDM since 2006. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Boney meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Virginia.

Christopher D. Bostic

Mr. Bostic, 23, has had ITDM since 2001. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bostic meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class D chauffeur's license from Louisiana.

Walter R. Braxton

Mr. Braxton, 50, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Braxton meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Virginia.

Gordon M. Caldwell

Mr. Caldwell, 47, has had ITDM since 2007. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss

of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Caldwell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a CDL from Washington.

Jake C. Cogswell

Mr. Cogswell, 25, has had ITDM since 1992. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Cogswell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Minnesota.

Eric W. Crawford

Mr. Crawford, 26, has had ITDM since 2004. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Crawford meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Texas.

Merle N. Cromwell

Mr. Cromwell, 66, has had ITDM since 2007. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Cromwell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Illinois.

Trenn A. Davis

Mr. Davis, 38, has had ITDM since 1980. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Davis meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he has stable non-proliferative diabetic retinopathy. He holds a Class A CDL from Kansas.

Bobby J. Davison

Mr. Davison, 35, has had ITDM since 1998. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Davison meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Louisiana.

Donald J. DeBaets

Mr. DeBaets, 69, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. DeBaets meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Anthony. Espinosa

Mr. Espinosa, 37, has had ITDM since 2005. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Espinosa meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Missouri.

Gregory W. Eylar

Mr. Eylar, 52, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Eylar meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Washington.

Stephen R. Ferrario

Mr. Ferrario, 42, has had ITDM since 1994. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ferrario meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from California.

Fred L. Frisch

Mr. Frisch, 43, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the

past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Frisch meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does have stable non-proliferative diabetic retinopathy. He holds a Class A CDL from Ohio.

Raymond J. Ford

Mr. Ford, 54, has had ITDM since 1988. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ford meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he has stable non-proliferative diabetic retinopathy. He holds a Class C operator's license from California.

Kevin J. Fries

Mr. Fries, 48, has had ITDM since 1994. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Fries meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Montana.

Douglas E. Fuller

Mr. Fuller, 42, has had ITDM since 2004. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Fuller meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Carolina.

Daniel D. Greenwell

Mr. Greenwell, 43, has had ITDM since 1989. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Greenwell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does have stable non-proliferative diabetic retinopathy. He holds a Class A CDL from New York.

William G. Hansen

Mr. Hansen, 56, has had ITDM since 2006. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hansen meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does have stable non-proliferative diabetic retinopathy. He holds a Class A CDL from Oregon.

George H. Hayes, Jr.

Mr. Hayes, 54, has had ITDM since 1995. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hayes meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Virginia.

Danny E. Hillier

Mr. Hillier, 46, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hillier meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Dakota.

John H. Hilliges

Mr. Hilliges, 53, has had ITDM since 2007. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hilliges meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Nebraska.

Thomas Hogan

Mr. Hogan, 77, has had ITDM since 2007. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hogan meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he has stable non-proliferative diabetic retinopathy. He holds a Class A CDL from Ohio.

Harvey J. Hollins

Mr. Hollins, 61, has had ITDM since 2003. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or

resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hollins meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Nevada.

John Horta

Mr. Horta, 45, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Horta meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does have stable non-proliferative diabetic retinopathy. He holds a Class D operator's license from Arizona.

Paris J. Howell

Mr. Howell, 43, has had ITDM since 2006. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Howell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Tennessee.

Eric J. Huffman

Mr. Huffman, 29, has had ITDM since 1990. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Huffman meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from South Dakota.

Tyson C. Johnson

Mr. Johnson, 25, has had ITDM since 1993. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Johnson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he has stable non-proliferative diabetic retinopathy. He holds a Class C operator's license from Pennsylvania.

Ken M. Jorgenson

Mr. Jorgenson, 56, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Jorgenson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Minnesota.

Barry J. Kelley

Mr. Kelley, 35, has had ITDM since 2007. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Kelley meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Maryland.

John H. Kingsley

Mr. Kingsley, 44, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Kingsley meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Virginia.

Gary J. Klostermann

Mr. Klostermann, 52, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Klostermann meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Iowa.

Steven F. Kohalmi

Mr. Kohalmi, 52, has had ITDM since 2006. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Kohalmi meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Pennsylvania.

Peter D. Krenz

Mr. Krenz, 55, has had ITDM since 2007. His endocrinologist examined him in 2008 and certified that he has had no

hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Krenz meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Oregon.

Robert J. Lampman

Mr. Lampman, 66, has had ITDM since 2002. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Lampman meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class C CDL from Michigan.

Jason C. Lang

Mr. Lang, 33, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Lang meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Vermont.

Kevin J. Lavoie

Mr. Lavoie, 41, has had ITDM since 1988. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Lavoie meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Oregon.

Dennis M. Lester

Mr. Lester, 47, has had ITDM since 2007. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Lester meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from North Carolina.

Dario Lopez

Mr. Lopez, 27, has had ITDM since 1996. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Lopez meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Illinois.

Jerald L. Marquardt

Mr. Marquardt, 48, has had ITDM since 1989. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Marquardt meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does have stable non-proliferative diabetic retinopathy. He holds a Class B CDL from Illinois.

Robert H. McCann, III.

Mr. McCann, 51, has had ITDM since 2007. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. McCann meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he has stable non-proliferative diabetic retinopathy. He holds a Class B CDL from Maryland.

Lewis S. Needles

Mr. Needles, 54, has had ITDM since 2006. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Needles meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class C CDL from New Jersey.

Derald W. Newton

Mr. Newton, 55, has had ITDM since 1973. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Newton meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he has stable non-proliferative diabetic retinopathy. He holds a Class D operator's license from New Mexico.

Galen L. Nightingale

Mr. Nightingale, 65, has had ITDM since 2005. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Nightingale meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he has stable non-proliferative diabetic retinopathy. He holds a Class A CDL from Kansas.

Chris C. Northway

Mr. Northway, 47, has had ITDM since 2000. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Northway meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

John D. Owens

Mr. Owens, 59, has had ITDM since 2005. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Owens meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Indiana.

Theodore S. Pankiewicz

Mr. Pankiewicz, 32, has had ITDM since 1978. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Pankiewicz meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he has stable proliferative diabetic retinopathy. He holds a Class C operator's license from Pennsylvania.

Jody A. Peckels

Mr. Peckels, 48, has had ITDM since 2002. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Peckels meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Oregon.

James H. Pfeiffer

Mr. Pfeiffer, 35, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Pfeiffer meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

Marc R. Pream

Mr. Pream, 61, has had ITDM since 2005. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Pream meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Minnesota.

Travis W. Proctor

Mr. Proctor, 31, has had ITDM since 1995. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Proctor meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Georgia.

William B. Racobs

Mr. Racobs, 62, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Racobs meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Iowa.

Remson H. Rawson

Mr. Rawson, 54, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Rawson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy.

He holds a Class A CDL from North Carolina.

Ann M. Reinke

Ms. Reinke, 53, has had ITDM since 2008. Her endocrinologist examined her in 2008 and certified that she has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of her diabetes using insulin, and is able to drive a CMV safely. Ms. Reinke meets the requirements of the vision standard at 49 CFR 391.41(b)(10). Her optometrist examined her in 2008 and certified that she does not have diabetic retinopathy. She holds a Class B CDL from Wisconsin.

Frank W. Reynolds

Mr. Reynolds, 37, has had ITDM since 2006. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Reynolds meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from North Carolina.

Vincente L. Rodriquez

Mr. Rodriquez, 24, has had ITDM since 1997. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Rodriquez meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from New Mexico.

Bradley C. Roen

Mr. Roen, 47, has had ITDM since 2007. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Roen meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Wisconsin.

Thomas C. Routon

Mr. Routon, 38, has had ITDM since 2007. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Routon meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he has stable proliferative diabetic retinopathy. He holds a Class D operator's license from Minnesota.

Tyler A. Russell

Mr. Russell, 25, has had ITDM since 2007. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Russell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Massachusetts.

Randy L. Schroeder

Mr. Schroeder, 51, has had ITDM since 2003. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Schroeder meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New York.

Michael W. Sharp

Mr. Sharp, 38, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Sharp meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Missouri.

Nathaniel B. Shaw

Mr. Shaw, 23, has had ITDM since 2003. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Shaw meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

Sean L. Shidell

Mr. Shidell, 38, has had ITDM since 2007. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Shidell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that

he does not have diabetic retinopathy. He holds a Class A CDL from Florida.

Wendell R. Shults

Mr. Shults, 43, has had ITDM since 1991. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Shults meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Texas.

Joseph B. Simon

Mr. Simon, 37, has had ITDM since 1978. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Simon meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he has stable non-proliferative diabetic retinopathy. He holds a Class A CDL from New York.

David E. Steinke

Mr. Steinke, 64, has had ITDM since 2002. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Steinke meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Floyd T. Stokes

Mr. Stokes, 56, has had ITDM since 2006. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Stokes meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Florida.

Gary E. Stone

Mr. Stone, 55, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Stone meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Timothy D. Stone

Mr. Stone, 26, has had ITDM since 2004. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Stone meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Arizona.

Anthony A. Thomas

Mr. Thomas, 38, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Thomas meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Kentucky.

William J. Thomas

Mr. Thomas, 60, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Thomas meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Carolina.

Kaleo B. Tokunaga

Mr. Tokunaga, 40, has had ITDM since 2008. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Tokunaga meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Hawaii.

John R. Turcotte

Mr. Turcotte, 61, has had ITDM since 2001. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Turcotte meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that

he does not have diabetic retinopathy. He holds a Class A CDL from Maine.

Danny J. Watson

Mr. Watson, 45, has had ITDM since 1978. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Watson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Kentucky.

Eric W. Williams

Mr. Williams, 52, has had ITDM since 2005. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Williams meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Maryland.

Russell A. Williams

Mr. Williams, 62, has had ITDM since 2005. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Williams meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he has stable proliferative diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Kimberly A. Woehrman

Ms. Woehrman, 44, has had ITDM since 2001. Her endocrinologist examined her in 2008 and certified that she has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of her diabetes using insulin, and is able to drive a CMV safely. Ms. Woehrman meets the requirements of the vision standard at 49 CFR 391.41(b)(10). Her ophthalmologist examined her in 2008 and certified that she does not have diabetic retinopathy. She holds a Class A CDL from Kansas.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the Notice.

FMCSA notes that Section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) the elimination of the requirement for three years of experience operating CMVs while being treated with insulin; and (2) the establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 Notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 USC. 31136 (e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary. FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 Notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 Notice, except as modified by the Notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: December 5, 2008.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E8–29418 Filed 12–11–08; 8:45 am]

BILLING CODE 4910–EX–P

[1] Section 4129(a) refers to the 2003 Notice as a ''final rule.'' However, the 2003 Notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket ID FMCSA–2008–0340]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces receipt of applications from 24 individuals for exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations. If granted, the exemptions would enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce without meeting the Federal vision standard.

DATES: Comments must be received on or before January 12, 2009.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2008–0340 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket ID for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476). This information is also available at *http://Docketsinfo.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' FMCSA can renew exemptions at the end of each 2-year period. The 24 individuals listed in this notice each have requested an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

Qualifications of Applicants

Bryant M. Adams

Mr. Adams, age 43, has had amblyopia in his left eye since childhood. The best corrected visual acuity in his right eye is 20/20 and in the left eye, 20/200. Following an examination in 2008, his optometrist noted, ''I certify that in my medical opinion, Bryant Adams has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Adams reported that he has driven straight trucks for 13½ years, accumulating 120,150 miles. He holds a Class C operator's license from California. His driving record for the last 3 years shows no crashes and two convictions for moving violations in a CMV, failure to obey traffic signals.

Ricky J. Childress

Mr. Childress, 60, has complete loss of vision in his right eye due to retinal detachment since 2001. The best corrected visual acuity in his left eye is 20/30. Following an examination in 2008, his ophthalmologist noted, ''In my opinion, Mr. Childress has sufficient vision to perform driving tasks required to operate a commercial vehicle, based on how he has performed and functioned exceedingly well in his field despite vision.'' Mr. Childress reported that he has driven straight trucks for 10 years, accumulating 437,500 miles, and tractor-trailer combinations for 15 years, accumulating 2.3 million miles. He holds a Class D operator's license from Alabama. His driving record for the last 3 years shows one crash, and no convictions for moving violations in a CMV.

Thomas A. Crowell

Mr. Crowell, 50, has a ruptured globe in his right eye due to a traumatic injury sustained as a child. The best corrected visual acuity in his right eye is 20/400 and in the left, 20/20. Following an examination in 2008, his ophthalmologist noted, ''I certify that Thomas Crowell has sufficient vision to perform driving tasks required to operate a commercial vehicle.'' Mr. Crowell reported that he has driven straight trucks for 2 years, accumulating 60,000 miles, and tractor-trailer combinations for 4 years, accumulating 495,496 miles. He holds a Class A Commercial Driver's License (CDL) from North Carolina. His driving record for the last 3 years shows one crash, for which he was not cited, and one conviction for a moving violation in a CMV: failure to obey a traffic sign.

Henry L. Decker

Mr. Decker, 58, has had refractive amblyopia in his left eye since birth. The best corrected visual acuity in his right eye is 20/20 and in the left, 20/200. Following an examination in 2008, his ophthalmologist noted, ''In my opinion, Mr. Decker has sufficient vision to perform the driving tasks to operate a commercial vehicle.'' Mr. Decker reported that he has driven straight trucks for 40 years, accumulating 600,000 miles, tractor-trailer combinations for 7 years, accumulating 59,500 miles, and buses for 6 months, accumulating 1,800 miles. He holds a Class B CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Thomas E. Dewitt, Jr.

Mr. Dewitt, 47, has had amblyopia in his right eye since birth. The best corrected visual acuity in his right eye is 20/50 and in the left, 20/20. Following an examination in 2008, his optometrist noted, ''In my medical opinion, applicant has sufficient vision to perform driving tasks required to operate a commercial vehicle.'' Mr. Dewitt reported that he has driven straight trucks for 12 years, accumulating 156,000 miles. He holds a Class A CDL from Ohio. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

David L. Dykman

Mr. Dykman, 48, has complete loss of vision in his right eye due traumatic injury that occurred in 2002. The visual acuity in the left eye is 20/20. Following an examination in 2008, his ophthalmologist noted, ''It is my medical opinion that David has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Dykman reported that he has driven straight trucks for 19½ years, accumulating 163,800 miles, and tractor-trailer combinations for 6½ years, accumulating 45,825 miles. He holds a Class B CDL from Idaho. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Milan D. Frasier

Mr. Frasier, 58, has loss of vision in his right eye due to retinal detachment that occurred in 2004. The best corrected visual acuity in his right eye is hand-motion vision and in the left, 20/20. Following an examination in 2008, his ophthalmologist noted, ''It is my medical opinion that Mr. Fraiser has sufficient vision to drive a commercial

vehicle.'' Mr. Frasier reported that he has driven tractor-trailer combinations for 30 years, accumulating 514,500 miles. He holds a Class A CDL from Idaho. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Wilfred J. Gagnon

Mr. Gagnon, 72, has complete loss of vision in his right eye due to a traumatic injury that occurred in 2000. The visual acuity in his left eye is 20/20. Following an examination in 2008, his optometrist noted, ''In my medical opinion, I believe Mr. Gagnon's vision in his left eye is sufficient to operate a commercial vehicle without glasses.'' Mr. Gagnon reported that he has driven straight trucks for 54 years, accumulating 1.9 million miles, and tractor-trailer combinations for 30 years, accumulating 1.1 million miles. He holds a Class A CDL from Vermont. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Grady O. Gilliland

Mr. Gilliland, 82, has loss of vision in his right eye due to optic nerve hypoplasia since birth. The best corrected visual acuity in his right eye is 20/400 and in the left, 20/30. Following an examination in 2008, his ophthalmologist noted, ''I feel that he has sufficient vision to perform driving tasks required to operate commercial vehicles knowing that his right eye has always been a poor vision eye all this life.'' Mr. Gilliland reported that he has driven straight trucks for 64 years, accumulating 320,000 miles. He holds a Class D operator's license from Alabama. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Harold J. Haier

Mr. Haier, 42, has had amblyopia since birth. The best corrected visual acuity in his right eye is 20/20 and in the left, 20/400. Following an examination in 2008, his optometrist noted, ''It is my opinion that Mr. Haier has sufficient vision to operate a commercial vehicle.'' Mr. Haier reported that he has driven straight trucks for 24 years, accumulating 432,000 miles, tractor-trailer combinations for less than 1 year, accumulating 800 miles, and buses for less than 1 year, accumulating 4,000 miles. He holds a Class A CDL from New York. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Crayton Jones, Jr.

Mr. Jones, 72, has complete loss of vision in his right eye due to a traumatic injury since childhood. The best corrected visual acuity in his left eye is 20/20. Following an examination in 2008, his ophthalmologist noted, ''I certify that in my medical opinion, he has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Jones reported that he has driven straight trucks for 6 years, accumulating 150,000 miles, tractor-trailer combinations for 6 years, accumulating 150,000 miles, and buses for 1 year, accumulating 1,000 miles. He holds a Class R operator's license from Colorado, which allows him to drive any motor vehicle with a gross weight of less than 26,001 pounds. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Timonthy L. Kelly

Mr. Kelly, 44, has complete loss of vision in his right eye due to a traumatic injury sustained in 1984. The visual acuity in his left eye is 20/20. Following an examination in 2008, his optometrist noted, ''In my medical opinion, Tim has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Kelly reported that he has driven tractor-trailer combinations for 8 years, accumulating 560,000 miles. He holds a Class A CDL from Texas. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Lewis A. Kielhack

Mr. Kielhack, 35, has a macular scar that caused loss of vision in his right eye due to a traumatic injury sustained in 1990. The best corrected visual acuity in his right eye is 20/400 and in the left eye, 20/20. Following an examination in 2008, his optometrist noted, ''In my opinion, Mr. Kielhack has sufficient vision to perform the driving tasks required to operate a commercial vehicle. His vision has been stable for over 18 years, and there is no indication that his vision will change.'' Mr. Kielhack reported that he has driven straight trucks for 14 years, accumulating 655,200 miles, and tractor-trailer combinations for 8 years, accumulating 24,000 miles. He holds a Class A CDL from Illinois. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

David Lancaster

Mr. Lancaster, 44, has loss of vision in his left eye due to a central scotoma that occurred as a result of a traumatic injury sustained in 1990. The visual acuity in his right eye is 20/15 and in the left eye, 20/400. Following an examination in 2008, his optometrist noted, ''It is my medical/optometric opinion that David Lancaster has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Lancaster reported that he has driven straight trucks for 20 years, accumulating 800,000 miles. He holds a Class O operator's license from Nebraska. Class O operator's license allows him to drive any non-commercial vehicle except motorcycles. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Brian M. Madaya

Mr. Madaya, 48, has a retinal detachment in his right eye since 2004. The best corrected visual acuity in his right eye is 20/400 and in the left eye, 20/20. Following an examination in 2008, his optometrist noted, ''Based on his very stable findings over the last several years, I am confident that his vision is completely in line with the Department of Transportation guidelines for operation of commercial motor vehicles.'' Mr. Madaya reported that he has driven straight trucks for 20 years, accumulating 620,000 miles and tractor-trailer combinations for 7½ years, accumulating 525,000 miles. He holds a Class A CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Joe A. McIlroy

Mr. McIlroy, 49, has a prosthetic left eye due to a traumatic injury sustained in 1988. The best corrected visual acuity in his right eye is 20/15. Following an examination in 2008, his ophthalmologist noted, ''In my opinion, Mr. McIlroy has sufficient vision to perform the driving tasks to operate a commercial vehicle.'' Mr. McIlroy reported that he has driven straight trucks for 28 years, accumulating 56,000 miles, and tractor-trailer combinations for 7 years, accumulating 280,000 miles. He holds a Class A CDL from New York. His driving record for the last 3 years shows no crashes and two convictions for moving violations in a CMV, failure to obey traffic signals.

Harry J. McSuley, Jr.

Mr. McSuley, 71, has loss of vision in his left eye due to retinal vein occlusion that occurred in 1998. The best corrected visual acuity in the right eye is 20/20 and in the left eye, 20/200. Following an examination in 2008, his ophthalmologist noted, ''In my

professional medical opinion, I feel Harry McSuley has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. McSuley reported that he has driven straight trucks for 55 years, accumulating 1,650,000 miles, and tractor-trailer combinations for 53 years, accumulating 3,445,000 miles. He holds a Class A CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Robert S. Metcalf

Mr. Metcalf, 57, has had amblyopia in his left eye since birth. The visual acuity in his right eye is 20/20 and in the left, 20/300. Following an examination in 2008, his optometrist noted, ''Aside from needing glasses for reading, Mr. Metcalf should have not problems driving a commercial vehicle without correction.'' Mr. Metcalf reported that he has driven straight trucks for 31 years, accumulating 620,000 miles, and tractor-trailer combinations for 28 years, accumulating 1.7 million miles. He holds a Class A CDL from Arizona. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Elmer R. Miller

Mr. Miller, 64, has complete loss of vision in his left eye due to a traumatic injury sustained in 1986. The best corrected visual acuity in his right eye is 20/30. Following an examination in 2008, his ophthalmologist noted, ''I certify that, in my medical opinion, he has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Miller reported that he has driven straight trucks for 47 years, accumulating 564,000 miles. He holds a Class C operator's license from Illinois. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Richard L. Moreland

Mr. Moreland, 49, has complete loss of vision in his right eye due to a traumatic injury sustained in 1966. The visual acuity in his left eye is 20/20. Following an examination in 2008, his optometrist noted, ''Based on these findings, I feel Richard L. Moreland has the visual abilities to safely continue to operate a commercial motor vehicle in interstate commerce because his visual loss has been present since 1966.'' Mr. Miller reported that he has driven straight trucks for 23 years, accumulating 230,000 miles. He holds a Class A CDL from Missouri. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Stanley J. Morris

Mr. Morris, 46, has complete loss of vision in his left eye due to a traumatic injury since childhood. The best corrected visual acuity in his right eye is 20/20. Following an examination in 2008, his optometrist noted, ''I certify that, in my medical opinion, the applicant's visual deficiency is stable and has sufficient vision to perform the driving tasks required to operate a commercial motor vehicle, and that the applicant's condition will not adversely affect his ability to operate a commercial motor vehicle safely.'' Mr. Morris reported that he has driven straight trucks for 11 years, accumulating 264,000 miles, and tractor-trailer combinations for 6 years, accumulating 399,000 million miles. He holds a Class A CDL from Missouri. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Barbara C. Pennington

Ms. Pennington, 45, has a prosthetic right eye due to enucleation following a traumatic injury in 1991. The best corrected visual acuity in her left eye is 20/20. Following an examination in 2008, her ophthalmologist noted, ''The vision is stable in her left eye and Ms. Pennington is able to operate a commercial motor vehicle from an ocular standpoint.'' Ms. Pennington reported that she has driven straight trucks for 1 year, accumulating 50,000 miles, and tractor-trailer combinations for 15 years, accumulating 1.5 million miles. She holds a Class A CDL from Florida. Her driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Ronald M. Scott

Mr. Scott, 52, has loss of vision in his right eye due to a traumatic injury that occurred in 1984. The visual acuity in his right eye is count fingers and in the left eye, 20/15. Following an examination in 2008, his optometrist noted, ''I feel that Mr. Scott has more than sufficient vision in his left eye to perform the driving tasks required to operate a commercial vehicle.'' Mr. Scott reported that he has driven straight trucks for 30 years, accumulating 2.6 million miles, and tractor-trailer combinations for 30 years, accumulating 3 million miles. He holds a Class A CDL from Indiana. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Jeremichael Steele

Mr. Steele, 41, has loss of vision in his left eye due to a retinal scar sustained from a traumatic injury as a child. The best corrected visual acuity in his right eye is 20/20. Following an examination in 2008, his optometrist noted, ''In my medical opinion, Mr. Steele has sufficient vision to perform the driving tasks to operate a commercial vehicle.'' Mr. Steele reported that he has driven tractor-trailer combinations for 6 years, accumulating 240,000 miles, and buses for 7 years, accumulating 63,000 miles. He holds a Class A CDL from North Carolina. His driving record for the last 3 years shows no crashes, and one conviction for a moving violation in a CMV; he changed lanes improperly.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. The Agency will consider all comments received before the close of business January 12, 2009. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The Agency will file comments received after the comment closing date in the public docket, and will consider them to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

Issued on: December 5, 2008.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E8–29415 Filed 12–11–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–00–7006; FMCSA–00–7363; FMCSA–01–10570; FMCSA–02–12294; FMCSA–04–18885; FMCSA–06–24783]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal

Motor Carrier Safety Regulations for 12 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective January 3, 2009. Comments must be received on or before January 12, 2009.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–00–7006; FMCSA–00–7363; FMCSA–01–10570; FMCSA–02–12294; FMCSA–04–18885; FMCSA–06–24783, using any of the following methods.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476). This information is also available at *http://DocketInfo.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202)–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 12 individuals who have requested a renewal of their exemption in accordance with FMCSA procedures. FMCSA has evaluated these 12 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are: Robert W. Brown, David D. Bungori, Jr., Benny J. Burke, David R. Cox, Gary T. Hicks, Robert T. Hill, John C. McLaughlin, Kenneth D. Sisk, David W. Skillman, Rick N. Ulrich, Stephen D. Vice, and Larry D. Wedekind.

These exemptions are extended subject to the following conditions: (1) That each individual have a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 12 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (73 FR 20245; 65 FR 57230; 67 FR 71610; 69 FR 64810; 71 FR 66217; 57 FR 57266; 69 FR 62741; 71 FR 62147; 65 FR 45817; 65 FR 77066; 67 FR 71610; 69 FR 64810; 72 FR 184; 66 FR 53826; 66 FR 66966; 69 FR 17267; 71 FR 43556; 67 FR 46016; 67 FR 57267; 69 FR 51346; 71 FR 50970; 69 FR 53493; 69 FR 62742; 71 FR 32183; 71 FR 41310). Each of these 12 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these

drivers submit comments by January 12, 2009.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 12 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was based on the merits of each case and only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all of these drivers, are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: December 5, 2008.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E8–29416 Filed 12–11–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2006–25040]

Capital Metropolitan Transportation Authority; Notice of Public Hearing

On August 8, 2006, the Federal Railroad Administration (FRA) published a notice (Notice) in the **Federal Register** announcing Capital Metropolitan Authority's (CMTA) request for a waiver of compliance from certain provisions of Title 49 of the Code of Federal Regulations (CFR) for the operation of a new planned Commuter Rail Service (CRS) that will share trackage with the Austin Area Terminal Railroad (AUAR), a common carrier freight railroad. As explained in the Notice, CMTA is constructing a 32-mile rail system (27 miles shared with AUAR) linking the City of Leander, Texas, with downtown Austin, TX. CMTA plans to utilize temporal separation of freight and passenger operations on the shared trackage and a light rail style, non-FRA compliant Diesel-Multiple Unit (DMU) vehicle in order to offer a '' 'one seat ride' operating on both the CMTA mainline and in city streets with tight curvature.''

As detailed in the Notice, CMTA seeks a waiver of compliance from certain regulatory provisions of 49 CFR parts 219 (Control of Alcohol and Drug Use), 221 (Rear end marking device), 223 (Safety glazing standards), 225 (Railroad accident/incident reporting), 229 (Railroad locomotive safety standards), 231 (Railroad safety appliance standards), 238 (Passenger equipment safety standards), 239 (Passenger train emergency preparedness) and 240 (Qualification and certification of locomotive engineers).

Noting that certain provisions in 49 CFR part 231 pertaining to safety appliances are statutorily required, and therefore not subject to FRA's waiver authority, CMTA also requests that FRA exercise its authority under 49 U.S.C. 20306 to exempt CMTA from certain provisions of Chapter 203, Title 49, of the United States Code because the ''CMTA DMU vehicles will be equipped with their own array of safety devices resulting in equivalent safety.'' Specifically, CMTA requests that for purposes of its planned CRS system, FRA exempt it from the requirements of 49 U.S.C. 20302 mandating that railroad vehicles be equipped with (1) Handbrakes, (2) sill steps; and (3) side and end handholds.

CMTA indicates that the DMU vehicles it plans to utilize for its CRS service are equipped with automatic spring applied parking brakes, as opposed to conventional hand brakes as required by Section 20302. CMTA further indicates that the parking brakes will be controlled by the one-person crew operating the vehicle from control stands within the vehicle and that the parking brakes are capable of holding a vehicle on a six percent grade at an 84.5 ton load. Accordingly, CMTA states the parking brake of its DMU vehicles serves the same purpose of a conventional hand brake, but in a manner that provides an equivalent or superior level of safety.

CMTA further indicates that sill steps (required by Section 20302) are not necessary for safety on the DMU vehicles and would not enhance the safety of the vehicles. Specifically, CMTA explains that the door threshold of the vehicles is 23.5 inches above the top of the rail, and such configuration renders still steps unnecessary.

CMTA also indicates that side and end handholds (required by Section 20302) are not necessary for safety on its DMU vehicles and in fact, such appliances might present a safety hazard in the street-running environment of its planned CRS system. Specifically, noting that handholds are typically intended for use by crew members performing yard and service duties, CMTA notes that its operations will not involve any such activities from positions outside and adjacent to the vehicle or near vehicle doors. Instead, CMTA indicates that yard moves will be controlled from the control stand within the vehicle by the on-board operator and switches will be hand thrown. Therefore, CMTA notes that there is no need for personnel to mount or dismount the vehicles using external appliances of any kind. Further, CMTA expresses reservation about installing external handholds because of the street-running characteristics of its planned CRS service noting that such appliances would give pedestrians ''the opportunity to grab onto something on the outside of the vehicle with the intention to hitch an unlawful,'' and unsafe, ride.

In accordance with 49 U.S.C. 20306, FRA may exempt CMTA from the above statutory requirements based on evidence received and findings developed at a hearing demonstrating that the statutory requirements ''preclude the development or implementation of more efficient railroad transportation equipment or other transportation innovations under existing law.'' Accordingly, in order to receive evidence and develop findings to determine whether FRA should invoke its discretionary authority under 49 U.S.C. 20306 in this instance, a public hearing is scheduled to begin at 9 a.m. on Thursday, January 8, 2009, at the Hilton Garden Inn located at 815 14th Street, NW., in Washington, DC. Interested parties are invited to present oral statements at the hearing. The hearing will be informal and will be conducted by a representative designated by FRA in accordance with FRA's Rules of Practice (49 CFR 211.25). The hearing will be a non-adversarial proceeding; therefore, there will be no cross examination of persons presenting statements. FRA representative will make an opening statement outlining the scope of the hearing. After all initial statements have been completed, those

persons wishing to make a brief rebuttal will be given the opportunity to do so in the same order in which initial statements were made. Additional procedures, as necessary for the conduct of the hearing, will be announced at the hearing.

The petitioners should be present at the hearing and prepared to present evidence that any requirements of Chapter 203, title 49, United States Code, for which exemption is sought to ''preclude the development or implementation of more efficient railroad transportation equipment or other transportation innovations under existing law.''

Issued in Washington, DC on December 8, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–29419 Filed 12–11–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–33 (Sub-No. 267X)]

Union Pacific Railroad Company—Abandonment Exemption—in Comanche County, OK

Union Pacific Railroad Company (UP) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon, and discontinue its lease operation over a 3.85-mile line of railroad known as the Lawton Industrial Lead, extending from milepost 50.75, near Fort Sill, to milepost 54.60, south of Lawton, in Comanche County, OK. The line traverses United States Postal Service Zip Code 73503.[1]

UP has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 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 January 13, 2009, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[2] formal expressions of intent to 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 22, 2008. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 2, 2009, with: Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to UP's representative: Mack H. Shumate, Jr., Senior General Attorney, 101 North Wacker Drive, Room 1920, Chicago, IL 60606.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

UP has filed a combined environmental and historic report addressing the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by December 19, 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), UP shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by UP's filing of a notice of consummation by December 12, 2009, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: December 5, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E8–29430 Filed 12–11–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35204]

Watco Companies, Inc.—Continuance in Control Exemption—Alabama Warrior Railway, L.L.C.

Watco Companies, Inc. (Watco), a noncarrier, has filed a verified notice of exemption to continue in control of Alabama Warrior Railway, L.L.C. (AWR), upon AWR's becoming a Class III rail carrier.[1]

This transaction is related to a concurrently filed verified notice of exemption in STB Finance Docket No. 35203, *Alabama Warrior Railway, L.L.C.—Operation Exemption—Sloss Industries Corporation and Jefferson Warrior Railroad Company, Inc.* In that proceeding, AWR seeks an exemption under 49 CFR 1150.31 to operate approximately 24.575 miles of rail lines owned by Sloss Industries Corporation and Jefferson Warrior Railroad Company, Inc. (JWR) in Birmingham, AL. Also, JWR will assign its operating rights to AWR over approximately 1,532.1 feet of rail line owned by BNSF Railway Company in Birmingham.

The parties intend to consummate the transaction on or shortly after December 26, 2008, the effective date of the exemption.

[1] The line is owned by the State of Oklahoma which holds no residual common carrier obligation. The line does contain federally granted right-of-way.

[2] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[3] Each OFA must be accompanied by the filing fee, which currently is set at $1,500. *See* 49 CFR 1002.2(f)(25).

[1] Watco owns 100% of the issued and outstanding stock of AWR.

Watco currently indirectly controls 19 Class III rail carriers: South Kansas and Oklahoma Railroad Company, Palouse River & Coulee City Railroad, Inc., Timber Rock Railroad, Inc., Stillwater Central Railroad, Inc., Eastern Idaho Railroad, Inc., Kansas & Oklahoma Railroad, Inc., Pennsylvania Southwestern Railroad, Inc., Great Northwest Railroad, Inc., Kaw River Railroad, Inc., Mission Mountain Railroad, Inc., Mississippi Southern Railroad, Inc., Yellowstone Valley Railroad, Inc., Louisiana Southern Railroad, Inc., Arkansas Southern Railroad, Inc., Alabama Southern Railroad, Inc., Vicksburg Southern Railroad, Inc., Austin Western Railroad, Inc., Baton Rouge Southern Railroad, LLC, and Pacific Sun Railroad, L.L.C.[2]

Watco states that the purpose of the proposed transaction is to reduce overhead expenses, and coordinate billing, maintenance, mechanical and personnel policies and practices of its rail carrier subsidiaries, and thereby improve the overall efficiency of rail service provided by the railroads in its corporate family.

Watco represents that: (1) The rail lines to be operated by AWR do not connect with any other railroads in the Watco corporate family; (2) the transaction is not part of a series of anticipated transactions that would connect the rail lines with any other railroad in the Watco corporate family; and (3) the transaction does not involve a Class I rail carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III carriers.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed no later than December 19, 2008 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35204, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Karl Morell, 1455 F Street, NW., Suite 225, Washington, DC 20005.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: December 5, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E8–29314 Filed 12–11–08; 8:45 am]

BILLING CODE 4915–01–P

[2] Watco notes that it has recently filed a notice to control another new carrier, but indicates that the above transaction is expected to be consummated first. *See Watco Companies—Continuance in Control Exemption—Grand Elk Railroad, LLC*, STB Finance Docket No. 35188 (STB served Nov. 17, 2008).

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35202]

Canadian Pacific Railway Company, Soo Line Holding Company, and Dakota, Minnesota & Eastern Railroad Corporation, et al.—Corporate Family Transaction—Iowa, Chicago & Eastern Railroad Corporation

Canadian Pacific Railway Company (CPR), Soo Line Holding Company (Soo Holding), Dakota, Minnesota & Eastern Railroad Corporation (DM&E), and Iowa, Chicago & Eastern Railroad Corporation (IC&E) have jointly filed a verified notice of exemption under 49 CFR 1180.2(d)(3) for an intra-corporate family transaction. DM&E currently has one wholly owned direct subsidiary, Cedar American Rail Holdings, Inc. (Cedar American), a noncarrier. Cedar American has two wholly owned subsidiaries: IC&E and Wyoming Dakota Railroad Properties, Inc. (Wyoming Dakota), a noncarrier. The transaction involves the merger of Cedar American and IC&E with and into DM&E, with DM&E being the surviving corporation. Upon completion of the transaction, Cedar American and IC&E would cease to exist, with Wyoming Dakota becoming a direct subsidiary of DM&E. DM&E will continue to be a direct subsidiary of Soo Holding and a ''sister'' corporation of Soo Line Railroad Company.

The transaction is scheduled to be consummated as soon as practicable after December 26, 2008, the effective date of the exemption.

The purpose of the transaction is to simplify the corporate structure of CPR's U.S. carrier subsidiaries, following the acquisition of control of DM&E and IC&E by Soo Holding (and, indirectly, by CPR). The elimination of IC&E and Cedar American as separate corporate entities will streamline DM&E's corporate structure, reduce administration expenses, and improve the overall efficiency of DM&E.

This is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1180.2(d)(3). The parties state that the transaction will not result in adverse changes in service levels, significant operational changes, or any change in the competitive status quo with carriers outside the corporate family.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. As a condition to the use of this exemption, any employees adversely affected by this transaction will be protected by the conditions set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.,* 360 I.C.C. 60 (1979).

If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Petitions for stay must be filed no later than December 19, 2008 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35202, must be filed with the Surface Transportation Board, 395 E Street, NW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Terence M. Hynes, Sidley Austin LLP, 1501 K Street, NW., Washington, DC 20005.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: December 9, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E8–29451 Filed 12–11–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35203]

Alabama Warrior Railway, L.L.C.—Operation Exemption—Sloss Industries Corporation and Jefferson Warrior Railroad Company, Inc.

Alabama Warrior Railway, L.L.C. (AWR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to operate approximately 24.575 miles of rail lines owned by Sloss Industries Corporation (Sloss) and Jefferson Warrior Railroad Company, Inc. (JWR) [1] between: (1) the entrance to the Sloss properties at 35th Avenue North and extending in a northeasterly direction through the Sloss properties to a point near Summit Street; and (2) the south leg of the wye located near the intersection of Erwin Dairy Road and 37th Street North and the Lehigh Yard located approximately .75-miles to the south of the wye.[2] Also, JWR will assign its operating rights to AWR over approximately 1,532.1 feet of rail line owned by BNSF Railway Company (BNSF), between BNSF STA. 58 +50.90 and BNSF STA. 73+83 on the Dimmick City Main Track. All of the rail lines are located in Birmingham, AL.

This transaction is related to a concurrently filed verified notice of exemption in STB Finance Docket No. 35204, *Watco Companies, Inc.—Continuance in Control Exemption—Alabama Warrior Railway, L.L.C.* In that proceeding, Watco Companies, Inc., has filed a verified notice of exemption to continue in control of AWR, upon AWR becoming a Class III rail carrier.

The transaction is expected to be consummated on or shortly after December 26, 2008 (the effective date of the exemption).

AWR certifies that its projected annual revenues as a result of the transaction will not result in AWR's becoming a Class II or Class I rail carrier and further certifies that its projected annual revenue will not exceed $5 million.

Pursuant to the Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, § 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting and shredding). The term ''solid waste'' is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than December 19, 2008 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35203, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Karl Morell, 1455 F Street, NW., Suite 225, Washington, DC 20005.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: December 5, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E8–29313 Filed 12–11–08; 8:45 am]

BILLING CODE 4915–01–P

[1] Sloss and JWR are affiliated companies.

[2] AWR states that there are no mileposts associated with the rail lines.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34658]

Alaska Railroad Corporation—Petition for Exemption—To Construct and Operate a Rail Line Between North Pole, Alaska and Delta Junction, AK

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of Availability of Draft Environmental Impact Statement, Notice of Public Meetings.

SUMMARY: On July 6, 2007, Alaska Railroad Corporation (ARRC) filed a petition with the Surface Transportation Board (Board) pursuant to 49 United States Code (U.S.C.) 10502 for the authority to construct and operate approximately 80 miles of new rail line from North Pole, Alaska, to Delta Junction, Alaska. Because construction and operation of this proposed action has the potential to result in significant environmental impacts, the Board's Section of Environmental Analysis (SEA) and eight cooperating agencies prepared a Draft Environmental Impact Statement (Draft EIS). The cooperating agencies include the U.S. Bureau of Land Management, Alaska State Office; U.S. Army Corps of Engineers, Alaska District; U.S. Department of Defense, Alaskan Command; U.S. Air Force 354th Fighter Wing, Eielson Air Force Base; Federal Transit Administration; Federal Railroad Administration; U.S. Coast Guard, Seventeenth District; and Alaska Department of Natural Resources. The purpose of this Notice of Availability is to notify individuals and agencies interested in or affected by the proposed action of the availability of the Draft EIS for review and comment, and of public meetings on the Draft EIS.

Implementation of the proposed project would extend ARRC's existing freight and passenger rail service to the region south of the community of North Pole, and would include construction of related structures, such as a passenger facility, communications towers, and sidings.

The Draft EIS analyses the potential environmental impacts of the proposed action and alternatives, including the no-action alternative. The Draft EIS addresses environmental issues and concerns identified during the scoping process. It also contains SEA's preliminary recommendations for environmental mitigation measures, ARRC's voluntary mitigation measures, and encourages mutually acceptable negotiated agreements to mitigate adverse environmental impacts should the Board approve the proposed.

SEA and the cooperating agencies are also holding four public meetings on the Draft EIS during which interested parties can make oral comments in an orderly fashion before meeting participants and/or submit written comments. A court reporter will be present to record the oral comments. The dates, locations and times of the public meetings are shown below:

January 12, 2009, 5–8 p.m., Pike's Waterfront Lodge, 1850 Hoselton Road, Fairbanks, AK.

January 13, 2009, 5–8 p.m., City Council Chambers, 125 Snowman Lane, North Pole, AK.

January 14, 2009, 5–8 p.m., Salcha Senior Center, 6062 Johnson Road, Salcha, AK.

January 15, 2009, 5–8 p.m., Jarvis West Building, Milepost 1420.5 Alaska Highway, Delta Junction, AK.

The Alaska Department of Natural Resources will be attending the meetings to hear public comments on the proposed project pursuant to their obligations under Alaska statute 42.40.460.

SEA and the cooperating agencies will prepare a Final Environmental Impact Statement (Final EIS) that considers comments on the Draft EIS. The Board

will then issue a final decision, based on all public and agency comments in the public record for this proceeding, that will address the transportation merits of the proposed project and the entire environmental record including the Draft EIS and Final EIS. That final decision will approve the proposed project, deny it, or approve it with mitigation conditions, including environmental conditions.

ADDRESSES: Comments should be sent in writing to: David Navecky, STB Finance Docket No. 34658, Surface Transportation Board, 395 E Street, SW., Washington, DC 20423. Comments on the Draft EIS may also be filed electronically on the Board's Web site, *http://www.stb.dot.gov*, by clicking on the ''E-FILING'' link. Then select ''Environmental Comments,'' which does not require a Login Account.

DATES: Written comments on the Draft EIS, which was served December 12, 2008, must be postmarked by February 2, 2009. E-filed comments must be received by February 2, 2009.

FOR FURTHER INFORMATION CONTACT: David Navecky by mail at the address above, by telephone at 202–245–0294 [FIRS for the hearing impaired (1–800–877–8339)], or by e-mail at *naveckyd@stb.dot.gov*. Further information about the project is also available by calling SEA's toll-free number at 1–800–359–5142.

Decided: December 12, 2008.

By the Board, Victoria Rutson, Chief, Section of Environmental Analysis.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E8–29448 Filed 12–11–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 8, 2008.

The Department of Treasury is planning to 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. 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 11020, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before February 10, 2009 to be assured of consideration.

Treasury Inspector General for Tax Administration (TIGTA)

OMB Number: 1505–XXXX.

Type of Review: New Information Collection Activity.

Title: Request for Transfer of Property Seized/Forfeited by a Treasury Agency.

Form: TD 92–22.46.

Description: The TIGTA's Office of Audit's mission is to provide independent oversight of IRS activities. Through its audit programs TIGTA promotes efficiency and effectiveness in the administration of internal revenue laws, including the prevention and detection of fraud, waste, and abuse affecting tax administration. To accomplish this, TIGTA Office of Audit at times finds it necessary to contact a limited number of taxpayers (including businesses) for various reasons, including to survey or contact taxpayers on issues such as customer service, for example, to determine the quality of service at IRS walk-in sites called TACs, telephones, during examinations (IRS audits of taxpayer tax returns), to survey or contact taxpayers to determine why certain eligible taxpayers did or did not take certain actions, and to survey or contact taxpayers to determine the accuracy of the IRS records.

Respondents: Individuals or households.

Estimated Total Reporting Burden: 2,500 hours.

Clearance Officer: Kimberly Hyatt, (202) 622–5913, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. E8–29422 Filed 12–11–08; 8:45 am]

BILLING CODE 4810–25–P

Federal Register

Friday,

December 12, 2008

Part II

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 780, 784, et al.

Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 780, 784, 816, and 817

[Docket ID No.: OSM–2007–0007]

RIN 1029–AC04

Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are amending our regulations concerning stream buffer zones, stream-channel diversions, siltation structures, impoundments, excess spoil, and coal mine waste. Among other things, this rule requires that surface coal mining operations be designed to minimize the creation of excess spoil and the adverse environmental impacts of fills constructed to dispose of excess spoil and coal mine waste. We have revised the stream buffer zone rule to more closely reflect the underlying provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), to adopt related permit application requirements, to require that disturbance of perennial and intermittent streams and their buffer zones generally be avoided unless it is not reasonably possible to do so, to identify exceptions to the requirement to maintain an undisturbed buffer zone for perennial and intermittent streams, and to clarify the relationship between SMCRA and the Clean Water Act.

DATES: This rule is effective January 12, 2009. The incorporation by reference of the publication listed in the rule is approved by the Director of the Federal Register as of January 12, 2009.

FOR FURTHER INFORMATION CONTACT: Dennis G. Rice, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240. Telephone: 202–208–2829.

You can find additional information concerning OSM, this rule, and related documents on OSM's home page on the Internet at *http://www.osmre.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. What does SMCRA say about surface coal mining operations in or near streams?
II. What provisions of SMCRA form the basis for our stream buffer zone rules?
III. What is the history of our stream buffer zone rules?
A. Legislative History of SMCRA
B. Initial Regulatory Program
C. Permanent Regulatory Program (1979 Rules)
D. Permanent Regulatory Program Revisions (1983 Rules)
E. How has the 1983 stream buffer zone rule been applied and interpreted?
F. What rulemaking actions have we proposed to clarify the 1983 rule?
IV. What is the relationship between SMCRA and the Clean Water Act with respect to this rule?
V. How did we obtain public input?
VI. What general comments did we receive on the proposed rule?
A. We Should Discourage the Mining and Use of Coal as a Power Source Because of the Role That the Combustion of Coal Plays in Climate Change
B. We Should Withdraw the Proposed Rule and Enforce the 1983 Stream Buffer Zone, the Meaning of Which Is Clear as Written
C. We Should Not Adopt Any Rule That Facilitates Mountaintop Mining Operations or the Filling of Streams
D. We Should Ensure the Protection of Headwater Streams by Requiring Maintenance of an Undisturbed Buffer Between Mining Activities and Streams
E. We Have Not Accorded Sufficient Importance to the Environmental Protection Purposes of SMCRA
F. EPA Cannot Legally Concur With the Revised Stream Buffer Zone Rules Because They Violate the Clean Water Act
G. The Applicability of the Final Rules Should Be Limited to Steep-Slope Areas and Mountaintop Removal Operations
H. The Stream Buffer Zone Rule Is Unnecessary and Should Be Removed in Its Entirety
VII. Why did we decide against applying the stream buffer zone rule to all waters of the United States (WOTUS)?
VIII. Section-by-section analysis: How are we revising our rules?
A. Sections 780.14 and 784.23: Operation Plan: Maps and Plans
B. Sections 780.25 and 784.16: Reclamation Plan: Siltation Structures, Impoundments, Refuse Piles, and Coal Mine Waste Impounding Structures
C. Sections 780.28 and 784.28: Activities in or Adjacent to Perennial or Intermittent Streams
D. Section 780.35: Disposal of Excess Spoil (Surface Mines)
E. Section 784.19: Disposal of Excess Spoil (Underground Mines)
F. Sections 816.11 and 817.11: Signs and Markers
G. Sections 816.43 and 817.43: Diversions
H. Sections 816.46 and 817.46: Siltation Structures
I. Sections 816.57 and 817.57: Activities in or Adjacent to Perennial or Intermittent Streams
J. Sections 816.71 and 817.71: General Requirements for Disposal of Excess Spoil
K. What Does the Phrase ''to the extent possible'' mean in these rules?
L. What does the phrase ''best technology currently available'' mean in these rules?
IX. Procedural Matters and Required Determinations

I. What does SMCRA say about surface coal mining operations in or near streams?

SMCRA contains three references to streams, two references to watercourses, and several provisions that indirectly refer to activities in or near streams.

Section 507(b)(10) [1] requires that permit applications include ''the name of the watershed and location of the surface stream or tributary into which surface and pit drainage will be discharged.'' However, this provision has no relevance to mining-related activities in or near streams or to the existing or proposed buffer zone rules.

Section 515(b)(18) requires that surface coal mining and reclamation operations ''refrain from the construction of roads or other access ways up a stream bed or drainage channel or in such proximity to such channel so as to seriously alter the normal flow of water.''

Section 516(c) requires the regulatory authority to suspend underground coal mining under permanent streams if an imminent danger to inhabitants exists. However, this provision is not relevant to a discussion of the stream buffer zone rules because, in response to litigation concerning the 1983 version of 30 CFR 817.57, we stipulated that ''this regulation is directed only to disturbance of surface lands by surface activities associated with underground mining.'' *In re: Permanent Surface Mining Regulation Litigation II-Round II,* 21 ERC 1725, 1741, footnote 21 (D.D.C. 1984).

Section 515(b)(22)(D) provides that sites selected for the disposal of excess spoil must ''not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented.'' In adopting this provision, Congress could have chosen to exclude perennial and intermittent streams (or other waters) from the scope of ''natural water courses,'' but it did not do so. In addition, the fact that this provision of the Act authorizes disposal of excess spoil in areas containing natural watercourses, springs, and seeps further suggests that Congress did not intend to prohibit placement of excess spoil in perennial or intermittent

[1] 30 U.S.C. 1257(b)(10). SMCRA, Pub. L. 95–87, is codified at 30 U.S.C. 1201–1328. Thus, for example, SMCRA section 102 is codified at 30 U.S.C. 1202, SMCRA section 515 is codified at 30 U.S.C. 1265, and SMCRA section 516 is codified at 30 U.S.C. 1266.

streams. The term ''natural watercourses'' includes all types of streams—perennial, intermittent, and ephemeral. Springs and seeps are groundwater discharges. To the extent that those discharges provide intermittent or continuous flow in a channel, they are included within the scope of our definitions in 30 CFR 701.5 of ''intermittent stream'' and ''perennial stream,'' respectively. The definition of ''intermittent stream,'' which is based upon technical literature, includes any ''stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge.'' Furthermore, in litigation under the Clean Water Act, the U.S. Court of Appeals for the Fourth Circuit cited section 515(b)(22) of SMCRA as supporting the statement in its decision that ''it is beyond dispute that SMCRA recognized the possibility of placing excess spoil material in waters of the United States even though those materials do not have a beneficial purpose.'' See *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh,* 317 F.3d 425, 443 (4th Cir. 2003).

Section 515(c)(4)(D) provides that, in approving a permit application for a mountaintop removal operation, the regulatory authority must require that ''no damage will be done to natural watercourses.'' The regulations implementing this provision clarify that the prohibition applies only to natural watercourses ''below the lowest coal seam mined.'' See 30 CFR 824.11(a)(9). Furthermore, section 515(c)(4)(E) of the Act specifies that ''all excess spoil material not retained on the mountaintop shall be placed in accordance with the provisions of subsection (b)(22) of this section.'' By including this proviso, Congress recognized that not all excess spoil generated by mountaintop removal operations could be retained on benches or placed within the mined-out area. And by cross-referencing section 515(b)(22), Congress authorized placement of excess spoil from mountaintop removal operations in natural watercourses, provided all requirements of section 515(b)(22) are met. In the steep-slope terrain of central Appalachia, excess spoil typically can most feasibly be placed in valley fills.

In addition, the legislative history of section 515(f) of SMCRA indicates that Congress anticipated that coal mine waste impoundments would be constructed in perennial and intermittent streams:

> In order to assure that mine waste impoundments used for the disposal of liquid or solid waste material from coal mines are constructed or have been constructed so as to safeguard the health and welfare of *downstream* populations, H.R. 2 gives the Army Corps of Engineers a role in determining the standards for construction, modification and abandonment of these impoundments.
>
> * * * * *
>
> Thus, the corps' experience and expertise in the area of design, construction, maintenance, et cetera, which were utilized for carrying out the congressionally authorized surveys of mine waste embankments in West Virginia following the disastrous failure of the mine waste impoundments on *Buffalo Creek,* is to be applied in order to prevent *similar* accidents in the future.

H. Rep. No. 95–218; at 125 (April 22, 1977) (emphasis added).

Section 515(f) provides that—

> The Secretary, with the written concurrence of the Chief of Engineers, shall establish within one hundred and thirty-five days from the date of enactment, standards and criteria regulating the design, location, construction, operation, maintenance, enlargement, modification, removal, and abandonment of new and existing coal mine waste piles referred to in section 515(b)(13) and section 516(b)(5).

Sections 515(b)(13) and 516(b)(5) concern ''all *existing and new* coal mine waste piles consisting of mine wastes, tailings, coal processing wastes, or other liquid and solid wastes and used either temporarily or permanently as dams or embankments.'' (Emphasis added.) Sections 515(f), 515(b)(13), and 516(b)(5) do not specifically mention streams or watercourses.

However, the reference to dams and embankments, the requirement for the concurrence of the U.S. Army Corps of Engineers (for its expertise in dam construction and flood control), and the legislative history documenting that the 1972 Buffalo Creek flood was the driving force behind adoption of those SMCRA provisions demonstrate that Congress was aware that coal mine waste impoundments had been constructed in perennial and intermittent streams in the past and would be constructed there in the future. Furthermore, the fact that all three paragraphs specifically apply to both new and existing structures (rather than to just existing structures) implies that new structures would and could be built in streams under SMCRA. As mentioned in the legislative history, Congress' intent was to prevent a recurrence of the Buffalo Creek impoundment failure and to ensure that all coal mine waste impoundments either are or have been constructed in a manner that protects the safety of downstream residents. There is no indication that Congress intended to prohibit construction of those structures in perennial or intermittent streams.

Finally, sections 515(b)(11) and 516(b)(4) of the Act govern the construction of coal refuse piles that are not used as dams or embankments. While those paragraphs do not mention constructing refuse piles in watercourses, neither do they prohibit such construction. Because of the similarity of those piles to excess spoil fills, the regulations implementing sections 515(b)(11) and 516(b)(4) incorporate language similar to that of section 515(b)(22)(D) for the construction of excess spoil disposal facilities. Specifically, the regulations at 30 CFR 816.83(a)(1) and 817.83(a)(1) allow the construction of non-impounding coal refuse piles on areas containing springs, natural or man-made watercourses, or wet-weather seeps if the design includes diversions and underdrains. Not all areas containing springs, watercourses, or wet-weather seeps are perennial or intermittent streams, but some are, which means that refuse piles may be constructed in streams.

II. What provisions of SMCRA form the basis for our stream buffer zone rules?

Paragraphs (b)(10)(B)(i) and (24) of section 515 of SMCRA served as the basis for all three previous versions (1977, 1979, and 1983) of the stream buffer zone rule with respect to surface mining activities. Those sections also serve as the basis for the revised rule at 30 CFR 816.57 that we are adopting today. Section 515(b)(10)(B)(i) requires that surface coal mining operations be conducted so as to prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible using the best technology currently available. Section 515(b)(24) requires that surface coal mining and reclamation operations be conducted to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values ''to the extent possible using the best technology currently available.''

In context, section 515(b)(10)(B)(i) provides that the performance standards adopted under SMCRA must require that surface coal mining and reclamation operations—

> (10) minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by—
>
> (A) * * *

(B)(i) conducting surface coal mining operations so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow, or runoff outside the permit area, but in no event shall contributions be in excess of requirements set by applicable State or Federal law.

* * * * *

Section 515(b)(24) requires that surface coal mining and reclamation operations be conducted in a manner that—

To the extent possible using the best technology currently available, minimize[s] disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve[s] enhancement of such resources where practicable.

The common thread in both provisions is the requirement for use of the best technology currently available to achieve the requirements of those provisions to the extent possible.

Paragraphs (b)(9)(B) and (11) of section 516 of SMCRA form the basis for the stream buffer zone rule at 30 CFR 817.57, which applies to surface activities associated with underground mines. Those provisions of section 516 are substantively equivalent to paragraphs (b)(10)(B)(i) and (24) of section 515 of SMCRA, respectively, except that section 516(b)(9)(B) also includes the provisions found in section 515(b)(10)(E) regarding the avoidance of channel deepening or enlargement. In the remainder of this preamble, we often refer only to the section 515 paragraphs, with the understanding that, unless otherwise stated or implied by context, references to those paragraphs should be read as including their section 516 counterparts.

III. What is the history of our stream buffer zone rules?

A. Legislative History of SMCRA

SMCRA does not establish or require a buffer zone for streams or other waters. In 1972, the U.S. House of Representatives passed a bill (H.R. 6482) that included a flat prohibition on mining within 100 feet of any ''body of water, stream, pond, or lake to which the public enjoys use and access, or other private property.'' This prohibition appeared in the counterpart to what is now section 522(e) of the Act. However, the bill never became law and the provision did not appear in subsequent versions of SMCRA legislation.

B. Initial Regulatory Program

As part of the regulations implementing the initial regulatory program under SMCRA, we adopted the concept of a 100-foot buffer zone around intermittent and perennial streams as a means ''to protect stream channels from abnormal erosion'' from nearby upslope mining activities. See 30 CFR 715.17(d)(3) and 42 FR 62652 (December 13, 1977). The regulation reads as follows:

No land within 100 feet of an intermittent or perennial stream shall be disturbed by surface coal mining and reclamation operations unless the regulatory authority specifically authorizes surface coal mining and reclamation operations through such a stream. The area not to be disturbed shall be designated a buffer zone and marked as specified in § 715.12.

The rule does not specify the conditions under which the regulatory authority may authorize operations within the buffer zone.

C. Permanent Regulatory Program (1979 Rules)

The original version of our permanent program regulations, as published on March 13, 1979, included more extensive stream buffer zone rules at 30 CFR 816.57 (for surface mining operations) and 817.57 (for underground mining operations). Specifically, the 1979 version of section 816.57 provided that no land within 100 feet of a perennial stream or a stream with a biological community shall be disturbed by surface mining activities, except in accordance with §§ 816.43–816.44 [the stream diversion regulations], unless the regulatory authority specifically authorizes surface mining activities closer to or through such a stream upon finding that the original stream channel will be restored; and during and after the mining, the water quantity and quality from the stream section within 100 feet of the surface mining activities shall not be adversely affected. Paragraph (c) of the 1979 rule provided that a biological community existed if the stream at any time contained an assemblage of two or more species of arthropods or molluscan animals that were adapted to flowing water for all or part of their life cycle, dependent upon a flowing water habitat, reproducing or could reasonably be expected to reproduce in the water body where they are found, and longer than 2 millimeters at some stage of the part of their life cycle spent in the flowing water habitat.

The counterpart regulation for underground mining at 30 CFR 817.57 was identical except that it substituted the term ''surface operations and facilities'' for ''surface mining activities'' and clearly indicated that the restrictions were limited to ''surface areas.''

The preamble to the 1979 rules explains that the purpose of the revised rules was to implement paragraphs (b)(10) and (b)(24) of section 515 of the Act. 44 FR 15176, March 13, 1979. It states that ''[b]uffer zones are required to protect streams from the adverse effects of sedimentation and from gross disturbance of stream channels,'' but that ''if operations can be conducted within 100 feet of a stream in an environmentally acceptable manner, they may be approved.'' *Id.* In addition, it states that ''[t]he 100-foot limit is based on typical distances that should be maintained to protect stream channels from sedimentation,'' but that, while the 100-foot standard provides a simple rule for enforcement purposes, ''site-specific variation should be made available when the regulatory authority has an objective basis for either increasing or decreasing the width of the buffer zone.'' *Id.*

D. Permanent Regulatory Program Revisions (1983 Rules)

In 1983, we revised the stream buffer zone rules to delete the requirement that the original stream channel be restored, to replace the biological community criterion for determining which non-perennial streams must be protected under the rule with a requirement for protection of all intermittent streams, and to add a requirement for a finding that the proposed mining activities will not cause or contribute to a violation of applicable state or federal water quality standards and will not adversely affect the environmental resources of the stream. See 48 FR 30312, June 30, 1983.

In 1983, we also adopted revised performance standards for coal preparation plants not located within the permit area of a mine. We decided not to apply the stream buffer zone rule to those preparation plants. See 30 CFR 827.12 and the preamble to those rules at 48 FR 20399, May 5, 1983.

The preamble to the 1983 stream buffer zone rules reiterates the general rationale for adoption of a stream buffer zone rule that we specified in the preamble to the 1979 rules. It identifies the reason for replacing the biological community threshold with the intermittent stream threshold as a matter of improving the ease of administration and eliminating the possibility of applying the rule to ephemeral streams and other relatively insignificant water bodies:

The biological-community standard was confusing to apply since there are areas with ephemeral surface waters of little biological or hydrologic significance which, at some time of the year, contain a biological community as defined by previous

§ 816.57(c). Thus, much confusion arose when operators attempted to apply the previous rule's standards to springs, seeps, ponding areas, and ephemeral streams. While some small biological communities which contribute to the overall production of downstream ecosystems will be excluded from special buffer-zone protection under final § 816.57(a), the purposes of Section 515(b)(24) of the Act will best be achieved by providing a buffer zone for those streams with more significant environmental-resource values.

48 FR 30313, June 30 1983. The preamble further states that ''[i]t is impossible to conduct surface mining without disturbing a number of minor natural streams, including some which contain biota'' and that ''surface coal mining operations will be permissible as long as environmental protection will be afforded to those streams with more significant environmental-resource value.'' *Id.* It further provides that the revised rules ''also recognize that intermittent and perennial streams generally have environmental-resource values worthy of protection under Section 515(b)(24) of the Act.'' *Id.* at 30312. In addition, the preamble notes that ''[a]lthough final § 816.57 is intended to protect significant biological values in streams, the primary objective of the rule is to provide protection for the hydrologic balance and related environmental values of perennial and intermittent streams.'' *Id.* at 30313. It further states that ''[t]he 100-foot limit is used to protect streams from sedimentation and help preserve riparian vegetation and aquatic habitats.'' *Id.* at 30314.

We also stated that we removed the requirement to restore the original stream channel in deference to the stream-channel diversion requirements of 30 CFR 816.43 and 817.43 and to clarify that there does not have to be a stream diversion for mining to occur inside the buffer zone. *Id.*

Finally, the preamble states that we added the finding concerning ''other environmental resources of the stream'' to clarify ''that regulatory authorities will be allowed to consider factors other than water quantity and quality in making buffer-zone determinations'' and ''to provide a more accurate reflection of the objectives of Sections 515(b)(10) and 515(b)(24) of the Act.'' *Id.* at 30316.

Revised 30 CFR 816.57(a) (1983) provided that ''[n]o land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream.'' The rule further provided that the regulatory authority may authorize such activities only upon finding that surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and if there will be a temporary or permanent stream-channel diversion, it will comply with § 816.43.

The 1983 version of the stream buffer zone rule for underground mining at 30 CFR 817.57 is identical except for substitution of the term ''underground mining activities'' for ''surface mining activities.''

The National Wildlife Federation challenged this regulation as being inconsistent with sections 515(b)(10) and (24) of the Act, primarily because it deleted the biological community threshold for stream protection. However, the court rejected that challenge, finding without elaboration that the ''regulation is not in conflict with either section 515(b)(10) or 515(b)(24).'' *In re: Permanent Surface Mining Regulation Litigation II—Round II,* 21 ERC 1725, 1741–1742 (D.D.C. 1984).

The court also noted that the Secretary had properly justified the rule change on the grounds that the previous rule was confusing and difficult to apply without protecting areas of little biological significance. Unfortunately, the new criterion (intermittent streams) has proven as difficult to apply as the biological community standard that it replaced. The definition of ''intermittent stream'' in 30 CFR 701.5 has two parts, separated by an ''or.'' The first part defines all streams with a drainage area of one square mile as intermittent. This part of the definition is the aspect that was litigated and upheld for its clarity of application. However, the second part of the definition includes all streams and stream segments that are below the local water table for part of the year and that derive at least part of their flow from groundwater discharge. This part of the definition has been more difficult to apply in practice. In fact, some States use biological criteria for making that determination.

Industry also challenged 30 CFR 817.57(a) to the extent that it included all underground mining activities. However, industry withdrew its challenge when the Secretary stipulated that the rule would apply only to surface lands and surface activities associated with underground mining. See footnote 21, *id.* at 1741.

E. How has the 1983 stream buffer zone rule been applied and interpreted?

Historically, we and the State regulatory authorities have applied the 1983 stream buffer zone rule in a manner that allowed the placement of excess spoil fills, refuse piles, slurry impoundments, and sedimentation ponds in intermittent and perennial streams. However, as discussed at length in the preamble to the January 7, 2004 proposed rule (69 FR 1038–1042), which we never finalized, there has been considerable controversy over the proper interpretation of both the Clean Water Act and our 1983 rules as they apply to the placement of fill material in or near perennial and intermittent streams. As evidenced by past litigation and the comments that we received on the proposed rule that we published on August 24, 2007, some interpretations of our 1983 rule are at odds with the underlying provisions of SMCRA.

We first placed our interpretation of the 1983 stream buffer zone rules in writing in a document entitled ''Summary Report—West Virginia Permit Review—Vandalia Resources, Inc. Permit No. S–2007–98.'' According to our annual oversight reports for West Virginia for 1999 and 2000, that document stated that the stream buffer zone rule does not apply to the footprint of a fill placed in a perennial or intermittent stream as part of a surface coal mining operation. On June 4, 1999, in *West Virginia Highlands Conservancy* v. *Babbitt*, Civ. No. 1:99CV01423 (D.D.C.), the plaintiffs challenged the validity of that document, alleging that it constituted rulemaking in violation of the Administrative Procedure Act. In an order filed September 23, 1999, the court approved an unopposed motion to dismiss the case as moot.

In a lawsuit filed in the U.S. District Court for the Southern District of West Virginia in July 1998, plaintiffs asserted that the stream buffer zone rule allows mining activities through or within the buffer zone for a perennial or intermittent stream only if the activities are minor incursions. They argued that the rule did not allow substantial segments of the stream to be buried underneath excess spoil fills or other mining-related structures. On October 20, 1999, the district court ruled in favor of the plaintiffs on this point, holding that the stream buffer zone rule applies to all segments of a stream, including those segments within the footprint of an excess spoil fill, not just to the stream as a whole. The court also stated that the construction of fills in perennial or intermittent streams is inconsistent with the language of 30 CFR

816.57(a)(1), which provides that the regulatory authority may authorize surface mining activities within a stream buffer zone only after finding that the proposed activities ''will not adversely affect the water quantity and quality or other environmental resources of the stream.'' See *Bragg* v. *Robertson*, 72 F. Supp. 2d 642, 660–663 (S.D. W. Va., 1999).

The U.S. Court of Appeals for the Fourth Circuit ultimately reversed the district court on other grounds (lack of jurisdiction under the Eleventh Amendment to the U.S. Constitution) without reaching the merits of the district court's holding on the applicability of the stream buffer zone rule. *Bragg* v. *West Virginia Coal Association*, 248 F.3d 275, 296 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

In a different case, the same district court stated that SMCRA and the stream buffer zone rule do not authorize disposal of overburden in streams: ''SMCRA contains no provision authorizing disposal of overburden waste in streams, a conclusion further supported by the buffer zone rule.'' *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh*, 204 F. Supp. 2d 927, 942 (S.D. W. Va. 2002).

The U.S. Court of Appeals for the Fourth Circuit subsequently rejected the district court's interpretation, stating that ''SMCRA does not prohibit the discharge of surface coal mining excess spoil in waters of the United States.'' *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh*, 317 F.3d 425, 442 (4th Cir. 2003). The court further stated that ''it is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States even though those materials do not have a beneficial purpose.'' *Id.* at 443.

The court explained the basis for its statements as follows:

> Section 515(b)(22)(D) of SMCRA authorizes mine operators to place excess spoil material in ''springs, natural water courses or wet weather seeps'' so long as ''lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented.'' 30 U.S.C. § 1265(b)(22)(D). In addition, § 515(b)(24) requires surface mine operators to ''minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable,'' implying the placement of fill in the waters of the United States. 30 U.S.C. § 1265(b)(24). It is apparent that SMCRA anticipates the possibility that excess spoil material could and would be placed in waters of the United States, and this fact cannot be juxtaposed with § 404 of the Clean Water Act to provide a clear intent to limit the term ''fill material'' to material deposited for a beneficial primary purpose.

Id. at 443.

The preamble to the proposed rule that we published on January 7, 2004, but which we never adopted in final form, contains additional discussion of litigation and related matters arising from the 1983 stream buffer zone rules. See especially Part I.B.1. at 69 FR 1038–1040.

F. What rulemaking actions have we proposed to clarify the 1983 rule?

On January 7, 2004 (69 FR 1036), we proposed to revise our stream buffer zone rules to retain the prohibition on disturbance of land within 100 feet of a perennial or intermittent stream, but alter the findings that the regulatory authority must make before granting a variance to this requirement. The revised rule would have replaced the Clean Water Act-oriented findings in the 1983 rule with a SMCRA-based requirement that the regulatory authority find in writing that the activities will, to the extent possible, use the best technology currently available to prevent additional contributions of suspended solids to the section of stream within 100 feet downstream of the mining activities and outside the area affected by mining activities; and minimize disturbances and adverse impacts on fish, wildlife, and other related environmental values of the stream. The proposed rule also would have required that operations be designed to minimize the creation of excess spoil.

Numerous commenters asked us to consider other alternatives to the proposed rule. Some commenters also asked that we prepare an environmental impact statement (EIS) on the proposed action. On June 16, 2005 (70 FR 35112), we announced our intent to prepare an EIS on the proposed rule changes. We also stated that we intended to consider additional alternatives and to publish a new proposed rule to coincide with the release of a draft EIS.

On August 24, 2007 (72 FR 48890), we published a new, extensively revised proposed rule and a notice of availability of the draft EIS. That proposed rule replaced the one we published on January 7, 2004. The August 24, 2007, proposed rule forms the basis for the final rule that we are adopting today. This final rule is intended to clarify the scope and meaning of the stream buffer zone rule, consistent with underlying statutory authority, and to ensure that regulatory authorities, mine operators, other governmental entities, landowners, and citizens all can have a common understanding of what the stream buffer zone rule does and does not require. The final rule also includes additional permitting requirements intended to ensure that operations are designed to minimize the creation of excess spoil and to require consideration of alternatives to the disposal of excess spoil and coal mine waste in perennial or intermittent streams or their buffer zones to minimize the adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available.

The revised stream buffer zone rule that we are adopting today attempts to minimize disputes and misunderstandings associated with application of the 1983 rule. The revised rule distinguishes between those situations in which maintenance of an undisturbed buffer between mining and reclamation activities and a perennial or intermittent stream constitutes the best technology currently available to implement the underlying statutory provisions (sections 515(b)(10)(B)(i) and (24) and 516(b)(9)(B) and (11) of SMCRA) and those situations in which maintenance of a buffer is neither feasible nor appropriate.

IV. What is the relationship between SMCRA and the Clean Water Act with respect to this rule?

In this final rule, we are adding paragraph (f) of sections 780.28 and 784.28 and paragraph (d) of sections 816.57 and 817.57 to clarify the relationship between SMCRA and the Clean Water Act with respect to activities conducted in or near perennial and intermittent streams. We are adopting these paragraphs to address concerns arising from the fact that this final rule removes language that previously appeared in sections 816.57(a) and 817.57(a) that specifically prohibited the conduct of mining activities within 100 feet of a perennial or intermittent stream unless the regulatory authority found that those activities would not cause or contribute to the violation of applicable State or Federal water quality standards and would not adversely affect the water quantity and quality or other environmental resources of the stream. We are removing that requirement because its language more closely resembles the Clean Water Act than the underlying provisions of SMCRA. See Parts II, VIII.C., and VIII.I. of this preamble for further discussion of sections 780.28, 784.28, 816.57, and 817.57 and the provisions of SMCRA

that provide the basis for the stream buffer zone rule.

None of the revisions to the stream buffer zone rule or other elements of this final rule affect a mine operator's responsibility to comply with effluent limitations or other requirements of the Clean Water Act. The requirements of the Clean Water Act have independent force and effect regardless of the terms of the SMCRA permit. The independent effect of the Clean Water Act is recognized in section 702(a) of SMCRA, which provides that—

> Nothing in this Act shall be construed as superseding, amending, modifying, or repealing the * * * [t]he Federal Water Pollution Control Act [Clean Water Act] [*citations omitted*], the State laws enacted pursuant thereto, or other Federal laws relating to the preservation of water quality.

30 U.S.C. 1292(a).

In interpreting this statutory provision with respect to effluent limitations adopted as part of our initial regulatory program, the U.S. Court of Appeals for the D.C. Circuit held that ''where the Secretary's regulation of surface coal mining's hydrologic impact overlaps EPA's, the Act expressly directs that the Federal Water Pollution Control Act and its regulatory framework are to control so as to afford consistent effluent standards nationwide.'' *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1367 (D.C. Cir. 1980).

In today's final rule, we are adding paragraph (f)(2) of sections 780.28 and 784.28 and paragraph (d) of sections 816.57 and 817.57(d) to reiterate and further clarify this relationship between SMCRA and the Clean Water Act. The new rules emphasize that issuance of a SMCRA permit is not a substitute for the reviews, authorizations, and certifications required under the Clean Water Act and does not authorize initiation of surface coal mining operations for which the applicant has not obtained all necessary authorizations, certifications, and permits under the Clean Water Act.

Consistent with the approach described above, our existing regulations at 30 CFR 816.42 and 817.42 provide that discharges of water from areas disturbed by surface or underground mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR part 434. Nothing in the final rule that we are adopting today would alter or affect the requirements of 30 CFR 816.42 or 817.42.

SMCRA and the Clean Water Act provide for separate regulatory programs with different purposes and very different permitting requirements and procedures. In addition, SMCRA and the Clean Water Act differ considerably with respect to jurisdiction. For example, unlike SMCRA, the Clean Water Act does not directly regulate groundwater. The Clean Water Act focuses primarily on regulating discharges of pollutants into waters of the United States, whereas SMCRA regulates a broad universe of environmental and other impacts of surface coal mining and reclamation operations. As stated in the legislative history of SMCRA:

> Statutory authority to *regulate* the adverse environmental effects of surface and underground coal mining under the Federal Water Pollution Control Act [Clean Water Act], as amended, is limited to the treatment or removal of any pollutants into the waters of the United States. * * * The Federal Water Pollution Control Act, as amended, can deal only with a part of the problem. The FWPCA does not contain the statutory authority for the establishment of standards and regulations requiring comprehensive preplanning and designing for appropriate mine operating and reclamation procedures to ensure protection of public health and safety and to prevent the variety of other damages to the land, the soil, the wildlife, and the aesthetic and recreational values that can result from coal mining. The statute also lacks the regulatory authority to deal with the discharge of pollutants from *abandoned* surface and underground coal mines.

H. Rep. No. 94–1445 at 90–91 (1976), emphasis in original.

Section 508(a)(9) of SMCRA requires that each permit application include ''the steps to be taken to comply with applicable air and water quality laws and regulations and any applicable health and safety standards.'' Our regulations at 30 CFR 780.18(b)(9) and 784.13(b)(9) similarly require that each permit application include:

> A description of steps to be taken to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 *et seq.*), and the Clean Water Act (33 U.S.C. 1251 *et seq.*), and other applicable air and water quality laws and regulations and health and safety standards.

In keeping with section 508(a)(9) of SMCRA, today's rule also includes new provisions in paragraph (f)(1) of sections 780.28 and 784.28 reiterating that every permit application must identify the authorizations that the applicant anticipates will be needed under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, and describe the steps that the permit applicant has taken or will take to procure those authorizations.

The Clean Water Act establishes a comprehensive program designed to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). To achieve this goal, it prohibits the discharge of pollutants into navigable waters except as in compliance with specified provisions of the Clean Water Act, including a provision that allows for discharges authorized by a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. 1311(a) and 1342(a). At 33 U.S.C. 1362(7), the Clean Water Act defines ''navigable waters'' as ''waters of the United States,'' a term which the Corps and EPA define at 33 CFR 328.3 and 40 CFR 232.2, respectively. The proper scope of that definition has been extensively litigated and EPA and the Corps have issued supplemental guidance to reflect the outcome of that litigation.

The Clean Water Act authorizes the discharge of pollutants into waters of the United States under two different permit programs. Section 404 authorizes discharges of dredged or fill material, while section 402 applies to all other pollutants. 33 U.S.C. 1344, 1342. Section 404 is primarily administered by the Corps, with the exception of those States and Indian tribes that have assumed the program pursuant to section 404(g). In both cases, EPA provides input and has oversight authority and responsibilities. Section 402 (NPDES) permits are issued by EPA or states and Indian tribes that EPA has authorized to administer the NPDES program under section 402(b).

Section 401 of the Clean Water Act requires that each applicant for a federal license or permit submit a certification from the state in which the discharge originates. The certification must state that the discharge will comply with federal and state water quality requirements. 33 U.S.C. 1341(a)(1). ''No license or permit shall be granted until the certification required by this section has been obtained or has been waived'' and ''[n]o license or permit shall be granted if certification has been denied by the State.'' *Id.* Section 401(d) further provides that the state certifications ''shall become a condition on any Federal license or permit subject to the provisions of this section.'' *Id.* at 1341(d).

Section 402 of the Clean Water Act governs discharges of pollutants other than dredged or fill material. 33 U.S.C. 1342. Permits issued under this section are known as NPDES permits. They typically contain technology-based numerical standards called effluent limitations that restrict the amount of specified pollutants that may be

discharged. 33 U.S.C. 1311, 1362(11). EPA has developed industry-wide technology-based wastewater effluent limitations for surface coal mining and reclamation operations. Those effluent limitations are codified in 40 CFR part 434. NPDES permits also must include any more stringent limitations necessary to meet state water quality standards. 33 U.S.C. 1311(b)(1)(C), 1342(a). EPA may authorize states to issue NPDES permits, but EPA retains authority to enforce the requirements of the Clean Water Act.

Section 404 of the Clean Water Act authorizes the Secretary of the Army, through the Corps, to regulate discharges of dredged and fill material through a permitting process. 33 U.S.C. 1344. On May 9, 2002 (67 FR 31129–31143), the Corps and EPA adopted a revised definition of ''fill material'' in 33 CFR 323.2(e) and 40 CFR 232.2, respectively, that includes ''overburden from mining or other excavation activities.'' In the same rulemaking, the Corps and EPA also adopted a revised definition of ''discharge of fill material'' in 33 CFR 323.2(f) and 40 CFR 232.2, respectively. The revised definition provides that ''[t]he term generally includes, without limitation, the * * * placement of overburden, slurry, or tailings or similar mining-related materials.'' Therefore, any mining overburden or coal mine waste used to replace any waters of the United States, or portion thereof, with dry land or to change the bottom elevation of any waters of the United States, or portion thereof, is classified as fill material for purposes of the Clean Water Act.

To implement section 404, the Corps may issue either individual permits under 33 CFR parts 320 through 328 or general permits under 33 CFR part 330. See 33 U.S.C. 1344(a) and (e). Both individual and general permits must comply with guidelines issued by EPA under section 404(b)(1), 33 U.S.C. 1344(b)(1). Those guidelines, which are codified at 40 CFR part 230, are referred to as the ''404(b)(1) Guidelines.'' The 404(b)(1) Guidelines generally prohibit the permitting of projects where there ''is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.'' 40 CFR 230.10(a). Under 40 CFR 230.10(a)(2), ''[a]n alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.''

The guidelines specify that the Corps must ensure that the proposed fill will not cause significantly adverse effects on human health or welfare, aquatic life, and aquatic ecosystems. 40 CFR 230.10(c)(1) through (c)(3). To comply with this requirement, the Corps must make a written determination of the effects of a proposed activity ''on the physical, chemical, and biological components of the aquatic environment.'' 40 CFR 230.11. *See also* 33 CFR 320.4(b)(4) and 325.2(a)(6) for requirements for individual permits.

The 404(b)(1) Guidelines also provide that ''no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.'' 40 CFR 230.10(d). One way the Corps can reduce the potential adverse impacts associated with filling activity is to require compensatory mitigation. See 33 CFR 325.4(a)(3) and 320.4(r) for individual permits and General Condition 20 (72 FR 11193, March 12, 2007) for nationwide permits under 33 CFR part 330. This differs substantially from SMCRA, which provides no authority to require compensatory mitigation.

Section 404(e) of the Clean Water Act authorizes the Corps to ''issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary [of the Army] determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment,'' provided the general permit is based upon the guidelines developed under section 404(b)(1) of the Clean Water Act.

The Corps has exercised its authority under section 404(e) to issue general nationwide permits (NWPs) for surface coal mining operations under SMCRA (NWP 21), coal remining activities under SMCRA (NWP 49), and underground coal mining activities under SMCRA (NWP 50). Those permits apply only if the activities are authorized under a SMCRA permit or an application for the activities is being processed as part of an integrated permit processing procedure. See 72 FR 11092, 11184, and 11191, March 12, 2007. In issuing NWPs 21, 49, and 50, the Corps has determined that the activities covered by those permits are in compliance with the 404(b)(1) Guidelines. That is, the Corps has determined that these activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment.

As the Corps states in the preamble to the most recent version of its general permits—

> When we issue the NWPs, we fully comply with the requirements of the 404(b)(1) Guidelines at 40 CFR 230.7, which govern the issuance of general permits under section 404. For the section 404 NWPs, each decision document contains a 404(b)(1) Guidelines analysis. Section 230.7(b) of the 404(b)(1) Guidelines requires only a ''written evaluation of the potential individual and cumulative impacts of the categories of activities to be regulated under the general permit.'' Since the required evaluation must be completed before the NWP is issued, the analysis is predictive in nature. The estimates of potential individual and cumulative impacts, as well as the projected compensatory mitigation that will be required, are based on the best available data from the Corps district offices, based on past use of NWPs.

72 FR 11094, March 12, 2007.

In the preamble to NWP 21, the Corps states that ''the analyses and environmental protection performance standards required by SMCRA, in conjunction with the pre-construction notification requirement, are generally sufficient to ensure that NWP 21 activities result in minimal individual and cumulative adverse impacts on the aquatic environment.'' 72 FR 11114. The most critical element in the Corps' determination that NWP 21 meets the Clean Water Act requirements for general permits is the fact that NWP 21 requires a preconstruction notification from the applicant, followed by a review of the project by the Corps, and then a written determination from the Corps before the activities covered by NWP 21 may be initiated. As the Corps states in the preamble—

> We believe our process for NWP 21 ensures that activities authorized by the NWP result in no more than minimal adverse impacts to the aquatic environment because each project is reviewed on a case-by-case basis and the district engineer either makes a minimal impacts determination on the project or asserts discretionary authority and requires an individual permit. Also, because of the case-by-case review and the requirement for written verification, we do not agree that it is necessary to prohibit discharges of dredged or fill material into perennial streams.
>
> * * * * *
>
> The pre-construction notification requirements of all NWPs allows for a case-by-case review of activities that have the potential to result in more than minimal adverse effects to the aquatic environment. If the adverse effects on the aquatic environment are more than minimal, then the district engineer can either add special conditions to the NWP authorization to ensure that the activity results in no more than minimal adverse environmental effects

or exercise discretionary authority to require an individual permit.

72 FR 11114.

Furthermore, at 72 FR 11117, the Corps states that—

The Corps does not assume that other state or Federal agencies conduct a review that is comparable to the section 404(b)(1) Guidelines. Although analysis of offsite alternatives is not required in conjunction with general permits, each proposed project is evaluated for onsite avoidance and minimization, in accordance with general condition 20, and is not authorized under the NWP if the adverse impacts to waters of the United States are more than minimal.

At 72 FR 11094, the Corps explains that—

NWPs 21, 49, and 50 are a special case, in that they authorize activities for which review of environmental impacts, including impacts to aquatic resources, is separately required under other Federal authorities (e.g., Surface Mining Control and Reclamation Act (SMCRA) permits for coal mining activities). The Corps believes it would be unnecessarily duplicative to separately require the same substantive analyses through an individual permit application as are already required under SMCRA. However, through the pre-construction notification review process, the district engineer will consider the analyses prepared for the SMCRA permit and exercise discretionary authority to require an individual permit in cases where the district engineer determines, after considering avoidance and reclamation activities undertaken pursuant to SMCRA, that the residual adverse effects are not minimal. The project sponsor is required to obtain written verification prior to commencing work.

Thus, the Corps uses SMCRA permit application data and analyses as a starting point to determine whether a proposed operation qualifies for authorization under NWP 21, but it does not rely upon that information exclusively. Nor does the Corps presume that issuance of a SMCRA permit is evidence of compliance with Clean Water Act requirements. See 72 FR 11115, which states that—

The Corps understands coal mining is covered by many environmental regulations; however the Corps has determined that SMCRA, in its current form, does not remove the need, either legally or substantively, for independent authorization under Section 404 of the Clean Water Act. Consequently, this NWP does not duplicate the SMCRA permit process.

The principles in the preceding discussion concerning NWP 21 also apply to NWPs 49 and 50. See 72 FR 11148–49 and 11151–52.

The preamble to General Condition 27, which applies to NWPs 21, 49, and 50, describes the Corps' decisionmaking process as follows:

In reviewing the PCN [preconstruction notification] for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. * * * If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the district engineer will notify the permittee and include any conditions the district engineer deems necessary. The district engineer must approve any compensatory mitigation proposal before the permittee commences work. * * *

If the district engineer determines that the adverse effects of the proposed work are more than minimal, then the district engineer will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan.

72 FR 11195–1196, March 12, 2007.

The preamble also notes that, before beginning any activities covered by the preconstruction notification, the person submitting the notification must obtain a state water quality certification under section 401 of the Clean Water Act in those states that do not issue an unconditional certification for the nationwide permits.

As the preceding discussion demonstrates, we believe that maintaining the distinction between the SMCRA and Clean Water Act regulatory programs is both administratively and legally appropriate. We do not believe the requirements of this final rule are duplicative of requirements under the Clean Water Act. However, consistent with section 713(a) of SMCRA, we encourage SMCRA regulatory authorities and the agencies administering the Clean Water Act to share permit application data and environmental analyses to streamline the permitting processes under SMCRA and the Clean Water Act.

V. How did we obtain public input?

We published the proposed rule on which this final rule is based on August 24, 2007, (72 FR 48890–48926). In response to requests from the public, we held public hearings on the proposed rule in Charleston, West Virginia; Hazard, Kentucky; Knoxville, Tennessee; and Washington, Pennsylvania on October 24, 2007. We also held public meetings in Big Stone Gap, Virginia on October 24, 2007, and in Alton, Illinois on November 1, 2007. In addition, we extended the comment period, which was originally scheduled to close October 23, 2007, until November 23, 2007. See 72 FR 57504, October 10, 2007.

Approximately 750 persons attended the public hearings and meetings. Of the attendees, 212 provided testimony, with 21 supporting the proposed rule and the remainder opposed. In addition to the testimony offered at the hearings and meetings, we received more than 43,000 written or electronic comments on the proposed rule. In general, most commenters opposed the proposed rule, primarily because they viewed the rule as facilitating mountaintop mining and construction of excess spoil fills in streams. Commenters representing the coal industry generally supported the proposed rule, except for the proposed revisions to (1) apply the buffer zone requirement to waters of the United States rather than to perennial and intermittent streams and (2) require an analysis of alternatives for disposal of excess spoil and coal mine waste. Comments from state regulatory authorities and other governmental entities were mixed in terms of support for or opposition to the rule.

In developing the final rule, we considered all comments that were germane to the proposed rule. In the remainder of this preamble, we summarize the comments received and discuss our disposition of those comments.

VI. What general comments did we receive on the proposed rule?

A. We Should Discourage the Mining and Use of Coal as a Power Source Because of the Role That the Combustion of Coal Plays in Climate Change

Many commenters expressed opposition to the use of coal as a fuel for the generation of electricity, expressing concern about its role in climate change. We acknowledge the commenters' concerns. However, regulations adopted under SMCRA are not the appropriate venue to address climate change issues. Coal-fired power

plants produce more than half of the electricity used in the United States and the use of coal as a fuel for power generation is likely to increase. Nothing in SMCRA authorizes us to regulate electric power generation facilities or to adopt regulations or take other actions for the purpose of reducing the use of coal for the generation of electricity or to require carbon sequestration. Indeed, in SCMRA, Congress repeatedly mentions the importance of coal to the Nation, including the continued production of coal as an energy source. Section 101(b) of SMCRA states that ''coal mining operations presently contribute significantly to the Nation's energy requirements.'' Section 101(d) refers to ''the expansion of coal mining to meet the Nation's energy needs'' and section 101(j) notes that ''surface and underground coal mining operations * * * contribute to the economic well-being, security, and general welfare of the Nation.'' Section 102(f) specifies that one of the purposes of SMCRA is to ''assure that the coal supply essential to the Nation's energy requirements and to its economic and social well-being is provided.'' That paragraph also provides that one of the purposes of SMCRA is to ''strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.'' Taken together, these passages and the other purposes of SMCRA listed in section 102 indicate that the regulatory provisions of SMCRA were enacted not to discourage the production or use of coal but rather to ensure that coal is mined in a manner that respects property rights and minimizes adverse impacts on land and water resources and communities. As stated in section 102(a) of SMCRA, in enacting SMCRA, Congress intended to ''establish a nationwide program to protect society and the environment from the adverse effects of *surface coal mining operations*.'' (Emphasis added.) There is no indication that Congress intended that the Act operate as a means of regulating the burning and use of coal as opposed to the manner and locations in which coal is mined.

The lack of regulatory authority does not mean that we are indifferent to the potential problems posed by climate change from greenhouse gas emissions like carbon dioxide. In cooperation with industry, academia, conservation organizations, individual landowners, and others, we developed the Appalachian Regional Reforestation Initiative, which encourages both the reclamation of mined lands in a manner that is favorable to tree growth and the planting of trees as part of the mine reclamation process. Young forests, especially robustly growing young hardwood forests like those found on reclaimed minesites that use the forestry reclamation approach encouraged under the Appalachian Regional Reforestation Initiative, are generally recognized as an effective means of removing carbon dioxide from the atmosphere.

B. We Should Withdraw the Proposed Rule and Enforce the 1983 Stream Buffer Zone, the Meaning of Which Is Clear as Written

Many commenters argued that we should withdraw the proposed rule and instead fully implement and enforce the 1983 version of the stream buffer zone rule at 30 CFR 816.57 and 817.57. According to the commenters, there is no need to clarify the meaning of the 1983 rule because the plain language of that rule precludes the construction of excess spoil and coal mine waste fills in perennial and intermittent streams. The commenters stated that the proposed rule is a reversal of the 1983 rule, not a clarification, because it specifies that excess spoil fills, refuse piles, and certain other activities conducted in the stream as part of surface coal mining operations are not subject to the prohibition on disturbance of the stream buffer zone.

We disagree with the commenters' interpretation of the 1983 rule. Historically, both the 1983 rule and its state counterparts have been applied in a manner that has allowed the construction of fills in perennial and intermittent streams as part of surface coal mining operations, provided those fills comply with all other applicable requirements of the SMCRA regulatory program and with all pertinent requirements under the Clean Water Act. In other words, the 1983 stream buffer zone rule applied only to activities within 100 feet of a perennial or intermittent stream. It did not apply to activities planned to occur in intermittent or perennial streams. Maintaining a 100-foot buffer zone to protect the stream's water quality and environmental resources makes sense only if the stream segment adjacent to the buffer zone is to remain intact. This historical interpretation and application of the stream buffer zone rule is in harmony with a statement of the U.S. Court of Appeals for the Fourth Circuit in *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh,* 317 F.3d 425, 443 (4th Cir. 2003) (''it is beyond dispute that SMCRA recognized the possibility of placing excess spoil material in waters of the United States''). Several industry commenters stated that to apply the rule in any other way would be nonsensical and that applying the rule to activities that are designed to take place in stream channels would seriously impair the viability of coal mining in central Appalachia. The historical application of the 1983 rule closely resembles the revised stream buffer zone rules that we are adopting today. Consequently, the revised rules are in fact a clarification of the 1983 rule, not a reversal of that rule.

C. We Should Not Adopt Any Rule That Facilitates Mountaintop Mining Operations or the Filling of Streams

Many commenters objected to the proposed rule based on the perception that the rule would facilitate mountaintop removal operations and other large-scale surface mines and related mining techniques currently used to extract coal from the mountainous regions of central Appalachia. The commenters cited the damage that those operations allegedly cause to streams, hardwood forests, fish and wildlife, water supplies, and the landscape and culture of Appalachia as justification for prohibiting that type of mining. We understand the commenters' concerns.

However, the perception that the proposed rule or this final rule would remove an obstacle to mountaintop removal operations or other large-scale mining operations is inaccurate. As we explained in the preamble to the proposed rule, our changes to the stream buffer zone rule are intended to clarify when and how that rule applies, consistent with the historical application of the 1983 rule under both SMCRA and the Clean Water Act. Our revisions are not intended to restrict coal removal. Nor are they intended to promote or discourage any particular method of mining, including mountaintop removal.

In enacting SMCRA, Congress did not ban mountaintop removal operations or the construction of excess spoil fills in streams. Indeed, section 515(c) of SMCRA specifically authorizes the use of mountaintop removal methods to recover coal seams in steep-slope areas, and section 515(b)(22)(D) allows the construction of excess spoil fills in areas that ''contain springs, natural water courses, or wet weather seeps'' if a proper drainage system is installed. As stated in section 102(f), two of the Act's purposes are to ''assure the coal supply essential to the Nation's energy requirements and to its economic and social well-being is provided'' and to ''strike a balance between protection of the environment and agricultural productivity and the Nation's need for

coal as an essential source of energy.'' When Congress wanted to place certain lands off-limits to coal mining, in whole or in part, or to prohibit certain types of mining, in whole or in part, it did so by including provisions in the Act to that effect. See, e.g., section 522 [''Designating Areas Unsuitable for Surface Coal Mining''], section 510(b)(5) [alluvial valley floors west of the hundredth meridian], and section 516(c) [underground coal mining under urbanized areas]. Otherwise, SMCRA and its implementing regulations establish how coal is to be mined, not whether it may be mined. The regulations that we are adopting today are consistent with the statute in that they are intended to minimize the adverse impacts of surface coal mining operations on fish, wildlife, and related environmental values without prohibiting the use of specific methods of mining or the recovery of coal from lands that have not been designated as unsuitable for surface coal mining operations.

Most fill material placed in streams in connection with coal mining is a result of the need to dispose of excess spoil generated by mining operations conducted in areas consisting of steep slopes and narrow valleys. To remove coal by surface mining methods, the formerly solid rock strata overlying the coal seam must be broken up into fragments and excavated. The broken rock fragments (referred to as spoil) are separated by numerous voids, resulting in a significant increase in volume over the volume of solid rock in place before mining. The increase in volume varies considerably depending upon the nature of the rock and the mining method, but the industry average is about 25 percent. Returning all spoil to the mined-out area in steep-slope terrain would create highly unstable conditions and in most cases is physically impossible. Consequently, some spoil must be permanently placed outside the mined-out area in engineered fills, typically in the upper reaches of valleys adjacent to the mine. As defined in 30 CFR 701.5, spoil not needed to restore the approximate original contour and disposed of in locations other than the mined-out area is considered ''excess spoil.''

The central Appalachian coalfields are characterized by highly eroded plateaus dissected by numerous narrow, deeply incised valleys with steep side slopes. In this region, even small valleys may contain intermittent and perennial streams. For example, in a study conducted in West Virginia, the United States Geological Survey found that, on average, perennial streams begin in watersheds as small as 40.8 acres and intermittent streams in watersheds as small as 14.5 acres. See Katherine S. Paybins, *Flow Origin, Drainage Area, and Hydrologic Characteristics for Headwater Streams in Mountaintop Coal-Mining Region of Southern West Virginia,* Water Resources Investigations Report 02–4300, U.S. Geological Survey, 2003, p. 1. Consequently, the construction of excess spoil fills in those valleys often involves burying the upper reaches of perennial and intermittent streams.

A further description of the existing environment of the central Appalachian coalfields can be found in the draft and final environmental impact statements issued in 2003 and 2005, respectively, by the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (COE or the Corps), the U.S. Fish and Wildlife Service (FWS), OSM, and the West Virginia Department of Environmental Protection. The draft EIS, which the final EIS incorporates by reference, contains the bulk of that description. The draft EIS is entitled ''Mountaintop Mining/Valley Fills in Appalachia Draft Programmatic Environmental Impact Statement'' (EPA 9–03–R–00013, EPA Region 3, June 2003) and is available at *http://www.epa.gov/region3/mtntop/eis.htm*. The final EIS, which is entitled ''Mountaintop Mining/Valley Fills in Appalachia Final Programmatic Environmental Impact Statement'' (EPA 9–03–R–05002, EPA Region 3, October 2005), is available at *http://www.epa.gov/region3/mtntop/pdf/mtm-vf_fpeis_full-document.pdf*.

Underground mines also may result in the filling of some stream segments where other viable options may not exist, especially in steep-slope areas. Rock and other overburden materials removed as part of the cut made to expose the coal seam into which the mine entries and ventilation shafts are driven typically are used to construct an adjoining bench upon which mine offices, parking lots, equipment, and other support facilities are located. This process is referred to as ''facing up'' the mine. Any material removed as part of the face-up operation that is not used to construct the bench or placed in temporary storage for use in restoring the approximate original contour and reclaiming the face-up area once the mine closes permanently is excess spoil. Should such excess spoil exist, it would be placed in fills on adjacent hillsides or in adjoining valleys. Underground mining operations also may involve the excavation of non-coal waste rock from underground tunnels. The waste rock, which we define as underground development waste, is typically brought to the surface and placed either in refuse piles or in excess spoil fills that meet the requirements for refuse piles, as required by 30 CFR 817.71(i).

Activities associated with coal preparation plants also may result in the filling of some stream segments. These plants clean coal by removing impurities, especially ash, incombustible rock, and sulfur. They create large quantities of coal processing waste, including both a very fine fraction, which is often suspended in water in a semi-liquid form (slurry) and a coarse fraction (refuse). The slurry is usually impounded behind dams constructed of coarse refuse in a valley adjacent to the plant.

One industry commenter stated that underground coal mining in central Appalachia depends on fills in mostly intermittent streams to store material from mine bench and stockpile construction and for sedimentation ponds and road crossings. The commenter also noted that coal processing waste is deposited in valley fills associated with coal preparation plants. Therefore, according to the commenter, without valley fills, coal mining in central Appalachia is doomed. While the commenter's statement may be somewhat of an exaggeration, there is little doubt that a prohibition on placement of excess spoil and coal mine waste in perennial or intermittent streams would have a significant adverse impact not only on surface mines, but also on underground mines and coal preparation plants.

Pages 7–8 of the final report dated January 13, 2003, for an economic study prepared for us by Hill & Associates, Inc. (Contract No. CT212142) contains the following discussion:

> We received strong input from the mining community that it is an egregious mistake to ignore impacts of the valley fill limitations on deep mines, especially new ones. First, many deep mines are co-dependent on related surface mines for quality blending requirements and even economic averaging arrangements. Eliminating or reducing the surface mining has a direct impact on the viability of the deep mining in these instances. Second, the typical reject rate in Central Appalachia from a wash plant associated with a deep mine is about 50%. Thus, for every one ton of coal mined, one ton of refuse is placed in a valley fill or related impoundment. In fact, the valley fills associated with wash plant refuse are generally among the larger valley fills associated with coal mining (with generally larger watershed) but are fewer in number than surface mining valley fills. Third, the construction of a new deep mine involves other valley fill issues. Often, a new deep mine is accompanied by a new wash plant with a new valley fill for refuse.

The Hill & Associates report uses the term ''deep mines'' for underground mines and the term ''wash plants'' for coal preparation plants. In addition, in the report, the term ''valley fills'' includes all excess spoil fills and coal mine waste disposal facilities constructed as part of a surface mine.

The following excerpt from a colloquy between Senators Howard Baker of Tennessee and Henry Jackson of Washington concerning S. 425, a 1973 bill that was a precursor to SMCRA, illustrates that Congress was cognizant of the potential scale of mountaintop removal operations and the attendant fills:

> Mr. BAKER. Mr. President, the last question I have to put, so that we may look this squarely in the face, is this: Would the distinguished chairman of the committee say certainly that what we are doing is sanctioning mountain top mining to the extent where whole mountains may be stripped down to ground level, and the storage of millions of tons of overburden may be placed in the hollows, creating hundreds of thousands of acres of new flat land, and that if we are going to adopt this variance which I intend to support, we should do it with our eyes wide open to the fact that whole mountains may disappear from the landscape?
>
> Mr. JACKSON. The answer is, yes, of course * * *. What we want to do is achieve the twin objectives, here, of being able to maintain a mining operation that will be satisfactory from an economic point of view, but also that will be environmentally acceptable.

119 Cong. Rec. S33314 (daily ed. October 9, 1973).

D. We Should Ensure the Protection of Headwater Streams by Requiring Maintenance of an Undisturbed Buffer Between Mining Activities and Streams

A number of commenters emphasized that headwater streams and mature forest cover are important to maintain the health of the ecological and biological functions of the entire stream. According to the commenters, numerous studies have clearly demonstrated that stream buffer zones of native vegetation (generally hardwood forests in the central Appalachian coal mining region) represent the best technology currently available for protecting the functions of headwater streams.

We agree with the commenters that headwater streams make a significant contribution to ecosystem function and the ecological productivity of downstream flows. We also agree that, in the absence of other considerations, precluding surface coal mining and reclamation operations in or near headwater streams may be the best technology currently available to protect the fish, wildlife, and related environmental values associated with those streams.

However, the universal protection of mature forest cover and headwater streams all the way to the top of the ridge or the head of the stream would preclude viable surface mining operations in almost all cases, especially in Appalachia. Sections 515(b)(24) and 516(b)(11) of SMCRA provide that surface coal mining and reclamation operations must use the best technology currently available to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values, but only ''to the extent possible.'' The ''to the extent possible'' clause in these statutory provisions recognizes that, because surface coal mining operations inherently involve significant disturbance of the land, those operations necessarily result in some disturbances to and adverse impacts on fish, wildlife, and related environmental values. Therefore, the determination of what constitutes the best technology currently available to minimize those adverse impacts is a site-specific determination that must be made in the context of the site's geologic, topographic, and ecological characteristics (including the location of the coal) and the nature of the mining operation. This approach is consistent with our regulatory definition of ''best technology currently available'' in 30 CFR 701.5, a definition that has remained unchanged since 1979. For example, it is almost never possible to conduct surface coal mining operations without disturbing ephemeral streams, especially in a mesic environment. In those cases, the best technology currently available would focus on how the site is reclaimed after mining, in particular, use of the revegetation, restoration, and fish and wildlife habitat enhancement measures mentioned in sections 816.97 and 817.97 of our rules.

In addition, many surface coal mining operations necessarily involve disturbance of intermittent or perennial streams and all or part of the buffer zone for the stream segment in which the activities listed in paragraphs (b)(1) through (b)(4) of sections 816.57 and 817.57 of this final rule occur. For example, in 2000 in West Virginia, a team consisting of representatives from OSM, the West Virginia Division of Environmental Protection, industry, and the environmental community completed an engineering evaluation of 14 proposed mine sites, which were representative of all proposed mining sites in West Virginia. As summarized on page 2 of the report, the team concluded that prohibiting construction of fills in intermittent and perennial streams would have a dramatic impact on coal recovery:

> Limiting valley fills to the ephemeral streams resulted in significant or total loss of the coal resource for 9 of the 11 mine sites when compared to the original mine site plans. All of the coal resource was lost for 6 of the 11 mine sites. By restricting fills to the ephemeral streams, the total coal recovery is estimated at 18.6 million tons, a 90.9 percent reduction. The original estimate was 186 million tons. The team noted that even if smaller fills could be constructed, they would impact nearly every available valley, possibly increasing the overall environmental impact.

Hence, this final rule does not absolutely prohibit the conduct of surface activities in intermittent or perennial streams, nor does it require maintenance of an undisturbed buffer between surface activities and the intermittent or perennial stream in situations where it is not possible to do so because of the nature of the proposed surface coal mining operations. In other words, avoidance of any disturbance to the stream and maintenance of an undisturbed buffer for the stream is not required if avoidance would preclude the conduct of surface coal mining and reclamation operations.

However, in keeping with the statutory requirement to use the best technology currently available to the extent possible, and in response to the commenters' concerns, we have revised the rule to include a requirement that, when a permit application includes a proposal to disturb a perennial or intermittent stream or land within 100 feet of such a stream, the permit applicant must demonstrate to the satisfaction of the regulatory authority that avoiding disturbance of a perennial or intermittent stream or lands within 100 feet of such a stream is not reasonably possible. See paragraphs (b)(1), (c)(1), (d)(1), and (e)(1) of sections 780.28 and 784.28, paragraph (d)(1)(i) of sections 780.25 and 784.16, and paragraph (a)(3)(i) of sections 780.35 and 784.19 of the final rule. Those provisions of our final rule use the term ''reasonably possible'' to clarify that the phrase ''to the extent possible'' in sections 515(b)(24) and 516(b)(11) of SMCRA should not be interpreted as requiring the use of any theoretically possible approach to compliance with the minimization requirement without regard to cost or other provisions of SMCRA. Those provisions include section 515(b)(1), which requires that surface coal mining operations be conducted ''so as to maximize the utilization and conservation of the solid

fuel resource being recovered so that reaffecting the land in the future through surface coal mining can be minimized,'' and section 102(f), which specifies that one of the purposes of SMCRA is to ensure that the coal supply essential to the nation's energy requirements is provided. Section 102(f) also calls for establishment of a regulatory program that balances environmental protection and coal production. We believe that our final rule strikes that balance by using the term ''reasonably possible'' to interpret and apply the requirements of sections 515(b)(24) and 516(b)(11) of the Act.

A survey of all coal mining permits issued between October 1, 2001, and June 30, 2005, indicates that coal mining activities authorized by those permits will directly affect about 535 miles of streams nationwide, of which 324 miles (60.6 percent) are in the central Appalachian coalfields. Based on data from the West Virginia permits, we estimate that approximately two-thirds of the 324 miles will be permanently covered by excess spoil fills and coal mine waste disposal facilities. When segments of headwater streams are buried permanently by excess spoil or mine waste fills, the discharge from the toe of the fill is equivalent to a spring. The groin ditches associated with the fill are too steep to fully replicate the buried stream segment. As discussed in the environmental impact statement for this rulemaking, typically, the stream segment downstream of the discharge from the toe of the fill has a higher base flow rate and lower peak flows than it did before construction of the fill. The temperature of the flow is also cooler and less variable than that of the original stream. Most of the remaining miles of stream directly affected by mining operations should experience only temporary adverse environmental impacts, chiefly as a result of mining through those streams. In those cases, the streams are diverted and relocated while the mining operation proceeds through the streambed. When mining is completed, the stream is restored to its original location unless the relocation is permanent.

Finally, our existing rules require that fills be revegetated in a manner consistent with the approved postmining land use. In time, we anticipate that hardwood forests will be reestablished on most fill surfaces in Appalachia.

E. We Have Not Accorded Sufficient Importance to the Environmental Protection Purposes of SMCRA

Several commenters objected to our repeated references to section 102(f) of SMCRA in the preamble to the proposed rule. Section 102(f) provides that one of the purposes of SMCRA is to ''assure that the coal supply essential to the Nation's energy requirements and to its economic and social well-being is provided'' and to ''strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.'' 30 U.S.C. 1202(f). The commenters allege that, in developing our proposed rule, we completely ignored the other purposes listed in section 102, in particular those in paragraphs (a) [''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations''], (c) [''assure that surface coal mining operations are not conducted where reclamation as required by this Act is not feasible''], and (d) [''assure that surface coal mining operations are so conducted as to protect the environment'']. The commenters argue that the result is to skew the analysis of SMCRA in favor of resource development while overlooking negative impacts to streams, water quality, and fish habitat. The commenters made these arguments in the context of advocating protection for headwater streams and interpreting the 1983 rule in a manner that would preclude the construction of excess spoil fills and coal mine waste disposal facilities in streams.

We disagree with the commenters' allegations. The purposes of SMCRA in section 102 explain what Congress intended to accomplish through the specific provisions found in the rest of the Act. They do not provide independent rulemaking authority. In particular, they do not provide authority to adopt regulations that would preclude surface coal mining operations on lands where those operations are not otherwise prohibited by SMCRA. Any regulations adopted under SMCRA (as well as any interpretation of an existing rule) must be consistent with the specific provisions of the Act. The environmental protection standards and other provisions of title V of the Act set out specific requirements, consistent with the environmental protection and other purposes of SMCRA, for the regulation of surface coal mining and reclamation operations. Therefore, any regulations implementing title V must be consistent with and based upon the provisions of that title. The purposes in section 102 can provide support or guidance for a regulation, but in and of themselves they do not establish requirements or authority for a regulation and they do not suffice to justify adoption of a regulation (or interpretation of an existing regulation) that is inconsistent with specific requirements or other provisions of the Act.

Within title V, section 515(c) expressly requires that our regulations establish provisions under which mountaintop removal mining operations may be permitted: ''Each State program may and each Federal program shall include procedures pursuant to which the regulatory authority may permit [mountaintop removal] operations.'' 30 U.S.C. 1265(c)(1). Adoption of a rule (or interpretation of an existing rule) to prohibit placement of excess spoil and coal mine waste in streams, as the commenters advocate on the basis of the environmental protection purposes of paragraphs (a), (c), and (d) of section 102 of SMCRA, would be inconsistent with this provision of SMCRA because mountaintop removal operations—and most other types of mining operations in steep-slope areas—typically cannot be conducted without construction of excess spoil fills in streams. In a study conducted in West Virginia, the United States Geological Survey found that, on average, perennial streams begin in watersheds as small as 40.8 acres and intermittent streams in watersheds as small as 14.5 acres. See Katherine S. Paybins, *Flow Origin, Drainage Area, and Hydrologic Characteristics for Headwater Streams in Mountaintop Coal-Mining Region of Southern West Virginia*, Water Resources Investigations Report 02–4300, U.S. Geological Survey, 2003, p.1. Industry commenters also asserted that underground mining operations in central Appalachia would be severely curtailed by such a limitation because those operations need to construct fills to contain underground development waste generated by the face-up and other aspects of mine construction. It would be difficult to construct those fills in steep-slope areas without impacting an intermittent or perennial stream.

In addition, section 515(b)(22)(D) of SMCRA authorizes the placement of excess spoil in areas that ''contain springs, natural water courses, or wet weather seeps'' if proper underdrains are constructed. Ephemeral, intermittent, and perennial streams are all natural watercourses. Springs are groundwater discharges. Discharges from springs typically form intermittent or perennial streams. In relevant part,

our rules at 30 CFR 701.5 define an ''intermittent stream'' as a stream or reach of a stream that obtains its flow from both surface runoff and ground water discharge.'' Therefore, by authorizing placement of excess spoil in areas that contain springs and natural watercourses, section 515(b)(22)(D) of SMCRA clearly allows construction of excess spoil fills in intermittent and perennial streams, provided the necessary underdrains are installed. Interpreting the purposes of SMCRA listed in paragraphs (a), (c), and (d) of section 102 as authorizing adoption of a rule (or interpretation of an existing rule) to effectively prohibit construction of excess spoil fills in perennial and intermittent streams thus would be inconsistent with section 515(b)(22)(D) of SMCRA and, by extension, section 515(c) of SMCRA.

F. EPA Cannot Legally Concur With the Revised Stream Buffer Zone Rules Because They Violate the Clean Water Act

Section 501(a)(B) of SMCRA specifies that we must obtain the written concurrence of the EPA Administrator with respect to regulations that relate to air or water quality standards published under the authority of either the Clean Air Act or the Clean Water Act. That provision applies to some of the changes that we are making in this final rule.

Several commenters stated that EPA cannot legally concur with the proposed rule because it would result in significant degradation to the aquatic ecosystem in violation of the Clean Water Act regulations at 40 CFR 230.10(c), which are part of the 404(b)(1) Guidelines. The commenters argue that, by eliminating the provision in the 1983 stream buffer zone rule that required a finding that the proposed activity would not cause or contribute to a violation of state or federal water quality standards and would not adversely affect the water quality, quantity, or other environmental resources of the stream, the proposed rule would implicitly allow effects that are both adverse and significant. According to the commenters, this result would be inconsistent with 40 CFR 230.10(c), which provides that, subject to an exception that is not germane here, ''no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States.'' In addition, 40 CFR 230.10(a) provides that ''no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.'' Therefore, according to the commenters, this final rule would violate the Clean Water Act, which would mean that EPA has no basis under the Clean Water Act for concurrence with the final rule. Another commenter argues the rule is not consistent with the Clean Water Act because it authorizes waste assimilation in streams, which the Clean Water Act prohibits.

We do not agree with the commenters. Section 501(a)(B) of SMCRA does not establish a requirement that the EPA Administrator's concurrence be based upon provisions of the Clean Water Act. Moreover, the requirements of the Clean Water Act apply independently of any regulations adopted under SMCRA. See section 702(a)(2) of SMCRA, which provides that nothing in SMCRA ''shall be construed as superseding, amending, modifying, or repealing'' the Clean Water Act or any regulations or state laws adopted under authority of that law. Our final rules at 30 CFR 780.28(f)(2), 784.28(f)(2), 816.57(a)(2), and 817.57(a)(2) reiterate this relationship between SMCRA and the Clean Water Act and emphasize that issuance of a SMCRA permit does not authorize initiation of surface coal mining operations for which the applicant has not obtained all necessary authorizations, certifications, and permits under the Clean Water Act. Therefore, EPA's concurrence with the final rule is not contrary to the Clean Water Act.

G. The Applicability of the Final Rules Should Be Limited to Steep-Slope Areas and Mountaintop Removal Operations

The Pennsylvania regulatory authority recommended that we not proceed with this rulemaking because it would impose additional burdens on Pennsylvania, create uncertainty for both citizen groups and mine operators, and would likely lead to extensive and costly litigation. According to the commenter, the rule's benefits would not offset the unfunded burdens, uncertainties and litigation that would result from adoption of the regulations. Pennsylvania also stated that if we proceed with a final rule, that rule should not require all states to change their programs to address a matter that is an issue only in those few states that have mountaintop removal operations and steep-slope mining. Instead, Pennsylvania recommended that we use the specific authority of section 515 of SMCRA to craft a rule tailored to mountaintop removal operations and steep-slope mining. The National Mining Association made similar comments with respect to our proposed excess spoil rules, arguing that the rulemaking record does not demonstrate a need for applying the excess spoil rules to any other areas.

We do not agree with the commenters' recommendations. We believe that perennial and intermittent streams potentially affected by excess spoil fills and coal mine waste disposal facilities in non-steep-slope areas and areas outside central Appalachia merit the same protection as streams in central Appalachia. Furthermore, states that may have very few operations involving placement of excess spoil or coal mine waste in perennial or intermittent streams would incur only minimal additional resource costs in processing applications for those operations.

The vast majority of excess spoil fills that involve placement of excess spoil in perennial or intermittent streams are located in steep-slope areas of central Appalachia. However, those structures are occasionally constructed in streams in other states and other areas. For example, with respect to excess spoil fills, a nationwide survey of all coal mining permits issued between October 1, 2001, and June 30, 2005, found that those permits included a total of 1,612 excess spoil fills, of which 1,589 (98.6 percent) are located in the central Appalachian coalfields. Specifically, most of the fills approved in those permits are located in Kentucky (1,079), West Virginia (372), and Virginia (125), with 13 approved in Tennessee. However, the remaining fills approved during that time are located in Alaska, Alabama, Ohio, Pennsylvania, and Washington, so we believe that sufficient basis exists for a national rulemaking. This survey is discussed in greater detail in the environmental impact statement that accompanies this rule.

Surface coal mining operations nationwide generate coal mine waste. Except in very flat terrain, refuse piles and especially slurry impoundments are constructed in stream valleys. There is no basis for limiting the scope of our coal mine waste rules to steep-slope areas or mountaintop removal mining.

In addition, the stream buffer zone rule is national in scope, as are the stream diversion rules. The frequency of use of those rules has little relationship to topography or type of mining. Surface coal mining operations routinely encounter perennial and intermittent streams in both steep-slope and non-steep-slope areas. The changes that we have made to the stream buffer zone rules, especially the new permit application requirements for operations

that propose to disturb the surface of lands within 100 feet of a perennial or intermittent stream and the revised findings that the regulatory authority must make before approving an exception to the buffer zone requirement, have universal applicability and utility, as do the changes to the stream diversion rules.

Finally, we do not agree with the commenter's characterization of the rule as creating uncertainty. To the contrary, this rule is intended in part to address and resolve the controversy and uncertainty surrounding the 1983 stream buffer zone rule. The permitting decisions that the regulatory authority must make under this final rule differ little in complexity from those that the regulatory authority must make under other provisions of the existing rules. As in the case of other situations in which the regulatory authority must apply subjective requirements, we anticipate that the regulatory authority will use best professional judgment in determining compliance. Therefore, we decline to adopt the commenter's recommendations.

H. The Stream Buffer Zone Rule Is Unnecessary and Should be Removed in Its Entirety

Several commenters advocated completely removing the stream buffer zone rule, noting that nothing in SMCRA mandates adoption of such a rule. One commenter noted that removal of the stream buffer zone rule would be the most effective method of eliminating ambiguity from the federal regulations concerning fill construction. The commenters stated that maintaining a stream buffer zone rule is not needed to provide SMCRA-mandated environmental protection and that the statute and regulations are replete with other regulatory requirements that directly address the concerns for which the stream buffer zone rule was adopted.

We considered the option recommended by the commenters, but decided to retain the stream buffer zone rule. With respect to perennial and intermittent streams, we believe that the rule serves a useful role in establishing a buffer zone as the best technology currently available to comply with the statutory requirements to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values, provided maintenance of a buffer zone is reasonably possible. See the discussion in Part VI.D. of this preamble.

VII. Why did we decide against applying the stream buffer zone rule to all waters of the United States (WOTUS)?

On August 24, 2007, we proposed to revise the scope of our stream buffer zone rules at 30 CFR 816.57 and 817.57, which applied to perennial and intermittent streams, to apply to all waters of the United States, which would include certain lakes, ponds, wetlands, and reaches of ephemeral streams. We had two reasons for proposing this change. First, the scope of the statutory provisions that form the basis for the stream buffer zone rule, i.e., sections 515(b)(10)(B)(i) and (24) and 516(b)(9)(B) and (11) of SMCRA, is not limited to perennial or intermittent streams. Instead, those provisions broadly require that, to the extent possible using the best technology currently available, surface coal mining operations be conducted so as to prevent additional contributions of suspended solids to streamflow or runoff outside the permit area and that surface coal mining and reclamation operations be conducted so as to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values. Sedimentation and sediment-laden runoff from mine sites could degrade those values. Second, we anticipated that achieving greater consistency with the terminology used in regulatory programs under the Clean Water Act would remove one obstacle to better coordination and streamlining of the SMCRA and Clean Water Act permitting processes.

In the preamble to the proposed rule, we requested comment on whether the increased regulatory consistency and other benefits of adopting the term WOTUS would outweigh the jurisdictional and other problems associated with use of that term as part of the SMCRA regulatory program. See 72 FR 48900, August 24, 2007. We found little public support for the proposed change.

All three iterations of the stream buffer zone rule that we adopted since the enactment of SMCRA have applied only to perennial and intermittent streams or subsets thereof. Many commenters opposed disturbing that regulatory stability, noting that our rules at 30 CFR 701.5 define perennial and intermittent streams in a well-understood manner consistent with other generally accepted definitions of those terms. They expressed concern that use of WOTUS would be confusing because that term has no clearly established legal or programmatic meaning. The commenters stated that the various organizational units of the Corps and EPA vary greatly in their interpretation and application of the term WOTUS and that the scope of that term is constantly evolving as the courts struggle to define the jurisdictional reach of the Clean Water Act. One commenter noted that the Supreme Court has been unable to agree on even a single governing principle for WOTUS. See *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (SWANCC); *Rapanos* v. *U.S.*, 547 U.S. 715 (2006). The commenter concluded that ''OSM should not anchor its regulatory program on such an unstable foundation,'' a sentiment shared by other commenters.

We received numerous comments to the effect that the proposed rule change would be unnecessary and possibly counterproductive because the definitions of perennial and intermittent streams in both our rules and state regulatory programs under SMCRA are clear and relatively straightforward to implement, while WOTUS is not. The Virginia regulatory authority commented that adding lakes, ponds, and wetlands to the scope of the buffer zone rule would probably not be much of a change to that agency's existing practice, apart from the matter of obtaining jurisdictional determinations, but that it would replace an established and effective regulatory term with no real benefit gained.

Several commenters opposed changing the scope of our stream buffer zone rules to WOTUS because the unsettled and subjective meaning of that term would spawn considerable uncertainty, which would be contrary to our stated objective of clarifying the existing stream buffer zone rules. The National Mining Association elaborated upon this argument as follows:

> When OSM revised the [stream buffer zone] rule in 1983, the principal reason for limiting the rule to perennial and intermittent streams was because the earlier version referencing streams with a biological community was confusing and difficult to apply. This, according to the agency, ''led to confusion on the part of operators'' attempting to apply the amorphous and ill-defined biological community standard. In response to challenges from several environmental groups, the federal district court upheld the agency's reasoning holding that ''it is precisely this type of justification, based on practical experience and expertise that justifies such a change.'' Moreover, the court noted that the stream buffer zone rule is not the only, or the most important, one in OSM's regulation[s] to implement §§ 515(b)(10) and (24). [Footnotes omitted.] * * * Here the practical experience discloses

that changing the scope of the rule to WOTUS will be even more confusing and difficult to apply than the 1979 rule due to the vague and confusing status of the meaning of waters of the United States.

The Association also expressed concern that the adoption of WOTUS, a Clean Water Act term that we have no authority to interpret or define, could have unintended impacts on SMCRA regulatory programs and the regulated community because we have no control over how that term may be defined in the future.

Several commenters expressed concern that the use of WOTUS would greatly delay the SMCRA permitting process because of the need to obtain jurisdictional determinations from the U.S. Army Corps of Engineers in accordance with a guidance document issued by EPA and the Corps on June 5, 2007, entitled ''Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos* v. *United States* & *Carabell* v. *United States*,'' *http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf*. According to the commenters, that document appears to require that permit applicants seek jurisdictional determinations from the Corps in many more situations than was the case before issuance of the guidance document. The National Mining Association stated that the Corps already has a massive backlog of requests for jurisdictional determinations. Because we are not adopting the use of WOTUS for other reasons, we did not investigate the accuracy of these comments. However, for informational purposes, we note that the Corps also issued Regulatory Guidance Letter No. 08–02 on June 26, 2008. That letter provides further guidance on jurisdictional determinations and related procedures.

The National Mining Association stated that it supports coordination of and reduction of duplication between the SMCRA and Clean Water Act permitting processes, but that, based on its experience in promoting that goal during the past seven years, it did not see any realistic probability that changing the focus of the buffer zone rule from perennial and intermittent streams to WOTUS would achieve that goal. The Association also stated that it did not foresee any discernible environmental benefits from the proposed change in focus.

Comments submitted on behalf of 12 national environmental organizations also strongly opposed the proposed use of WOTUS to define the scope of the stream buffer zone rule:

> One of the most perplexing aspects of the proposed rule is OSM's plan to change the bodies of water to which stream buffer zone provisions apply. If adopted, the rule would no longer apply to all perennial and intermittent streams, but instead would cover ''waters of the United States.'' Although this is touted as providing ''increased environmental protection and consistency with the Clean Water Act,'' less protection and more confusion seems inevitable if the proposal is adopted.
>
> To begin with, this proposal appears to be a solution in search of a problem. OSM acknowledges: ''we do not anticipate that this change in terminology will result in a significant expansion in the applicability of our rules because the vast majority of waters that may be affected by surface coal mining and reclamation operations are perennial and intermittent streams.'' By itself, this fact is not a reason to reject the proposal; we agree with the idea that a wide range of water bodies ought to be protected from mining-related damage, as SMCRA contains provisions that seek to protect water bodies beyond streams. However, in view of the other problems discussed below with linking the Stream Buffer Zone rule to ''waters of the United States'' under the Clean Water Act, the likely incremental benefit of including other water bodies does not justify the change.
>
> If there is one thing that conservation groups, the federal government, and the coal mining companies probably can agree on in this rulemaking, it is that it is not clear today what aquatic features qualify as ''waters of the United States,'' at least without further factual inquiry. As a result of two Supreme Court decisions and unhelpful ''guidance'' by EPA and the Army Corps of Engineers, some have come to the conclusion that even certain streams may not qualify as ''waters of the United States'' protected by the Clean Water Act's core programs.
>
> * * * * *
>
> Were the Stream Buffer Zone rule to be amended by the proposed rule to apply to ''waters of the United States,'' then, we have significant concern that it may be applied to only a subset of perennial and intermittent streams, whereas it historically has applied to all such streams. Effectively, implementing this change may lead to the proposed rule protecting fewer streams than the Stream Buffer Zone rule has in the past * * *.
>
> Finally, we do not believe that it is feasible, as OSM suggests, to resolve these jurisdictional issues by having ''the SMCRA regulatory authority * * * consult and coordinate with the Corps of Engineers in situations in which there is a question as to whether waters within or adjacent to the proposed permit area are waters of the United States under the Clean Water Act.'' As the OSM may or not be aware, it is the EPA, not the Corps, that has the responsibility for determining which water bodies are ''waters of the United States'' for purposes of the 404 program and the entire Clean Water Act.
>
> The EPA, working in conjunction with the Corps, is just beginning to make many jurisdictional and non-jurisdictional determinations using *Rapanos* as a guide, and the preliminary indications are that the process is very time-consuming and, more importantly, may be so arbitrary that it is leading to waters being declared unprotected when they in fact should remain jurisdictional.

Three commenters (the U.S. Fish and Wildlife Service, the Geologic Resources and Water Resources Divisions of the National Park Service, and the Pennsylvania Fish and Boat Commission) expressly supported the proposed use of WOTUS in defining the scope of the stream buffer zone rules. However, two of the three expressed concern that the change might reduce the protection afforded to perennial and intermittent streams. The U.S. Fish and Wildlife Service stated that it supported the use of WOTUS ''as a matter of regulatory consistency and sound public policy, but remains concerned about the unsettled nature of jurisdictional determinations in headwater streams'' in the wake of recent Supreme Court decisions. The Service requested that we work with them ''to develop a process to monitor the extent to which intermittent or perennial streams are determined not to be 'waters of the U.S.' '' The Pennsylvania Fish and Boat Commission strongly urged that we also retain the rule's applicability to perennial and intermittent streams because application of those terms in the SMCRA context is not dependent upon a jurisdictional determination by the U.S. Army Corps of Engineers. The Commission expressed the fear that adoption of WOTUS without also retaining the rule's applicability to perennial and intermittent streams ''would weaken or reduce the protection on most streams, especially headwater streams.''

The Geologic Resources and Water Resources Divisions of the National Park Service stated that they fully supported the proposed change because many high-value aquatic ecosystems are neither perennial nor intermittent streams. According to the commenter, the proposed rule change would not place an undue burden or impact on operators, especially when considering the environmental benefits that would be realized through protecting a more inclusive set of aquatic systems, including wetlands, lakes, and ponds. The commenter stated that the National Park Service routinely seeks permits through local Corps offices and has never found that this requirement imposed a burden or had a substantial impact on the completion of any project.

After evaluating the comments received, we find the arguments against adoption of WOTUS persuasive. The final rule that we are adopting today retains the status quo with respect to the scope of the stream buffer zone rule; i.e., that rule will continue to apply to

perennial and intermittent streams rather than to WOTUS. Rather than attempting to introduce Clean Water Act terminology and procedures into regulations implementing SMCRA, we believe that the more prudent and defensible course of action is to adopt terminology and requirements based on provisions of SMCRA. SMCRA does not use the term WOTUS in establishing regulatory requirements for surface coal mining operations, but it does refer to streams. At the same time, section 702(a) of SMCRA clearly specifies that nothing in SMCRA may be construed as superseding, amending, modifying, or repealing the Clean Water Act or its implementing regulations. Therefore, issuance of a SMCRA permit does not authorize the permittee to initiate activities for which a permit, certification, or other authorization is required under the Clean Water Act. The final rules at 30 CFR 780.28(f)(2), 784.28(f)(2), 816.57(a)(2), and 817.57(a)(2) that we are adopting today reiterate that fact.

One commenter strongly disagreed with our statement in the preamble to proposed 30 CFR 780.28 and 784.28 that we did not anticipate that switching from perennial and intermittent streams to WOTUS would result in a significant expansion in the applicability of our rules because the vast majority of waters that may be affected by surface coal mining and reclamation operations are perennial and intermittent streams. This comment is now moot in light of our decision not to adopt WOTUS.

We also wish to clarify that we use the terms perennial, intermittent, and ephemeral streams, as defined in 30 CFR 701.5, to implement the SMCRA regulatory program. Our definitions of those terms do not affect jurisdictional determinations under the Clean Water Act. The Corps and EPA are responsible for making those jurisdictional determinations.

Although we have decided not to adopt WOTUS as part of the stream buffer zone rule, our existing rules will continue to provide protection to lakes, ponds, wetlands, and, to some extent, ephemeral streams by other means. Those rules fully implement the statutory provisions that form the basis for the stream buffer zone rule, i.e., sections 515(b)(10)(B)(i) and (24) and 516(b)(9)(B) and (11) of SMCRA, which require that, to the extent possible using the best technology currently available, surface coal mining operations be conducted so as to prevent additional contributions of suspended solids to streamflow or runoff outside the permit area and that surface coal mining and reclamation operations be conducted so as to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values.

Most significantly, 30 CFR 780.16(b) and 784.21(b) require that each permit application include a fish and wildlife protection and enhancement plan. The plan must describe how, to the extent possible, using the best technology currently available, the operator will minimize disturbances and adverse impacts on fish, wildlife, and related environmental values during surface coal mining and reclamation operations and how enhancement of those resources will be achieved where practicable. The plan must be consistent with the requirements of 30 CFR 816.97 or 817.97 and it must include protective measures to be taken during the active mining phase. The rule lists the establishment of buffer zones as one example of those protective measures.

Under 30 CFR 816.97(a) and 817.97(a), the operator must, to the extent possible, using the best technology currently available, minimize disturbances and adverse impacts on fish and wildlife and related environmental values and must achieve enhancement of those resources where practicable. Paragraph (f) of 30 CFR 816.97 and 817.97 provides that the operator must avoid disturbances to, enhance where practicable, restore, or replace wetlands and riparian vegetation along rivers and streams and bordering ponds and lakes. Paragraph (f) also requires that the operator avoid disturbances to, enhance where practicable, or restore habitats of unusually high value for fish and wildlife.

With respect to water quality, 30 CFR 780.21(h) and 784.14(g) require that each permit application include a hydrologic reclamation plan indicating how the relevant requirements of 30 CFR part 816 or 817, including sections 816.41 through 816.43 or 817.41 through 817.43, will be met. The plan must be specific to local hydrologic conditions and it must contain the steps to be taken to minimize disturbances to the hydrologic balance within the permit and adjacent areas. Under 30 CFR 816.41(a) and 817.41(a), all surface and underground mining and reclamation activities must be conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas.

VIII. Section-by-section analysis: How are we revising our rules?

A. Sections 780.14 and 784.23 Operation Plan: Maps and Plans

As proposed, we are revising 30 CFR 780.14(b)(11) and 784.23(b)(10) by replacing the terms ''coal processing waste bank'' and ''coal processing waste dam and embankment'' with ''refuse pile'' and ''coal mine waste impounding structure'' to employ terminology consistent with the definitions and performance standards that we adopted September 26, 1983. See the discussion under the heading ''Changes to conform to 1983 rule revisions'' in Part VIII.B. of this preamble for a more detailed explanation.

In addition, as proposed, we are replacing the references to sections 780.35(c) and 816.71(b) in the former version of section 780.14(c) with a reference to section 780.35 to be consistent with other changes that we are making to those rules. Those changes include moving the design certification requirement formerly located in section 816.71(b) to section 780.35(b) to consolidate permitting requirements. In similar fashion, as proposed, we are deleting the reference to section 817.71(b) formerly located in section 784.23(c) because we are moving the design certification provisions previously located in section 817.71(b) to section 784.19(b) to consolidate permitting requirements. There is no need for a replacement cross-reference because section 784.23(c) already cross-references section 784.19 in its entirety.

We received no comments concerning the proposed changes discussed above.

B. Sections 780.25 and 784.16 Reclamation Plan: Siltation Structures, Impoundments, Refuse Piles, and Coal Mine Waste Impounding Structures

1. Changes To Conform to 1983 Revisions to Definitions and Performance Standards

On September 26, 1983 (48 FR 44006), we revised the definitions and performance standards in our regulations relating to coal mine waste to be more consistent with the terminology used by the Mine Safety and Health Administration (MSHA). As we stated at 48 FR 44009, col. 1, ''[i]t is undesirable to have two regulatory programs for the same subject that contain conflicting standards or which use fundamentally different terminology.''

Among other things, we adopted definitions of three new terms in 30 CFR 701.5. ''*Coal mine waste*'' is defined as ''coal processing waste and

underground development waste.'' ''*Impounding structure*'' is defined as ''a dam, embankment, or other structure used to impound water, slurry, or other liquid or semi-liquid material.'' ''*Refuse pile*'' is defined as ''a surface deposit of coal mine waste that does not impound water, slurry, or other liquid or semi-liquid material.'' The latter two terms are consistent with the terminology of MSHA's rules. ''Refuse pile'' replaces the term ''coal processing waste bank'' previously used in our rules, while ''impounding structure'' incorporates (but is not limited to) all structures that our rules previously referred to as coal processing waste dams or embankments.

In concert with the new definition of coal mine waste, we revised our performance standards at 30 CFR 817.71–817.74 to eliminate the language that combined underground development waste with excess spoil for purposes of performances standards for underground mines. Because the definition of coal mine waste includes underground development waste, we revised our rules to specify that the disposal of underground development waste is subject to the performance standards for refuse piles (30 CFR 817.83) rather than the performance standards for the disposal of excess spoil that applied under the old rules.

However, we did not revise our permitting requirements in a similar fashion at that time. Therefore, in our August 24, 2007, proposed rule, we proposed to modify our regulations in 30 CFR parts 780 and 784 to harmonize those rules with our 1983 changes to the definitions and performance standards concerning coal mine waste. In essence, in the proposed rule, we replaced the term ''coal processing waste banks'' with ''refuse piles'' and the term ''coal processing waste dams and embankments'' with references to coal mine waste impounding structures.

As proposed, this final rule revises the heading and contents of sections 780.25 and 784.16 by replacing the terms ''coal processing waste bank'' and ''coal processing waste dam and embankment'' with ''refuse pile'' and ''coal mine waste impounding structure.'' With these changes, our permitting requirements concerning coal mine waste employ terminology consistent with the definitions and performance standards for coal mine waste that we adopted on September 26, 1983.

We received no comments on the revisions discussed above. However, some industry commenters opposed the September 26, 1983, rule changes that classified underground development waste as coal mine waste and required that coal mine waste (including underground development waste) disposed of outside the mine workings and excavations be placed in accordance with 30 CFR 817.83, which contains the performance standards for refuse piles. The commenters argued that underground development waste should be treated as excess spoil, not coal mine waste. The commenters' objections are untimely. The definition of coal mine waste in 30 CFR 701.5 is now a matter of settled law, as is the performance standard at 30 CFR 817.81(a), which requires that coal mine waste disposed of outside the mine workings and excavations be placed in designated coal mine waste disposal areas within the permit area. The existing regulations at 30 CFR 817.71(i) allow coal mine waste to be placed in excess spoil fills with the approval of the regulatory authority, but only if the waste is nontoxic and non-acid-forming and only if the waste is placed in accordance with 30 CFR 817.83 (the requirements for refuse piles).

Several commenters expressed concern that the 1983 rule's classification of underground development waste as coal mine waste could prohibit the use of underground development material for construction of face-up areas, support facilities, and other beneficial uses. We do not understand how underground development waste could be used for the construction of face-up areas because the face-up of the mine must be completed and construction of mine adits must begin before underground development waste would be produced. Perhaps the commenters are interpreting the 1983 rules as classifying material removed as part of the face-up of the underground mine as underground development waste. If so, the commenters are misreading those rules. Nothing in the definitions of coal mine waste or underground development waste classifies face-up materials as either coal mine waste or underground development waste. In addition, nothing in our existing rules or the rules that we are adopting today would prohibit the use of underground development waste for construction of support facilities or other mining-related uses, provided the use of the waste for those purposes complies with all regulatory program requirements applicable to those uses. The final rules that we are adopting today apply only to the permanent disposal of coal mine waste (including underground development waste), not to the temporary use of those materials for mining-related purposes.

2. Paragraph (a)(2)

This paragraph sets forth design requirements for all impoundments other than low hazard impoundments. As proposed, we are removing the last sentence of former paragraph (a)(2) of sections 780.25 and 784.16 and redesignating the remainder of that paragraph as paragraph (a)(2)(i) of those sections. We are redesignating the last sentence of former paragraph (a)(2) as paragraph (a)(2)(ii). In addition, we are redesignating former subparagraphs (a)(2)(i) through (iv) of sections 780.25 and 784.16 as subparagraphs (a)(2)(ii)(A) through (D) of those sections. We are making these redesignations because both the last sentence of former paragraph (a)(2) and former subparagraphs (i) through (iv) apply to all structures meeting the criteria of 30 CFR 77.216(a), while the remainder of former paragraph (a)(2) applies only to those impoundments that meet the Class B or C criteria (now the Significant Hazard Class or High Hazard Class criteria, respectively) for dams in the U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS) publication Technical Release No. 60, ''Earth Dams and Reservoirs.''

As proposed, we are revising redesignated paragraph (a)(2)(i) of sections 780.25 and 784.16 to update the incorporation by reference of the NRCS publication ''Earth Dams and Reservoirs,'' Technical Release No. 60 (210–VI–TR60, October 1985), by replacing the reference to the October 1985 edition with a reference to the superseding July 2005 edition. Consistent with the terminology in the newer edition, we are replacing references to Class B or C dam criteria with references to Significant Hazard Class or High Hazard Class dam criteria, respectively. Only the terminology has changed—the actual criteria remain the same as before. The newer publication is not available from the National Technical Information Service, but is available online from the Natural Resources Conservation Service (the successor to the Soil Conservation Service). Consequently, we are deleting the ordering information pertinent to the National Technical Information Service and replacing it with the URL (Web address) at which the publication may be reviewed and from which it may be downloaded without charge. We are also updating the address and location of our administrative record room and updating the URL information (Web address) for the National Archives and Records Administration.

We received no comments on the changes discussed above.

3. Paragraph (c)

Paragraph (c) contains design requirements that apply to all impoundments. To improve clarity and consistency with other regulations, we are revising paragraph (c)(2) of sections 780.25 and 784.16 as proposed by replacing the term ''Mine Safety and Health Administration'' with a citation to 30 CFR 77.216(a), which contains the MSHA impoundment criteria to which paragraph (c)(2) refers. Revised paragraph (c)(2) requires that plans for impoundments meeting MSHA criteria comply with MSHA's impoundment design requirements at 30 CFR 77.216–2. We are deleting the requirement that those plans also comply with 30 CFR 77.216–1. The deleted requirement is not germane to permit applications and plans because it contains signage requirements that apply only to impoundments that already exist or are under construction. We are also making two nonsubstantive changes: Replacing ''shall'' with ''must'' in keeping with plain language principles and, in the second sentence, deleting an obsolete reference to paragraph (a).

The final rule also includes a new paragraph (c)(4). We originally proposed to redesignate paragraph (f) of sections 780.25 and 784.16 as paragraph (e) of those sections. In a nonsubstantive editorial revision, we are instead redesignating paragraph (f) [paragraph (e) in our 2007 proposed rule] as paragraph (c)(4) of sections 780.25 and 784.16. The paragraph in question applies only to impoundments that meet certain criteria in NRCS Technical Release No. 60 or the criteria of 30 CFR 77.216(a). It has no relevance to other types of siltation structures or to refuse piles. Therefore, it is more appropriate as part of paragraph (c), which applies to all types of impoundments, including coal mine waste impoundments, rather than as a separate paragraph (e). Consistent with this redesignation, we are also deleting the references to paragraphs (b) [siltation structures] and (d) [coal mine waste impoundments and refuse piles] that appeared in proposed paragraph (e). Final paragraph (c)(4) is otherwise identical to proposed paragraph (e). As proposed, we also are revising this paragraph to be consistent with the terminology in the July 2005 edition of NRCS Technical Release No. 60 by replacing references to Class B or C dam criteria with references to Significant Hazard Class or High Hazard Class dam criteria, respectively. Only the terminology has changed; the actual criteria remain the same as before.

We received no comments on the changes discussed above.

4. Paragraph (d) Introductory Language

The final rule includes new introductory language specifying that an applicant for a permit must comply with all applicable requirements in paragraphs (d)(1) through (3) if the applicant proposes to place coal mine waste in a refuse pile or impoundment or use coal mine waste to construct an impounding structure. This requirement, which is not new, is a nonsubstantive editorial change that reflects the structure of the final rule.

5. Paragraph (d)(1)

We have extensively revised paragraph (d)(1) of sections 780.25 and 784.16 in response to comments. Final sections 780.25(d)(1) and 784.16(d)(1) are identical except that the reference to section 816.59 in section 780.25(d)(1) is replaced with a reference to 817.59 in section 784.16(d)(1).

This new paragraph contains requirements for minimizing adverse environmental impacts on perennial and intermittent streams and adjacent areas when a permit application proposes to construct a refuse pile or slurry impoundment or to use coal mine waste to construct an impounding structure. We are adopting these requirements under the authority of sections 515(b)(24) and 516(b)(11) of SMCRA. Those statutory provisions require that, to the extent possible using the best technology currently available, surface coal mining and reclamation operations be conducted to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values.

Discussion of General Comments Received on Paragraph (d)(1)

Several commenters argued that we have no authority to adopt these regulations because section 515(f) of SMCRA, which contains requirements for refuse piles and slurry impoundments, only mentions criteria related to safety, not environmental protection. We do not agree with the commenters. SMCRA contains numerous environmental protection requirements, including those set forth in sections 515(b)(24) and 516(b)(11), that apply to all surface coal mining and reclamation operations and all aspects of those operations, including the disposal of coal mine waste. The fact that section 515(f) does not mention environmental protection in no way suggests that coal mine waste disposal facilities need not comply with the environmental protection provisions of SMCRA or that we lack the authority to adopt regulations establishing environmental protection requirements for those facilities.

Industry commenters strongly opposed the requirement in proposed paragraph (d)(1) for an analysis of alternatives for placement of coal mine waste. The commenters cited a variety of reasons, including excessive costs, delays in permitting, the probable lack of environmental benefits, the potential for conflict between the SMCRA regulatory authority's application of the alternatives analysis requirement and the approach adopted by the Clean Water Act permitting authority, duplication of effort with the Clean Water Act, a lack of justification under SMCRA, exceeding the intent of SMCRA, and a fear that this requirement could result in a never-ending cycle of analysis and litigation concerning whether the correct alternative was selected by the permit applicant and approved by the state regulatory authority. Many commenters stated that the requirement for an alternatives analysis has no basis in SMCRA and instead appears to be a mixture of provisions borrowed from the National Environmental Policy Act and the Clean Water Act.

Nothing in the proposed alternatives analysis requirement in paragraph (d)(1) of sections 780.25 and 784.16 of the final rule is based upon the National Environmental Policy Act. We respectfully disagree with those commenters who argued that the requirement for an alternatives analysis is a Clean Water Act requirement that has no basis or justification under SMCRA and that exceeds the intent of SMCRA. We acknowledge that we derived this element of our proposed rules from the alternatives analysis requirements of the 404(b)(1) Guidelines in 40 CFR part 230, which include the substantive environmental criteria used in evaluating activities regulated under section 404 of the Clean Water Act. However, we concluded that a modified version of the alternatives analysis requirements in the 404(b)(1) Guidelines is an appropriate means of obtaining the background data and analyses that both the applicant and the regulatory authority need to make informed decisions concerning compliance with the requirements of sections 515(b)(24) and 516(b)(11) of SMCRA, which provide that surface coal mining and reclamation operations must be conducted to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

Therefore, paragraphs (d)(1)(ii) and (d)(1)(iii) of sections 780.25 and 784.16

of this final rule apply the alternatives analysis requirement to all applications that propose to place coal mine waste in or within 100 feet of a perennial or intermittent stream. In addition, paragraph (d)(1)(iii)(A) of these sections of the final rule applies more detailed analytical requirements to applications that propose to place coal mine waste in perennial or intermittent streams as opposed to applications that propose to place coal mine waste only within 100 feet of those streams.

A few commenters criticized the analysis of alternatives provisions of the proposed rule because they did not completely parallel the requirements of the 404(b)(1) Guidelines in 40 CFR part 230. At least one commenter recommended that we incorporate the 404(b)(1) Guidelines by reference. We do not find this recommendation appropriate because the 404(b)(1) Guidelines are designed to implement the Clean Water Act, while our regulations implement SMCRA and must be based upon SMCRA requirements. Under section 702(a) of SMCRA, nothing in SMCRA may be construed as amending, modifying, repealing, or superseding any Clean Water Act requirement. However, there is also nothing in SMCRA that would compel or authorize us to adopt regulations that parallel or incorporate Clean Water Act requirements.

SMCRA and the Clean Water Act provide for separate regulatory programs with different purposes and very different permitting requirements and procedures. In addition, as other commenters noted, SMCRA and the Clean Water Act differ considerably with respect to jurisdiction. The Clean Water Act focuses on regulating discharges of pollutants into waters of the United States, whereas SMCRA regulates a broad universe of environmental and other impacts of surface coal mining and reclamation operations, including impacts on water quantity, water quality, and terrestrial and aquatic ecosystems. We encourage coordination and cooperation between SMCRA regulatory authorities and the agencies administering the Clean Water Act. See the memorandum of understanding entitled ''Memorandum of Understanding among the U.S. Army Corps of Engineers, the U.S. Office of Surface Mining, the U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service for the Purpose of Providing Concurrent and Coordinated Review and Processing of Surface Coal Mining Applications Proposing Placement of Dredged and/or Fill Material in Waters of the United States,'' which took effect February 8, 2005, and the provisions of this final rule that authorize the SMCRA regulatory authority to accept an analysis of alternatives completed for Clean Water Act purposes as meeting the requirements for an analysis of alternatives under this final rule, when and to the extent appropriate. However, we believe that maintaining the distinction between those programs is both administratively and legally appropriate. That conclusion is supported by the comments that we received from both industry and state regulatory authorities.

Many industry commenters, supported by some, but not all, state regulatory authority commenters, stated that the proposed alternatives analysis requirement would introduce a major new element of uncertainty, and result in costly and wasteful duplication of effort on the part of permit applicants and state regulatory authorities. The commenters stated that this element of our proposed rule was inconsistent with our statement in the preamble to that rule that a primary reason for the rulemaking was to provide improved clarity and reduction of uncertainty regarding the meaning of the regulations. One commenter stated that at best the alternatives analysis requirement ''adds yet another layer of redundant paperwork and analysis as it duplicates the federally-administered 404 process. At worst, OSM has set the stage for conflicts between the section 404 program and the largely state-implemented SMCRA programs.'' The commenter further stated that by imposing an alternatives analysis requirement on state regulatory authorities, we are ''flirting dangerously'' with creating conflicting alternatives analyses because ''the goals and objectives of SMCRA and corresponding state statutes may be different than those of the Corps and EPA under section 404.''

While we understand the commenters' apprehensions, these comments are speculative in nature. There may be some initial uncertainty as regulatory authorities establish procedures and criteria for implementation of the alternative analysis requirements and determining least overall adverse impact on fish, wildlife, and related environmental values under this rule, but that uncertainty should subside once those procedures and criteria are in place.

The Interstate Mining Compact Commission, writing on behalf of member state regulatory authorities, argued that the alternative analysis requirement is duplicative of requirements under the Clean Water Act that are already encompassed by the SMCRA permitting scheme. As discussed elsewhere in this preamble, we believe that the alternatives analysis requirement that we are adopting as part of this final rule differs from and serves a somewhat different purpose than the alternatives analysis requirement under the regulations and other documents implementing section 404 of the Clean Water Act. To the extent that duplication may exist, we encourage states to coordinate the processing of coal mining permit applications with the U.S. Army Corps of Engineers in accordance with a memorandum of understanding entitled ''Memorandum of Understanding among the U.S. Army Corps of Engineers, the U.S. Office of Surface Mining, the U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service for the Purpose of Providing Concurrent and Coordinated Review and Processing of Surface Coal Mining Applications Proposing Placement of Dredged and/or Fill Material in Waters of the United States,'' which took effect February 8, 2005. This final rule also authorizes the SMCRA regulatory authority to accept an analysis of alternatives completed for Clean Water Act purposes as meeting the requirements for an analysis of alternatives under this final rule, when and to the extent appropriate.

The Commission and some, but not all, commenters representing individual state regulatory authorities also opposed the alternatives analysis requirement in the proposed rule because of state fiscal constraints and fear of the ''potentially overwhelming'' time and effort that would be required for state permitting personnel to adequately review and analyze alternatives.

We anticipate that few, if any, state regulatory authorities will experience a significant increase in demands on their resources as a result of the alternatives analysis requirement in the final rule. West Virginia, one of the states most impacted by the rule, supported the proposed rule. Kentucky, another state that would be significantly impacted, estimated that, on average, the new requirement would add ten hours to the time required to process a permit application. We believe that the intangible environmental benefits of the rule (increased scrutiny of efforts to minimize adverse impacts on fish, wildlife, and related environmental values associated with perennial and intermittent streams) will outweigh what we anticipate will be a modest increase in demand on state regulatory authority resources.

The U.S. Fish and Wildlife Service requested that we work with the Service

to build a process into the alternative analysis requirements in the final rule to protect unique and high value fish and wildlife resources. In response, we note that our fish and wildlife protection rules at 30 CFR 816.97(f) and 817.97(f) already require that the operator ''avoid disturbances to, enhance where practicable, or restore habitats of unusually high value for fish and wildlife.'' In addition, our permitting rules at 30 CFR 780.16 and 784.21 provide a role for the Service in determining fish and wildlife data collection requirements and reviewing the fish and wildlife protection plan in the permit application. Therefore, addition of the provision requested by the Service is not necessary.

Discussion of Specific Provisions of Paragraph (d)(1)

In the final rule, the first sentence of paragraph (d)(1) of sections 780.25 and 784.16 provides that the permit applicant must design the operation to avoid placement of coal mine waste in or within 100 feet of perennial and intermittent streams to the extent possible. We added this provision in response to EPA concerns and numerous comments urging greater protection for headwater streams because of their ecological importance and contribution to the function of the stream as a whole. In effect, the new sentence identifies avoiding placement of coal mine waste in or within 100 feet of perennial or intermittent streams as the preferred method of complying with the SMCRA requirement to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values with respect to those streams. That is, whenever avoidance of disturbance is reasonably possible, the rule establishes avoidance as the best technology currently available to meet the requirements of sections 515(b)(24) and 516(b)(11) of SMCRA, which require minimization of disturbances and adverse impacts to fish, wildlife, and related environmental values to the extent possible using the best technology currently available. This provision of the final rule is consistent with our stream buffer zone rules at 30 CFR 816.57 and 817.57, which establish maintenance of an undisturbed buffer for perennial and intermittent streams as the best technology currently available to meet the requirements of sections 515(b)(24) and 516(b)(11) of SMCRA, provided maintenance of an undisturbed buffer is reasonably possible.

However, the final rule does not and cannot mandate avoidance in all cases for all stream segments. The provisions of SMCRA underlying this rule require minimization of disturbances and adverse impacts on fish, wildlife, and related environmental values only ''to the extent possible.'' Avoiding disturbance of the stream and maintenance of an undisturbed buffer zone for that stream is the ultimate means of minimizing adverse impacts on fish, wildlife, and related environmental values and hence is the default best technology currently available to comply with the statutory minimization requirement. However, there is sometimes no viable alternative to the construction of coal mine waste disposal facilities in perennial or intermittent streams and their buffer zones, in which case avoidance is not reasonably possible. Under those circumstances, SMCRA—and hence this final rule—do not require avoidance. Instead, the applicant must propose other methods of complying with the minimization requirement that are consistent with the proposed surface coal mining operations. We do not interpret SMCRA as authorizing us to prohibit surface coal mining operations in situations other than those specifically set forth in the Act. However, SMCRA does not override prohibitions that apply under other laws and regulations. Any such requirements and prohibitions will continue to apply according to the terms of those laws and regulations.

Paragraph (d)(1)(i) of the final rule requires that the permit applicant explain, to the satisfaction of the regulatory authority, why an alternative coal mine waste disposal method or an alternative location or configuration that does not involve placement of coal mine waste in or within 100 feet of a perennial or intermittent stream is not reasonably possible. We added this requirement to reinforce the provision in paragraph (d)(1) of the final rule establishing avoidance of placement of coal mine waste in or within 100 feet of a perennial or intermittent stream, whenever avoidance is reasonably possible, as the best technology currently available to comply with the statutory requirement for minimization of disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available.

Paragraph (d)(1)(ii) of the final rule provides that, if the permit applicant is unable to design the operation to avoid placement of coal mine waste in or within 100 feet of a perennial or intermittent stream, the application must identify a reasonable range of alternative locations or configurations for any proposed refuse piles or coal mine waste impoundments. A number of commenters on a similar provision in the proposed rule expressed concern that this provision was too vague and could be interpreted as requiring an unlimited number of alternatives, including those that have no possibility of being implemented. In response to this concern, we have added language clarifying that this provision does not require identification of all potential alternatives and that only those reasonably possible alternatives that are likely to differ significantly in terms of impacts on fish, wildlife, and related environmental values need be identified and considered. The latter provision is consistent with the policies to which EPA and the Corps adhere in implementing section 404 of the Clean Water Act. See the EPA/COE memorandum entitled ''Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements.''

In response to the commenters' concerns, we also added language to paragraph (d)(1)(ii) of the final rule specifying that an alternative is reasonably possible if it conforms to the safety, engineering, design, and construction requirements of the regulatory program; is capable of being done after consideration of cost, logistics, and available technology; and is consistent with the coal recovery provisions of sections 816.59 and 817.59. In other words, nothing in the rule should be construed as elevating environmental concerns over safety considerations, as prohibiting the conduct of surface coal mining operations that are not otherwise prohibited under SMCRA or other laws or regulations, or as requiring consideration of unreasonably expensive or technologically infeasible alternatives.

The portion of this rule that refers to ''consideration of cost, logistics, and available technology'' is derived from the EPA regulations at 40 CFR 230.10(a)(2), which define a practicable alternative for purposes of section 404 of the Clean Water Act. In interpreting this provision, the EPA/COE memorandum entitled ''Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements'' states that ''[t]he determination of what constitutes an unreasonable expense should generally consider whether the projected cost is substantially greater than the costs normally associated with this particular type of project.'' We have included similar language in paragraph

(d)(1)(ii)(B) of the final rule because (1) the concept of a practicable alternative for purposes of section 404 of the Clean Water Act is in some ways analogous to the determination of reasonably possible alternatives under this rule, and (2) the principle is consistent with the phrase ''to the extent possible'' in sections 515(b)(24) and 516(b)(11) of SMCRA. See Part VI.D. of this preamble for a more extensive discussion of the rationale for our use of the term ''reasonably possible'' and its consistency with statutory provisions.

The final rule does not include the provision in paragraph (d)(1)(i)(C) of the proposed rule stating that the least costly alternative may not be selected at the expense of environmental protection solely on the basis of cost. One commenter objected to the proposed provision as being too extreme and subject to misinterpretation, noting that there may be situations in which cost could and should be the determining factor. We agree. Nothing in SMCRA compels adoption of this provision. In lieu of this provision, we have added language to paragraph (d)(1)(ii)(B) of the final rule clarifying that the fact that one alternative may cost somewhat more than a different alternative does not necessarily warrant exclusion of the more costly alternative from consideration. We believe that the revised language is more consistent with sections 515(b)(24) and 516(b)(11) of SMCRA, which require use of the best technology currently available, but only to the extent possible.

Paragraph (d)(1)(iii) of the final rule provides that any application proposing to place coal mine waste in or within 100 feet of a perennial or intermittent stream must include an analysis of the impacts of the alternatives identified in paragraph (d)(1)(ii) on fish, wildlife, and related environmental values. The analysis must consider impacts on both terrestrial and aquatic ecosystems. These provisions are substantively identical to the corresponding provisions in the proposed rule.

Paragraph (d)(1)(iii)(A) of the final rule provides that, for every alternative that proposes placement of coal mine waste in a perennial or intermittent stream, the analysis must include an evaluation of impacts on the physical, chemical, and biological characteristics of the stream downstream of the proposed refuse pile or coal mine waste impoundment, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the coal mine waste may introduce or increase contaminants, and the effects on aquatic organisms and the wildlife that is dependent upon the stream. As discussed below, this paragraph of the final rule includes a number of changes from the proposed rule as a result of the comments that we received on the proposed rule.

One commenter stated that—

> [T]he components of an alternatives analysis for a coal mine disposal activity, as set forth in proposed 30 CFR 784.16(d)(1)(ii), should be subdivided for clarity and certain of the components should be reconsidered in terms of their purpose or value. As written, 30 CFR 784.16(d)(1)(ii) requires ''* * * an evaluation of short-term and long-term impacts on the aquatic ecosystem, both individually and on a cumulative basis'' and goes on to specify that the evaluation ''must consider impacts on the physical, chemical, and biological characteristics of downstream flow, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the coal mine waste may introduce or increase contaminants, the effects on aquatic organisms and the extent to which wildlife is dependent upon those organisms.'' As strung together, these requirements create a number of ambiguities, which will lead to problems in interpretation. The list also includes terms that have no recognized meaning, such as ''biological characteristics of downstream flows.'' In addition to these ambiguities, this section also requires assessments that are new to the regulation of mining activities, including assessments of the effects of turbidity and of secondary impacts on wildlife that may be dependent on aquatic organisms in a potentially affected water body. In the absence of commonly recognized guidelines, the results of these assessments will be virtually impossible to validate.

We have revised the rule to replace the potentially confusing phrase ''biological characteristics of downstream flows'' with clearer language requiring information on the biological characteristics of the stream downstream of the proposed refuse pile or coal mine waste impoundment. See paragraph (d)(1)(iii)(A) of final sections 780.25 and 784.16. We also replaced the requirement for an evaluation of the extent to which wildlife is dependent upon aquatic organisms with a requirement for an evaluation of the effects of the proposed operation on wildlife that is dependent upon the stream. In addition, we decided not to adopt the portion of proposed paragraph (d)(1)(ii) requiring that the analysis include an evaluation of the short-term and long-term impacts of each alternative on the aquatic ecosystem, both individually and on a cumulative basis. This proposed requirement is subsumed within the other analytical requirements of the final rule and would not likely result in the submission of any meaningful additional information.

However, we did not make further changes in response to this comment because the commenter did not explain how the requirements should be subdivided for clarity or why or how they create ambiguity. With respect to the commenter's statement that the assessments required by this rule will be impossible to validate in the absence of commonly recognized guidelines, we believe that the commenter may have misunderstood the purpose of the evaluation required by this rule. The data and analyses required by this rule are intended only to facilitate comparisons of the relative impacts of various alternatives on fish, wildlife, and related environmental values, not to establish reclamation standards. To the extent that the commenter may have meant that there are no generally accepted protocols for evaluating some of the listed characteristics, we believe that regulatory authorities have the technical capability to develop any needed protocols specific to conditions within their states.

One state regulatory authority urged us to revise the rule to include consideration of impacts such as traffic, dust and noise on local residents who may be affected by a proposed operation. While we encourage permit applicants to consider these factors in designing their operations, we do not consider them to be disturbances or adverse impacts on fish, wildlife, and related environmental values within the context of sections 515(b)(24) and 516(b)(11) of SMCRA. Therefore, we are not including those factors as required components of the alternatives analysis under paragraph (d)(1)(iii) of the final rule.

Paragraph (d)(1)(iii)(B) of the final rule allows the applicant to submit an analysis of alternatives prepared under 40 CFR 230.10 for Clean Water Act purposes in lieu of the analysis of impacts on fish, wildlife, and related environmental values required under paragraph (d)(1)(iii)(A) of the final rule. The regulatory authority will determine the extent to which that analysis satisfies the requirements of paragraph (d)(1)(iii)(A) of the final rule. These provisions of the final rule are similar to their counterparts in the proposed rule.

One commenter expressed dismay that the rule did not require that the regulatory authority accept the Clean Water Act analysis of alternatives as fully meeting the requirements of this rule. We do not believe that addition of this requirement to our rules would be appropriate because the alternatives analysis required under the final rule must address all environmental impacts

(both aquatic and terrestrial) of surface coal mining operations, whereas the analysis of alternatives required under Clean Water Act regulations focuses on impacts to waters of the United States. However, under the final rule, the SMCRA regulatory authority has the discretion to determine that an analysis of alternatives conducted for Clean Water Act purposes satisfies the requirements for an analysis of alternatives under this final rule, in whole or in part, as appropriate.

Paragraph (d)(1)(iv) of the final rule requires selection of the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems, to the extent possible. The proposed rule included an additional sentence specifying that if the applicant proposes to select a different alternative, the applicant must demonstrate, to the satisfaction of the regulatory authority, why implementation of the more environmentally protective alternative is not possible. The final rule does not include this sentence because we have determined that it is neither needed nor appropriate in view of the other changes that we have made to the rule. Specifically, we have added language to paragraph (d)(1)(ii) of the final rule limiting the alternatives that the applicant must identify to only those alternatives that are reasonably possible. In addition, we have added paragraph (d)(1)(i), which requires that the permit applicant explain, to the satisfaction of the regulatory authority, why an alternative that does not involve placement of coal mine waste in or within 100 feet of a perennial or intermittent stream is not reasonably possible.

The combination of these two changes means that the sentence in the proposed rule is no longer logical or appropriate because the only alternatives considered under the final rule are those that are reasonably possible, which means that, within the universe of reasonably possible alternatives identified, the applicant must select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values. In other words, the sentence in the proposed rule no longer has any relevance or meaning because, under the final rule, the applicant does not have the option of proposing alternatives that are not reasonably possible. Given that change, the final rule provides that the applicant must select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values.

Some commenters requested that we define or explain the term ''least overall adverse environmental impact.'' We do not believe that a meaningful definition is possible, given the somewhat subjective nature of the term and the site-specific nature of determinations under this rule. We expect that persons preparing permit applications and regulatory authority personnel reviewing those applications will use their best professional judgment in applying this standard. Consistent with the commonly accepted meaning of the words ''overall'' and ''environmental,'' we have modified the rule to clarify that the scope of the term includes impacts to terrestrial ecosystems, not just impacts to water quality and aquatic ecosystems. The relative importance of these three components, as well as the constituents of each of those components, will vary from site to site. Therefore, they are not readily defined in a national rule. However, we have replaced the term ''least overall adverse environmental impact'' with the term ''least overall adverse impact on fish, wildlife, and related environmental values'' to be consistent with the terminology of sections 515(b)(24) and 516(b)(11) of SMCRA and to provide greater clarity.

EPA encouraged both permit applicants and SMCRA regulatory authorities to use a watershed approach in determining which alternative would have the least overall adverse impact on fish, wildlife, and related environmental values:

> A watershed approach expands the informational and analytic basis of site selection decisions to ensure impacts are considered on a watershed scale rather than only project by project. The idea being locational factors (e.g., hydrology, surrounding land use) are important to evaluating the indirect and cumulative impacts of the project. Watershed planning efforts can identify and prioritize where preservation of existing aquatic resources are important for maintaining or improving the quality (and functioning) of downstream resources. The objective of this evaluation is to maintain and improve the quantity and quality of the watershed's aquatic resources and to ensure water quality standards (numeric and narrative criteria, anti-degradation, and designated uses) are met in downstream waters.
>
> Permit applicants should work with federal and state regulatory authorities to identify appropriate and available information, such as existing watershed plans, or in the absence of such plans, existing information on current watershed conditions and needs, past and current mining (and other development) trends, cumulative impacts of past, present, and reasonable foreseeable future mining activities, and chronic environmental problems (e.g., poor water quality, CWA 303(d)-listed streams, etc.) in the watershed. The regulatory authorities can also provide information on the appropriate watershed scale to consider. The level of data and analysis for implementing a watershed approach should be commensurate with the scale of the project, to the extent appropriate and reasonable.

We agree that the analysis of potential alternatives required under paragraph (d)(1)(ii) should appropriately consider the overall condition of the aquatic resources in the watershed, including any impacts from previous mining activities.

6. Proposed Paragraph (d)(2)

In the proposed rule, paragraph (d)(2) of sections 780.25 and 784.16 provided that each application for an operation that will generate or dispose of coal mine waste must describe the steps to be taken to avoid or, if avoidance is not possible, to minimize the adverse environmental impacts that may result from the construction of refuse piles and coal mine waste impoundments and impounding structures. The preamble to the proposed rule explained that this requirement applied to construction, maintenance, and reclamation of the alternative selected under paragraph (d)(1)(i)(C).

EPA recommended that we revise the rule to incorporate the concepts of avoidance and minimization of adverse environmental impacts into the alternatives analysis required by paragraph (d)(1) of sections 780.25 and 784.16 rather than placing them in a separate paragraph. EPA stated that the intended purpose of the alternatives analysis is to determine the means by which coal mine waste could be disposed of with the least adverse environmental impact. EPA further recommended removal of the preamble language in the proposed rule that specifies that the avoidance and minimization requirements in proposed paragraph (d)(2) only apply to the alternatives selected under proposed paragraph (d)(1)(i)(C). According to EPA, these changes would reduce potential uncertainty regarding the appropriate factors to consider in the alternatives analysis and would reinforce the requirement to evaluate different project locations and design elements when assessing the viability and environmental impacts of each location.

After considering these comments and the changes that we made to paragraph (d)(1) in the final rule, we have decided not to adopt proposed paragraph (d)(2) because provisions of that paragraph are now redundant and unnecessary. Under 30 CFR 816.97(a) and 817.97(a), the

operator must, to the extent possible, using the best technology currently available, minimize disturbances and adverse impacts on fish and wildlife and related environmental values and must achieve enhancement of those resources where practicable. Paragraph (f) of 30 CFR 816.97 and 817.97 provides that the operator must avoid disturbances to, enhance where practicable, restore, or replace wetlands and riparian vegetation along rivers and streams and bordering ponds and lakes. That paragraph also requires that the operator avoid disturbances to, enhance where practicable, or restore habitats of unusually high value for fish and wildlife. Paragraph (b)(1) of 30 CFR 780.16 and 784.21 requires that the fish and wildlife protection and enhancement plan in the permit application be consistent with the requirements of 30 CFR 816.97 and 817.97, respectively. Therefore, proposed paragraph (d)(2) would not add any requirements that are not already found in 30 CFR 816.97 and 817.97.

In addition, as revised in the final rule, paragraph (d)(1) of sections 780.25 and 784.16 provides that permit applicants must design their operations to avoid placement of coal mine waste in or within 100 feet of a perennial or intermittent stream to the extent possible. This new provision establishes avoidance of disturbance of perennial and intermittent streams and their buffer zones as the best technology currently available to comply with the requirement under sections 515(b)(24) and 516(b)(11) to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values. However, the statutory minimization requirement applies only ''to the extent possible,'' and, given the realities of geology (which dictates where coal is located), topography, and mining mechanics and economics, it is not always possible to implement the ultimate form of minimization, which is avoidance of disturbances, and still conduct surface coal mining operations. Consequently, paragraph (d)(1) of the final rule requires that the applicant avoid disturbance only to the extent possible. Paragraph (d)(1)(i) of the revised final rule provides that, when a permit applicant proposes to construct a refuse pile or coal mine waste impounding structure in or within 100 feet of a perennial or intermittent stream, the applicant must explain, to the satisfaction of the regulatory authority, why an alternative that does not involve placement of coal mine waste in or within 100 feet of a perennial or intermittent stream is not reasonably possible. Therefore, adoption of proposed paragraph (d)(2) is no longer appropriate because, as revised, paragraph (d)(1) of the final rule requires consideration of avoidance as part of the alternatives analysis and selection process.

7. Paragraphs (d)(2) and (3)

As proposed, we are combining former paragraphs (d) and (e) of sections 780.25 and 784.16, which contained design requirements for coal processing waste banks, and former paragraph (e), which contained design requirements for coal processing waste dams and embankments, into a substantially revised paragraph (d). Paragraph (d)(2), which contains design requirements specific to refuse piles, corresponds to former paragraph (d). Paragraph (d)(3), which contains design requirements specific to impoundments and impounding structures constructed of or intended to impound coal mine waste, corresponds to former paragraph (e). Because of changes in other provisions of paragraph (d), the nomenclature in the final rule differs slightly from the proposed rule in that proposed paragraph (d)(3) is codified as paragraph (d)(2) in the final rule and proposed paragraph (d)(4) is codified as paragraph (d)(3) in the final rule.

As proposed, final paragraph (d)(2) of sections 780.25 and 784.16 does not include the cross-reference to section 816.84 formerly found in section 780.25(d) and the cross-reference to section 817.84 formerly found in section 784.16(d). We are deleting those cross-references because final sections 780.25(d)(2) and 784.16(d)(2) pertain only to refuse piles, not to the coal mine waste impounding structures to which sections 816.84 and 817.84 apply. The deletion is not a substantive change because the former version of the rules did not pertain to coal mine waste impounding structures either.

Similarly, as proposed, final paragraph (d)(3) of sections 780.25 and 784.16 does not include the cross-reference to section 816.83 formerly found in section 780.25(e) and the cross-reference to section 817.83 formerly found in section 784.16(e). We are deleting those cross-references because final sections 780.25(d)(3) and 784.16(d)(3) pertain only to coal mine waste impoundments and impounding structures, not to the refuse piles to which sections 816.83 and 817.83 apply. The deletion is not a substantive change because the former version of the rules did not pertain to refuse piles either.

In addition, revised paragraph (d)(3) of sections 780.25 and 784.16 does not contain the requirement formerly found in sections 780.25(e) and 784.16(e) that each plan for an impounding structure comply with 30 CFR 77.216–1. As proposed, we are deleting this cross-reference because 30 CFR 77.216–1 does not include any design requirements. Instead, that rule consists solely of MSHA requirements for signage for existing impoundments and impoundments under construction. Consequently, there is no reason to retain this cross-reference because the referenced requirement is not relevant to preparation of plans or permit applications for proposed impoundments. Final paragraph (d)(3) retains the requirement that each plan for an impounding structure comply with 30 CFR 77.216–2, which contains design requirements for impoundments and impounding structures.

We received no comments on the changes discussed above.

C. Sections 780.28 and 784.28 Activities in or Adjacent to Perennial or Intermittent Streams

As explained in the preamble to the proposed rule, we are adding new sections 780.28 and 784.28 because the review and approval of proposals to disturb the surface of lands within 100 feet of perennial and intermittent streams is a permitting action, not a performance standard. Consequently, as proposed, we are moving the permitting aspects of the stream buffer zone rules, which were formerly codified at 30 CFR 816.57(a)(1) and 817.57(a)(1) as part of the performance standards in subchapter K, to new sections 780.28 and 784.28, which are part of the permitting requirements of subchapter G. We are also extensively revising the proposed rules in response to comments.

Sections 780.28 and 784.28 replace the rules formerly located at 30 CFR 816.57(a)(1) and 817.57(a)(1), which provided that the regulatory authority may authorize activities on the surface of lands within 100 feet of a perennial or intermittent stream only upon finding that the activities will not cause or contribute to the violation of applicable State or Federal water quality standards and will not adversely affect the water quantity and quality or other environmental resources of the stream. As discussed in Part VII of this preamble, we have decided to retain the scope of the original rules, which applied to perennial and intermittent streams, rather than change the scope to waters of the United States, as we proposed on August 24, 2007.

In the proposed rule, paragraph (a) of sections 780.28 and 784.28 defined their applicability, paragraph (b) established mapping requirements, paragraph (c) contained permit application requirements for obtaining a variance from the prohibition on disturbance of the buffer zone established under section 816.57 or section 817.57, paragraph (d) contained standards for regulatory authority approval of a requested variance, paragraph (e) established permit application and regulatory authority approval requirements for activities that are not subject to the prohibition on disturbance of the buffer zone, and paragraph (f) explained the relationship between our rules and Clean Water Act requirements.

One commenter suggested that we streamline and simplify both the structure of these sections and their contents. The commenter requested that we modify the rule to more clearly distinguish between activities that will be conducted in the buffer zone for a perennial or intermittent stream and those that are planned to be conducted in the stream itself. The commenter also requested that we avoid describing the stream buffer zone requirement as a ''prohibition'' and argued that the new mapping requirements in proposed paragraph (b) were unnecessary. We have accepted these comments and revised the rules accordingly. However, we did not adopt the actual rewrite of the rules that the commenter provided. In addition, while sections 780.28 and 784.28 of the final rule do not refer to the stream buffer zone requirements of sections 816.57 and 817.57 as a prohibition, we do not agree with the commenter that use of that term would be an incorrect characterization. We continue to use that term in the preamble when appropriate.

We also extensively restructured and revised these sections of the proposed rule in response to numerous comments (1) urging greater protection for headwater streams in view of their importance to the function and productivity of the stream as a whole, and (2) emphasizing that maintenance of undisturbed buffer zones of mature native vegetation is the best technology currently available to achieve the requirements of sections 515(b)(24) and 516(b)(11) of the Act concerning minimization of disturbances and adverse impacts on fish, wildlife, and related environmental values. Commenters objected to our preamble discussion of these sections in the proposed rule in which we stated that a rule establishing a buffer zone as the best technology currently available would be inconsistent with the definition of ''best technology currently available'' in 30 CFR 701.5 because it would not provide sufficient flexibility to accommodate advances in science and technology. In particular, commenters noted that we cited no technical or other support for the proposition that there are equally effective alternatives to buffer zones for purposes of meeting the requirements of sections 515(b)(24) and 516(b)(11) of SMCRA, which require that surface coal mining and reclamation operations be conducted so as to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available.

Our discussion of the meaning of best technology currently available in the preamble to the proposed rule focused on sediment control and meeting the requirements of sections 515(b)(10)(B)(i) and 516(b)(9)(B) of SMCRA, which provide that surface coal mining operations must be conducted in a manner that prevents, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or to runoff outside the permit area. We are not repeating that discussion in this preamble, although it remains valid with respect to sediment control. However, sediment control is the focus of only two of the four statutory provisions underlying the stream buffer zone rule and is the subject of only half of the definition of ''best technology currently available'' in 30 CFR 701.5.

We are revising sections 780.28 and 784.28 to clarify that maintenance of an undisturbed 100-foot buffer between the stream and mining and reclamation activities conducted on the surface of lands is the default best technology currently available to meet the underlying statutory requirements whenever the stream segment in question need not be disturbed and it is possible to leave an undisturbed 100-foot buffer. In other words, the final rule requires maintenance of an undisturbed l00-foot buffer unless the permit applicant can demonstrate to the satisfaction of the regulatory authority that maintaining a 100-foot buffer is either not reasonably possible or not necessary to meet the fish and wildlife and hydrologic balance protection provisions of the regulatory program. We anticipate that the latter demonstration will be difficult to make with respect to fish and wildlife protection requirements unless the stream is highly polluted or the land within the buffer has been and continues to be significantly disturbed or degraded by activities such as intensive agriculture.

In summary, we have added the following requirements in response to comments:

- The regulatory authority's decision must be made in the form of written findings.
- For activities to be conducted in a perennial or intermittent stream (including the activities listed in paragraphs (b)(2) through (b)(4) of sections 816.57 and 817.57), the permit application must demonstrate, and the regulatory authority must find, that avoiding disturbance of the stream is not reasonably possible. See Part VI.D. of this preamble for a more extensive discussion of our rationale for adopting the term ''reasonably possible'' and its consistency with statutory provisions. We also added a requirement that the permit include a condition requiring a demonstration of compliance with the Clean Water Act in the manner specified in paragraph (a)(2) of section 816.57 or section 817.57 before the permittee may conduct any activities in a perennial or intermittent stream that require authorization or certification under the Clean Water Act.
- For activities to be conducted within 100 feet of a perennial or intermittent stream, but not in the stream itself, the permit application must demonstrate, and the regulatory authority must find, that avoiding disturbance of the stream is either not reasonably possible or not necessary to meet the fish and wildlife and hydrologic balance protection provisions of the regulatory program. This requirement applies only to activities that will occur on land subject to the buffer requirement of paragraph (a)(1) of sections 816.57 and 817.57. It does not apply to activities conducted on lands included within the scope of paragraph (b) of sections 816.57 and 817.57; i.e., to what would have been the buffer zone for those segments of a perennial or intermittent stream for which the regulatory authority approves one or more of the activities listed in paragraphs (b)(1) through (b)(4) of section 816.57 or 817.57. See Part VIII.I. of this preamble.

For purposes of these sections, the requirement to demonstrate that avoidance of disturbance of the stream or buffer zone is not reasonably possible should not be construed as elevating environmental concerns over safety considerations, as prohibiting the conduct of surface coal mining operations that are not otherwise prohibited under SMCRA or other laws, as prohibiting maximization of coal

recovery to the extent provided in sections 816.59 and 817.59, or as requiring unreasonably excessive expenditures to avoid disturbance. However, by itself, the fact that designing and conducting the operation to avoid disturbance of the stream or buffer zone may be more expensive than designing and conducting it to include disturbance of the stream or buffer zone does not necessarily mean that avoidance of disturbance is not reasonably possible. Consistent with the statutory directive to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available, the permit applicant and the regulatory authority must weigh the environmental benefits of avoiding disturbance against the cost of doing so and determine the appropriate balance based on site-specific environmental, economic, operational, and engineering considerations, not the financial status of the permit applicant.

The U.S. Fish and Wildlife Service recommended that we revise these rules to include language similar to that used in our rules governing selection of alternatives under the alternatives analysis requirements for coal mine waste and excess spoil in sections 780.25 and 780.35. We are not adopting this recommendation because an alternatives analysis is not a part of our stream buffer zone rules. For those situations in which an alternatives analysis is required under section 780.25(d)(1) or 780.35(a)(3), there is no need to replicate that requirement here. Those rules and their preamble already provide guidance for the identification of reasonably possible alternatives and require selection of the alternative with the least overall adverse impact on fish, wildlife, and related environmental values.

The U.S. Fish and Wildlife Service also requested that we work with the Service to build a process into these sections of the final rule to protect unique and high value fish and wildlife resources and to develop design standards that would provide greater specificity as to how the decision criteria for granting variances from the stream buffer zone requirements will be applied. In response, we note that our fish and wildlife protection rules at 30 CFR 816.97(f) and 817.97(f) already require that the operator ''avoid disturbances to, enhance where practicable, or restore habitats of unusually high value for fish and wildlife.'' In addition, our permitting rules at 30 CFR 780.16 and 784.21 provide a role for the Service in determining fish and wildlife data collection requirements and reviewing the fish and wildlife protection and enhancement plan in the permit application. Therefore, we believe that our existing rules provide adequate opportunity for involvement by the Service and that addition of the provisions requested by the Service would be redundant. However, we are willing to work with the Service in developing suggested guidelines for application of paragraphs (c)(3)(ii) and (e)(2)(ii) of sections 780.28 and 784.28; *i.e.*, identifying measures and techniques that may constitute the best technology currently available under various situations to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, as required by sections 780.16(b), 784.21(b), 816.97(a), and 817.97(a).

Several commenters requested that we clarify in the preamble that section 784.28 applies only to lands upon which surface activities will exist and lands immediately adjacent to those lands, not to areas that merely overlie underground operations associated with an underground mine. We agree with the position stated by the commenters and have inserted the word ''surface'' in the heading and other provisions of section 784.28 to provide added clarity. One commenter expressed concern that use of the terms ''adjacent'' or ''adjacent area'' could result in the requirements of this rule being applied to lands overlying the underground mine workings because the definition of ''adjacent area'' in 30 CFR 701.5 includes areas with ''probable impacts from underground workings.'' We find the commenter's concern to be unfounded. The definition of adjacent area clearly states that the term's meaning must be determined in the context in which the term is used. Nothing in the context of the final rule that we are adopting today suggests that section 784.28 should or could be applied to the area overlying underground workings, except in the narrow situation in which that area happens to be coincident with or within 100 feet of an area upon which there will be surface activities associated with the underground mine.

Final sections 780.28 and 784.28 are identical with the exception of appropriate modifications to reflect the differences between surface mining and underground mining. Most significantly, in section 784.28, the term ''surface mining activities'' is replaced by language that clarifies that the requirements of that section apply only to surface activities conducted on the surface of lands in connection with an underground coal mining operation. The following paragraphs discuss each element of final sections 780.28 and 784.28.

1. Final Paragraph (a)

Paragraph (a)(1) of final sections 780.28 and 784.28 provides that, except as otherwise specified in paragraph (a)(2), those sections apply to applications to conduct activities in perennial or intermittent streams or on the surface of lands within 100 feet, measured horizontally, of perennial or intermittent streams. This paragraph reflects the fact that, under sections 816.57(a) and 817.57(a), we prohibit surface activities that would disturb the surface of lands within 100 feet of perennial and intermittent streams unless the regulatory authority approves a variance from that prohibition or unless the exception in paragraph (b) of sections 816.57 and 817.57 applies. We have added a clause clarifying that the l00-foot buffer zone must be measured horizontally, consistent with generally accepted practice and convention with respect to distance requirements. We originally proposed to include this clause in the mapping requirements of paragraph (b), but we moved it to paragraph (a) as a result of our decision not to adopt proposed paragraph (b). As we stated in the preamble to proposed paragraph (b), the 100 feet must be measured from the ordinary high water mark of the stream, consistent with the Corps of Engineers' practices for establishing jurisdictional limits for waters of the United States.

We are adding paragraph (a)(2)(i) to specify that sections 780.28 and 784.28 do not apply to applications under section 785.21 for permits for coal preparation plants not located within the permit area of a mine. This provision reflects the fact that we did not propose any changes to the rules concerning those preparation plants in sections 785.21 and 827.12 of our regulations and the fact that we do not intend for this final rule to alter those rules with respect to the applicability of the stream buffer zone rules to coal preparation plants not located in the permit area of a mine. Section 827.12 of our rules does not apply the stream buffer zone rule in sections 816.57 and 817.57 to coal preparation plants not located within the permit area of a mine. See 48 FR 20399, May 5, 1983.

We are adding paragraph (a)(2)(i) because, as part of this final rule, we are moving the permitting aspects of the previous version of the stream buffer zone rule in sections 816.57 and 817.57 to new sections 780.28 and 784.28.

Existing section 785.21(c) provides that coal preparation plants not located within the permit area of a mine are subject not only to the special permitting requirements of section 785.21, but also to ''all other applicable requirements of this subchapter.'' ''This subchapter'' refers to subchapter G of chapter VII, which contains the permitting requirements for all surface coal mining and reclamation operations. Thus, to ensure that section 785.21(c) is not now interpreted as including the newly added permitting requirements related to the stream buffer zone rule, we are adding the exception in paragraph (a)(2)(i) of sections 780.28 and 784.28.

We are also adding paragraph (a)(2)(ii) to clarify that paragraphs (b) through (e) of sections 780.28 and 784.28 do not apply to diversions of perennial or intermittent streams, which are governed by sections 780.29, 784.29, 816.43, and 817.43. This change reflects the 1983 rules, in which the findings and substantive requirements applicable to the approval of stream-channel diversions were specified primarily in the stream-channel diversion rules rather than the stream buffer zone rules. Paragraph (b)(1) of sections 816.43 and 817.43 contains the finding that the regulatory authority must make before approving a proposed stream-channel diversion. See Part VIII.G. of this preamble for a discussion of the changes that we are making to the stream-channel diversion rules.

2. Proposed Paragraph (b)

Proposed paragraph (b) would have required that maps submitted as part of the permit application show all waters of the United States that are located either within the proposed permit area or within the adjacent area, as that term is defined at 30 CFR 701.5. However, with our decision not to change the scope of the stream buffer zone rule from perennial and intermittent streams to waters of the United States, there is no longer any need for the proposed mapping requirement. The existing requirements in sections 779.25(a)(7) and 783.25(a)(7), which require that permit application maps show streams, lakes, ponds, and springs located within the proposed permit and adjacent areas, are adequate in that they require mapping of all perennial and intermittent streams located in or within 100 feet of the permit area. Therefore, comments opposing the adoption of proposed paragraph (b) are now moot and will not be discussed further.

3. Final Paragraph (b)

Paragraph (b) of sections 780.28 and 784.28 establishes application requirements for persons seeking to conduct activities in a perennial or intermittent stream as part of one of the activities listed in paragraphs (b)(2) through (b)(4) of section 816.57 or 817.57. Those activities include construction of bridge abutments and other stream-crossing structures in streams, construction of sedimentation pond embankments in streams, and construction of excess spoil fills and coal mine waste disposal facilities in streams. The application must demonstrate that avoiding disturbance of the stream is not reasonably possible and that the proposed activities will comply with all applicable requirements in paragraphs (b) and (c) of section 816.57 or 817.57. These requirements, which we have adopted in response to comments urging greater protection for headwater streams, as discussed in Part VI.D. of this preamble, are more specific than paragraph (e) of the proposed rule, which would have required only a demonstration that to the extent possible, the applicant would use the best technology currently available as required by the hydrologic balance protection requirements of 30 CFR 816.41(d) or 817.41(d) and the fish and wildlife protection requirements of 30 CFR 816.97(a) or 817.97(a).

4. Final Paragraph (c)

Paragraph (c) of sections 780.28 and 784.28 contains application requirements for persons seeking to conduct surface activities that would disturb the surface of land within 100 feet of a perennial or intermittent stream, but that would not take place in the stream itself. This paragraph applies only to activities that will occur on lands subject to the buffer requirement of paragraph (a) of sections 816.57 and 817.57. It does not apply to activities conducted on lands included within the scope of paragraph (b) of sections 816.57 and 817.57; *i.e.*, to what would have been the buffer zone for stream segments for which the regulatory authority approves one or more of the activities listed in paragraphs (b)(1) through (b)(4) of section 816.57 or 817.57.

Under paragraph (c), the application must demonstrate that avoiding disturbance of land within 100 feet of the stream either is not reasonably possible or is not necessary to meet the fish and wildlife and hydrologic balance protection provisions of the regulatory program. In addition, the application must identify any lesser buffer that is proposed instead of maintaining a 100-foot buffer between surface activities and the perennial or intermittent stream. Finally; the application must explain how the lesser buffer, together with any other proposed protective measures, constitute the best technology currently available to (1) prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible, as required by section 780.21(h) or 784.14(g) and section 816.41(d)(1) or 817.41(d)(1), and (2) minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, as required by section 780.16(b) or 784.21(b) and section 816.97(a) or 817.97(a). Final paragraph (c) is similar to paragraph (c) of the proposed rule except for the first of these requirements [the one codified in paragraph (c)(1)], which we added in response to comments urging greater protection for headwater streams, as discussed in Part VI.D. of this preamble.

Paragraph (c)(3) of sections 780.28 and 784.28 refers to certain other OSM rules. Among those rules, sections 816.41(d) and 817.41(d) require, in relevant part, that mining operations prevent, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area. They implement, in part, the sedimentation prevention requirements of sections 515(b)(10)(B)(i) and 516(b)(9)(B) of SMCRA, respectively. Sections 816.97(a) and 817.97(a) require, in relevant part, that, to the extent possible using the best technology currently available, the operator minimize disturbances and adverse impacts on fish, wildlife, and related environmental values. They implement, in part, the fish and wildlife protection requirements of sections 515(b)(24) and 516(b)(11) of SMCRA, respectively. Sections 780.21(h) and 784.14(g) require that each permit application include a hydrologic reclamation plan designed to implement, among other things, the requirements of sections 816.41(d) and 817.41(d), respectively. Sections 780.16(b) and 784.21(b) require that each permit application include a fish and wildlife protection and enhancement plan designed to implement the requirements of sections 816.97(a) and 817.97(a), respectively.

5. Final Paragraph (d)

Paragraph (d)(1) of sections 780.28 and 784.28 provides that before approving any surface activities in a perennial or intermittent stream, the regulatory authority must find in

writing that avoiding disturbance of the stream is not reasonably possible and the plans submitted with the application meet all applicable requirements in paragraphs (b) and (c) of section 816.57 or 817.57. The findings are the same as the demonstration that the applicant must make in the application under paragraph (b) of these sections. These findings, which we have adopted in response to comments urging greater protection for headwater streams, as discussed in Part VI.D. of this preamble, are more specific than the corresponding provisions of paragraph (e) of the proposed rule, which would have required only that the regulatory authority find that, to the extent possible, the applicant will use the best technology currently available as required by the hydrologic balance protection requirements of 30 CFR 816.41(d) or 817.41(d) and the fish and wildlife protection requirements of 30 CFR 816.97(a) or 817.97(a).

We are also adopting a new paragraph (d)(2) of sections 780.28 and 784.28 in response to comments that we received on proposed paragraph (f) of those sections. Paragraph (d)(2) provides that before approving a permit application in which the applicant proposes to conduct surface activities in a perennial or intermittent stream, the regulatory authority must include a permit condition requiring a demonstration of compliance with the Clean Water Act in the manner specified in paragraph (a)(2) of sections 816.57 and 817.57 before the permittee may conduct those activities. This requirement applies to the extent that the activities require authorization or certification under the Clean Water Act. Please refer to the preamble discussion of paragraph (f) for an explanation of the rationale for this provision.

6. Final Paragraph (e)

Paragraph (e) of sections 780.28 and 784.28 specifies that before approving any surface activities that would disturb the surface of land subject to the buffer requirement of section 816.57(a)(1) or 817.57(a)(1), the regulatory authority must find in writing that the applicant has made the demonstrations required under paragraph (c) of sections 780.28 and 784.28. The final rule is similar to paragraph (d) of the proposed rule except that we decided not to adopt the provision in paragraph (d)(1) of the proposed rule that would have established a determination by the regulatory authority that the measures proposed by the applicant would be no less effective in meeting the requirements of the regulatory program than maintenance of an undisturbed buffer under paragraph (a) of section 816.57 or 817.57 as a prerequisite for approval.

Some commenters objected to this proposed requirement, noting that the proposed rule did not include a corresponding requirement for a similar demonstration in the permit application. They also stated that the focus of any finding should be on whether the buffer and related measures were effective in meeting other regulatory program requirements, and that it would be very difficult to quantify the theoretical effectiveness of a 100-foot buffer compared to a lesser buffer on a site-specific basis, as the proposed rule would have required. We agree. Therefore, we are not including a requirement for the proposed finding in the final rule. The replacement finding in paragraph (e)(1) of sections 780.28 and 784.28 in the final rule has a counterpart in the permit application requirements of paragraph (c) and focuses on whether and how the statutory and regulatory requirements to use the best technology currently available to prevent additional contributions of suspended solids to streamflow or runoff outside the permit area to the extent possible and to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible will be met.

The findings required by paragraph (e) of sections 780.28 and 784.28 replace the finding that the regulatory authority had to make under paragraph (a)(1) of the 1983 version of sections 816.57 and 817.57 before authorizing activities that would disturb the surface of lands within 100 feet of a perennial or intermittent stream. The provision that we are deleting from sections 816.57 and 817.57 stated that, before authorizing an activity closer than 100 feet to a perennial or intermittent stream, the regulatory authority must find that the activity will not cause or contribute to the violation of applicable State or Federal water quality standards and will not adversely affect the water quantity and quality or other environmental resources of the stream. That requirement has no direct counterpart in sections 515(b)(10)(B)(i), 515(b)(24), 516(b)(9)(B), or 516(b)(11) of SMCRA, which, as previously discussed, are the provisions of SMCRA that form the basis for the stream buffer zone rule.

The introductory language of sections 515(b)(10) and 516(b)(9) of SMCRA does provide that performance standards for surface coal mining operations must include a requirement for the minimization of disturbances to the quality and quantity (or, in the case of section 516(b)(9), just the quantity) of water in surface and ground water systems. However, that language does not stand alone as an independent requirement. Instead, when read in its entirety, section 515(b)(10) provides that the requirement for minimization of disturbances to water quality and quantity must be achieved by implementation of the measures and techniques described in subparagraphs (A) through (F) of section 515(b)(10). Similarly, section 516(b)(9) provides that the requirement for minimization of disturbances to water quantity must be achieved by implementation of subparagraphs (A) and (B) of section 516(b)(9).

In addition, sections 515(b)(10)(B)(i) and 516(b)(9)(B) refer only to the prevention of additional contributions of suspended solids. Those paragraphs provide that contributions of suspended solids to streamflow must not be in excess of requirements set by applicable State or Federal law, but they do not mention any other water quality parameter. Therefore, that provision by itself does not authorize the required finding previously found in paragraph (a)(1) of sections 816.57 and 817.57. Furthermore, the SMCRA regulatory authority is not necessarily in the best position to determine whether a proposed activity will cause or contribute to a violation of applicable State or Federal water quality standards for any parameter. Those standards and parameters are established and implemented under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*), not SMCRA, and are sometimes administered by an agency other than the SMCRA regulatory authority. Under 30 CFR 780.18(b)(9) and 784.13(b)(9), the SMCRA permit application must include a description of the steps to be taken to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Clean Water Act (33 U.S.C. 1251 *et seq.*), and other applicable air and water quality laws and regulations, but there is no requirement that the SMCRA regulatory authority pass judgment on the adequacy of that description or on the adequacy of the steps that the applicant proposes to take.

As discussed above, sections 515(b)(10)(B)(i) and 516(b)(9)(B) of SMCRA provide that ''in no event shall such contributions [of suspended solids] be in excess of requirements set by applicable State or Federal law.'' This language originated in H.R. 2, the House of Representatives' version of the legislation that became SMCRA. In

describing the intent of these provisions, the House Committee on Interior and Insular Affairs stated:

> In cases where there will be water discharge from the mine sites, the number of such discharges should be minimized by collectively controlling and channeling the watercourse into an acceptable receiving stream or area location. It also should be understood that prior to any discharge off the permit area, the discharge should be treated to remove pollutants that may be present. Such treatment must, at a minimum, meet the requirements of this Act and insure compliance with applicable local, State, or Federal water quality requirements.

H. Rep. No. 95–218 at 116 (1977).

Nothing in the language of the Act or the legislative history quoted above mandates retention of the provision that we are removing from paragraph (a)(1) of sections 816.57 and 817.57. The statutory provisions are clearly intended to ensure treatment of discharges from the minesite that leave the permit area. Those requirements are already addressed by the performance standards at 30 CFR 816.42 and 817.42, which require that discharges of water from areas disturbed by surface or underground mining activities ''be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR Part 434.'' Similarly, other existing rules already cover the permit application phase in that the determination of probable hydrologic consequences of the proposed operation must include findings on what impact the proposed operation will have on sediment yields from the disturbed area and certain water quality parameters, including suspended solids. See 30 CFR 780.21(f)(3)(iv) and 784.14(e)(3)(iii). Under 30 CFR 780.21(h) and 784.14(g), the hydrologic reclamation plan submitted with the permit application must include a description of how the relevant requirements of 30 CFR part 816 or 817, including the water quality requirements of section 816.42 or 817.42, will be met and the measures to be taken to ''prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow.''

In addition, the absolute nature of the ''will not adversely affect'' language formerly found in paragraph (a)(1) of sections 816.57 and 817.57 is inconsistent with paragraphs (b)(10)(B)(i) and (b)(24) of section 515 and paragraphs (b)(9)(B) and (b)(11) of section 516 of the Act, all of which provide that surface coal mining operations must be conducted to meet the requirements of those paragraphs ''to the extent possible'' using the ''best technology currently available.'' The appropriate standard under sections 515(b)(24) and 516(b)(11) is minimization of disturbances and adverse impacts on fish, wildlife, and related environmental values. While avoidance is the ultimate form of minimization, there is no statutory basis for a rule that requires absolute avoidance of all adverse effects. Such a rule would run afoul of the plain language of sections 515(b)(24) and 516(b)(11) the Act, which requires only minimization of disturbances and adverse impacts and then only to the extent possible using the best technology currently available.

As discussed more fully in Part III.D. of this preamble, the preamble to the 1983 version of the stream buffer zone rules (''the 1983 preamble'') recognizes that the protection afforded by those rules need not be absolute. It acknowledges that some adverse impacts on hydrology and fish, wildlife, and related environmental values are unavoidable because of the nature of surface coal mining operations. Furthermore, the 1983 preamble states that ''OSM recognizes that some surface mining activities can be conducted within 100 feet of a perennial or an intermittent stream without causing *significant* adverse impacts on the hydrologic balance and related environmental values,'' thus implying that some adverse impacts would occur. 48 FR 30313, col. 1, June 30, 1983, emphasis added. Similarly, ''final § 816.57 is intended to protect *significant* biological values in streams.'' *Id.,* col. 3, emphasis added. And, with respect to stream diversions, the 1983 preamble specifies that—

> Alteration of streams may have adverse aquatic and ecological impacts on both diverted stream reaches and other downstream areas with which they merge. However, final § 816.57(a) will *minimize* these impacts.

Id. at 30315, col. 1, emphasis added.

Our removal of the requirement formerly found in 30 CFR 816.57(a)(1) and 817.57(a)(1) for a finding concerning applicable State or Federal water quality standards does not authorize activities that would constitute or result in a violation of State or Federal water quality standards. Section 702(a) of SMCRA provides that nothing in SMCRA may be construed as superseding, amending, modifying, or repealing the Clean Water Act, its implementing regulations, State laws enacted pursuant to the Clean Water Act, or other Federal laws relating to preservation of water quality. In addition, our regulations at 30 CFR 816.42 and 817.42 require that discharges of water from disturbed areas ''be made in compliance with all applicable State and Federal water quality laws and regulations.''

In the preamble to the proposed rule, we sought comment on whether we should amend 30 CFR 816.42 and 817.42, which currently address only discharges of water, to include a paragraph specifying, for informational purposes, that discharges of dredged or fill materials into waters of the United States must comply with all applicable State and Federal requirements. Commenters were divided on the merits of this potential rule change. We have decided against adding this provision, both because of the possibility that the language might be erroneously interpreted as being enforceable under SMCRA rather than as just an informational provision and because adding the language is unlikely to be helpful to the regulated community, which is well aware of the need to comply with both SMCRA and the various elements of Clean Water Act regulatory programs.

7. Final Paragraph (f)

Paragraph (f) of sections 780.28 and 784.28 summarizes the relationship between SMCRA permitting actions and Clean Water Act requirements. Paragraph (f)(1) provides that every permit application must identify the authorizations that the applicant anticipates will be needed under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, and describe the steps that the permit applicant has taken or will take to procure those authorizations. This provision implements, in part, section 508(a)(9) of SMCRA, which requires that each permit application include ''the steps to be taken to comply with applicable air and water quality laws and regulations.''

Paragraph (f)(2) of sections 780.28 and 784.28 specifies that, if the permit application meets all applicable requirements of subchapter G (the permitting regulations), the regulatory authority will process the permit application and may issue the permit before the applicant obtains all necessary authorizations under the Clean Water Act, 33 U.S.C. 1251 *et seq.* This arrangement may facilitate review by the Corps of any preconstruction notification submitted by the permit applicant under Nationwide Permits 21, 49, and 50. The nationwide permits

apply only if the SMCRA permit has already been issued or if the application is being processed as part of an integrated permit processing procedure. See 72 FR 11092, 11184, and 11191, March 12, 2007.

As proposed, paragraph (f)(2) would have provided that the permittee may not initiate any activities for which Clean Water Act authorization or certification is required until that authorization or certification is obtained. The preamble to the proposed rule stated that we considered that provision informational. We requested comment on whether the provision should remain informational or whether we should revise our rules to require its inclusion as a SMCRA permit condition, which would mean that the prohibition on initiation of activities before obtaining all necessary Clean Water Act authorizations and certifications would be independently enforceable under SMCRA. See 72 FR 48901, August 24, 2007.

Commenters were divided on this issue. The U.S. Fish and Wildlife Service and the Geologic and Water Resources Divisions of the National Park Service supported adoption of a rule requiring a permit condition under SMCRA. The EPA also supported adoption of a requirement for a permit condition under SMCRA, stating that such a requirement would enhance compliance with Clean Water Act requirements. One state regulatory authority opposed adoption of a requirement for a permit condition; the commenter instead recommended that coordination of permitting and enforcement of Clean Water Act requirements be left to the states and the Corps. Comments from the mining industry strongly opposed adoption of a rule that would impose a permit condition under SMCRA, expressing the fear that it would only result in more duplication and confusion in regulation of the coal mining industry. One commenter stated that, if the permittee needs to comply with the Clean Water Act, then the requirements of that statute should be enforced according to the statutory scheme specified in the Clean Water Act.

In response to the comments supporting adoption of a rule requiring imposition of a permit condition, we are adding a new paragraph (d)(2) to sections 780.28 and 784.28. That paragraph provides that before approving a permit application in which the applicant proposes to conduct surface activities in a perennial or intermittent stream, the regulatory authority must include a permit condition requiring a demonstration of compliance with the Clean Water Act in the manner specified in paragraph (a)(2) of sections 816.57 and 817.57 before the permittee may conduct those activities. This requirement applies to the extent that the activities require authorization or certification under the Clean Water Act. New paragraph (a)(2) of sections 816.57 and 817.57 provides that surface activities, including those activities identified in paragraphs (b)(1) through (b)(4) of sections 816.57 and 817.57, may be authorized in perennial or intermittent streams only where those activities would not cause or contribute to the violation of applicable State or Federal water quality standards developed pursuant to the Clean Water Act, as determined through certification under section 401 of the Clean Water Act or a permit under section 402 or 404 of the Clean Water Act.

However, in adopting these rules, we reiterate that nothing in SMCRA provides the SMCRA regulatory authority with jurisdiction over the Clean Water Act or the authority to determine when a permit or authorization is required under the Clean Water Act. Under paragraphs (a) and (a)(2) of section 702 of SMCRA, nothing in SMCRA (and, by extension, regulations adopted under SMCRA) may be construed as superseding, amending, modifying, or repealing the Clean Water Act or any state laws or state or federal rules adopted under the Clean Water Act. In addition, nothing in the Clean Water Act vests SMCRA regulatory authorities with the authority to enforce compliance with the permitting and certification requirements of that law.

We have revised proposed paragraph (f)(2) to be consistent with these principles. As revised, final paragraph (f)(2) provides that issuance of a SMCRA permit does not authorize the permittee to initiate any activities for which Clean Water Act authorization or certification is required. The final rule further states that ''[i]nformation submitted and analyses conducted under subchapter G of this chapter may inform the agency responsible for authorizations and certifications under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, but they are not a substitute for the reviews, authorizations, and certifications required under those sections of the Clean Water Act.'' Paragraph (f)(2) does not impose any new requirements under SMCRA, nor does it authorize the regulatory authority to make any determinations required under the Clean Water Act.

D. Section 780.35 Disposal of Excess Spoil (Surface Mines)

1. General Discussion of the Rule and the Rationale for the Rule Changes

The environmental impacts of fills and other structures associated with the disposal of excess spoil from surface coal mining operations, and of coal mine waste, have been the subject of controversy, largely because they involve the filling of substantial portions of stream valleys, especially in central Appalachia. This controversy has highlighted the need to ensure that excess spoil creation is minimized to the extent possible, and that excess spoil and coal mine waste disposal facilities are located and designed to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available, as required by sections 515(b)(24) and 516(b)(11) of SMCRA.

Prior to the adoption of this final rule, our regulations pertaining to the disposal of excess spoil primarily focused on ensuring that fills are safe and stable. This final rule adds several requirements intended to promote environmental protection, including minimization of the adverse environmental impacts of fill construction in perennial and intermittent streams. Several commenters argued that we have no authority to adopt these regulations because section 515(b)(22) of SMCRA, which establishes standards for the disposal of excess spoil, does not include any requirements for protection of fish, wildlife, and related environmental values, but instead focuses on engineering standards intended to promote stability, prevent mass movement, and control infiltration of water. We do not agree with the commenters. The rule changes that we are adopting today implement, in part, the requirement in section 515(b)(24) of SMCRA that surface coal mining and reclamation operations be conducted in a manner that minimizes disturbances to, and adverse impacts on, fish, wildlife, and related environmental values to the extent possible, using the best technology currently available. Section 515(b)(24) applies to the disposal of excess spoil both by its own terms (disposal of excess spoil is a part of surface coal mining and reclamation operations) and through section 515(b)(22)(I), which requires that the placement of excess spoil meet ''all other provisions of this Act.'' SMCRA contains numerous environmental protection requirements that apply to all

surface coal mining and reclamation operations and all aspects of those operations, including the disposal of excess spoil. The fact that section 515(b)(22) does not mention environmental protection in no way suggests that excess spoil fills need not comply with the environmental protection provisions of SMCRA or that we lack the authority to adopt regulations establishing environmental protection requirements for those structures.

One commenter stated that we should limit the applicability of the new regulations governing excess spoil placement to operations in steep-slope areas where the spoil will be placed in stream channels. The commenter also stated that the generation and disposal of excess spoil as part of non-steep slope operations has never been identified as a significant issue and that we have not provided any significant justification in the rulemaking record to support a need for applying the excess spoil rule to non-steep-slope operations. We disagree. We believe that these changes to our rules have merit wherever the potential exists for operations to generate excess spoil and that they should apply nationwide. Streams in non-steep-slope areas are no less significant in terms of fish, wildlife, and related environmental values than are streams in steep-slope areas. Excess spoil fills outside central Appalachia are rare but they do occur.

Several commenters requested that the preamble clarify that the term ''excess spoil'' does not include initial box cut spoil from the first cut in an area mine, even though it will be placed outside the mined area. Nothing in this final rule alters the definition of ''excess spoil'' or how that term is applied or interpreted. As defined in section 701.5, the term ''excess spoil'' means—

> Spoil material disposed of in a location other than the mined out area; provided that spoil material used to achieve the approximate original contour or to blend the mined-out area with the surrounding terrain in accordance with §§ 816.102(d) and 817.102(d) of this chapter in non-steep slope areas shall not be considered excess spoil.

The preamble to the definition of ''excess spoil'' states that—

> In the final rule, spoil used to merely blend the mined-out area with the surrounding terrain need not be treated as excess spoil. Thus, spoil from box cuts or first cuts in non-steep slope areas would not be excess spoil when it is used to achieve approximate original contour; i.e., to blend the mined-out area into the surrounding terrain according to § 816.102(d) of the backfilling and grading rules. * * * If, however, the spoil from a box cut or a first cut is deposited on slopes with angles defined as steep slopes, the box cut or first cut spoil must be handled as excess spoil in accordance with §§ 816.71 and 817.71.

48 FR 32911 (July 19, 1983).

Paragraph (a)(1) of section 780.35 of the final rule requires that surface coal mining operations be designed to minimize the creation of excess spoil to the extent possible. Paragraph (a)(2) of section 780.35 of the final rule specifies that the maximum cumulative design volume of all proposed excess spoil fills within the permit area must be no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate. These requirements should reduce the adverse impacts of the operation on fish, wildlife, and related environmental values by minimizing the amount of land and water disturbed to construct excess spoil fills.

Paragraph (a)(3) of section 780.35 of the final rule requires that the permit application include an analysis of the impacts on fish, wildlife, and related environmental values of a reasonable range of alternatives for disposal of excess spoil, including variations in the number, size, location, and configuration of proposed fills. Only reasonably possible alternatives that differ significantly in their impacts on fish, wildlife, and related environmental values need be considered. The analysis must consider impacts on both terrestrial and aquatic ecosystems. In addition, when construction of the excess spoil fill would involve placement of excess spoil in perennial or intermittent streams, the rule specifies certain factors that must be considered as part of the evaluation of impacts on fish, wildlife, and related environmental values to ensure adequate assessment of impacts on water quality and aquatic ecosystems, which are among the ''related environmental values'' mentioned in sections 515(b)(24) and 516(b)(11) of SMCRA. The applicant must select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems.

We are adopting these rules to improve the analysis of permit applications and permitting decisions under SMCRA. SMCRA itself does not require an analysis of alternatives. However, we believe that the alternatives analysis requirement is a reasonable means of implementing sections 515(b)(24) and 516(b)(11) of SMCRA. Those provisions of the Act require that surface coal mining and reclamation operations be conducted in a manner that minimizes disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

The addition of these requirements to our rules is consistent with section 102(d) of SMCRA, which provides that one of the purposes of SMCRA is to assure that surface coal mining operations are conducted so as to protect the environment. In addition, the rules are consistent with section 102(f) of SMCRA, which provides that another purpose of SMCRA is to strike a balance between protection of the environment and the nation's need for coal as an essential energy source. The rule changes that we are adopting today discourage the disturbance of perennial and intermittent streams and their buffers, but they also recognize that it is not reasonably possible to do so in all cases for all types of surface coal mining operations. For example, if the creation of excess spoil as part of a surface coal mining operation is unavoidable, the final rule would not prevent construction of the fills needed to accommodate the excess spoil. Instead, our new and revised rules are intended to ensure that surface coal mining and reclamation operations are planned and conducted in a manner that minimizes adverse environmental impacts from the construction of fills for the disposal of excess spoil to the extent that it is possible to do so without restricting coal production in a manner inconsistent with SMCRA in general and sections 816.59 and 817.59 of our regulations in particular. Section 201(c)(2) of SMCRA, 30 U.S.C. 1211(c)(2), which directs the Secretary of the Interior to publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of SMCRA, provides additional authority for the adoption of these rules.

One state regulatory authority stated that trying to balance the fill minimization requirements of paragraphs (a)(1) and (2) with the alternatives analysis and alternative selection requirements of paragraph (a)(3) will be extremely difficult. According to the commenter, the best location to place excess spoil to minimize the footprint of the fill is not likely to be the best location environmentally. The commenter suggested that guidance may be needed to address this potential conflict.

We do not agree that the requirements of these paragraphs are in conflict. Paragraph (a)(1) requires that the volume of excess spoil created by the operation be minimized by returning as

much of the spoil as possible to the mined-out area, after taking into consideration applicable regulations concerning final contours, safety, stability, environmental protection, and the postmining land use. Paragraph (a)(2) requires that the operation be designed so that the maximum cumulative volume of all planned excess spoil fills does not exceed the capacity needed to accommodate the anticipate cumulative volume of excess spoil that the proposed operation will generate. Nothing in these two paragraphs in any way contradicts the provision in paragraph (a)(3) requiring selection of the alternative with least overall adverse impact on fish, wildlife, and related environmental values.

As proposed, this final rule consolidates most fill design and permitting requirements in the permit application regulations in sections 780.35 and 784.19, rather than splitting them between those regulations and the performance standards in sections 816.71 and 817.71, as they were before the adoption of this rule. Also, as proposed, the final rule revises the rule language to remove inconsistencies between the performance standards and the permitting requirements, to eliminate redundancies, and to be more consistent with plain language principles.

The final rule adds paragraphs (a)(1) through (a)(4) to section 780.35 to establish environmentally-oriented requirements for permit applications for operations that propose to generate excess spoil. In the remainder of this part of the preamble, we discuss those and other provisions of the final rule and the comments received on their counterparts in the proposed rule.

2. Final Paragraphs (a)(1) and (a)(2)

Paragraph (a)(1) of section 780.35 provides that each application for an operation that would generate excess spoil must include a demonstration, prepared to the satisfaction of the regulatory authority, that the operation has been designed to minimize the volume of excess spoil to the extent possible, thus ensuring that as much spoil as possible is returned to the mined-out area. The demonstration must take into consideration applicable regulations concerning restoration of the approximate original contour, safety, stability, and environmental protection and the needs of the proposed postmining land use. Some or all of those factors may limit the amount of spoil that can be returned to the mined-out area, especially the requirements related to safety, stability, and postmining land use. Also, if the regulatory authority does not approve the proposed postmining land use, the applicant and the regulatory authority will need to revisit the demonstration to determine whether it must be revised to reflect the needs and attributes of the postmining land use that is finally approved.

Paragraph (a)(2) of section 780.35 requires that the application include a demonstration that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate.

The goal of both paragraphs (a)(1) and (a)(2) is to minimize fill footprints and thus minimize disturbances of forests, perennial and intermittent streams, and riparian vegetation, consistent with the requirement in sections 515(b)(24) and 516(b)(11) of SMCRA to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available.

Since the mid-1990's, the extent of excess spoil fill construction in central Appalachia has been controversial, especially when fills bury stream segments. As part of our oversight activities, we conducted studies in 1999 in Kentucky, Virginia, and West Virginia to determine how state regulatory authorities were administering SMCRA regulatory programs regarding restoration of approximate original contour. From our review of permit files and reclaimed mines, we determined that, typically, some of the spoil placed in excess spoil fills could have been retained on or returned to mined-out areas. See ''An Evaluation of Approximate Original Contour and Postmining Land Use in Kentucky'' (OSM, September 1999); ''An Evaluation of Approximate Original Contour Variances and Postmining Land Uses in Virginia'' (OSM, September 1999); and ''Final Report: An Evaluation of Approximate Original Contour and Postmining Land Use in West Virginia'' (OSM, May 1999).

In many instances, we found that the permit application overestimated the anticipated volume of excess spoil that the operation would produce. In addition, fills were designed and constructed larger than necessary to accommodate the anticipated excess spoil, which resulted in the unnecessary disturbance of additional land. Kentucky, Virginia, and West Virginia worked with us to develop enhanced guidance on material balance determinations, spoil management, and approximate original contour determinations to correct these problems to the extent feasible under the existing regulations. We also developed guidance for use under the Tennessee Federal regulatory program. In most cases, the regulatory authorities in those states have adopted policies based on that guidance for use in reviewing permit applications.

Some industry commenters opposed the new excess spoil minimization requirements, citing the preceding discussion as evidence that the policies appear to be satisfactorily addressing any past issues and that there is no longer any problem that would justify rulemaking. Other industry commenters supported these provisions to the extent that they codify policies that are working in the central Appalachian states.

We believe that adoption of proposed paragraphs (a)(1) and (a)(2) as final rules is appropriate because policies are subject to change. The final rules that we are adopting today reinforce the basis for the policies in place in Kentucky, Tennessee, Virginia, and West Virginia. They also strengthen the enforceability of decisions based on those policies and provide national consistency by ensuring that certain basic requirements will be applied nationwide, including in those states that have not adopted policies. We also believe that the environment, the public, and the regulated community are best served by the adoption of national regulations to clarify environmental considerations concerning the generation and disposal of excess spoil.

3. Final Paragraph (a)(3)

As proposed, paragraph (a)(3) of section 780.35 would have required that each application include a description of all excess spoil disposal alternatives considered and an analysis of the environmental impacts of those alternatives. In the final rule, we extensively revised and reorganized paragraph (a)(3) in response to the many comments that we received on this portion of the proposed rule.

Discussion of General Comments Received on Proposed Paragraph (a)(3)

Industry commenters strongly opposed the requirement in proposed paragraph (a)(3) for an analysis of alternatives for excess spoil fills. The commenters cited a variety of reasons, including excessive costs, delays in permitting, duplication of effort with the Clean Water Act, the probable lack of environmental benefits, the potential for conflict between the SMCRA

regulatory authority's application of the alternatives analysis requirement and the approach adopted by the Clean Water Act permitting authority, a lack of justification under SMCRA, exceeding the intent of SMCRA, and a fear that this requirement could result in a never-ending cycle of analysis and litigation concerning whether the correct alternative was selected by the permit applicant and approved by the state regulatory authority. Many commenters stated that the requirement for an alternatives analysis has no basis in SMCRA and instead appears to be a mixture of provisions borrowed from the National Environmental Policy Act and the Clean Water Act.

Nothing in the proposed alternatives analysis requirement in paragraph (a)(3) of sections 780.35 and 784.19 of the final rule is based upon the National Environmental Policy Act. We respectfully disagree with those commenters who argued that the requirement for an alternatives analysis is a Clean Water Act requirement that has no basis or justification under SMCRA and that exceeds the intent of SMCRA. We acknowledge that we derived this element of our proposed rules from the alternatives analysis requirements of the 404(b)(1) Guidelines in 40 CFR part 230, which include the substantive environmental criteria used in evaluating activities regulated under section 404 of the Clean Water Act. However, we concluded that a modified version of the alternatives analysis requirements in the 404(b)(1) Guidelines is an appropriate means of obtaining the background data and analyses that both the applicant and the regulatory authority need to make informed decisions concerning compliance with the requirements of sections 515(b)(24) and 516(b)(11) of SMCRA, which provide that surface coal mining and reclamation operations must be conducted to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available. Therefore, paragraphs (a)(3)(ii) and (a)(3)(iii) of sections 780.35 and 784.19 of this final rule apply the alternatives analysis requirement to all applications that propose to place excess spoil in or within 100 feet of a perennial or intermittent stream. In addition, paragraph (a)(3)(iii)(A) of these sections of the final rule applies more detailed analytical requirements to applications that propose to place excess spoil in perennial or intermittent streams as opposed to applications that propose to place excess spoil only within 100 feet of those streams.

One commenter stated that the rule should not require an alternatives analysis when the permit applicant proposes to use excess spoil to reclaim benches and highwalls on abandoned mine lands. Alternatively, the commenter suggested that any reasonably possible alternative that consisted solely of placement on abandoned mine benches should be deemed the alternative with the least overall adverse environmental impact. We interpret these comments as referring to excess spoil fills constructed on preexisting benches under 30 CFR 816.74 and 817.74. We encourage the use of excess spoil to reclaim abandoned mine lands, but we do not agree that applications proposing to use excess spoil for that purpose should be exempt from compliance with the alternatives analysis requirements of paragraph (a)(3). Perennial and intermittent streams merit special consideration regardless of whether those streams flow through undisturbed land or abandoned mine lands. Also, abandoned mine lands vary widely in quality, so we do not agree that an alternative proposing to place excess spoil only on abandoned mine lands should be deemed the alternative with the least overall adverse impact on fish, wildlife, and related environmental values. However, the alternatives analysis requirement applies only if the applicant proposes to place excess spoil in or within 100 feet of a perennial or intermittent stream. When constructing fills on preexisting benches, there is a distinct possibility that the requirement will not apply at all because there may be no perennial or intermittent streams within 100 feet of the benches.

A few commenters criticized the analysis of alternatives provisions of the proposed rule because they did not completely parallel the requirements of the 404(b)(1) Guidelines in 40 CFR part 230. At least one commenter recommended that we incorporate the 404(b)(1) Guidelines by reference. We do not find this recommendation appropriate because the 404(b)(1) Guidelines are designed to implement the Clean Water Act, while our regulations implement SMCRA and must be based upon SMCRA requirements. Under section 702(a) of SMCRA, nothing in SMCRA may be construed as amending, modifying, repealing, or superseding any Clean Water Act requirement. However, there is also nothing in SMCRA that would compel or authorize us to adopt regulations that parallel or incorporate Clean Water Act requirements.

SMCRA and the Clean Water Act provide for separate regulatory programs with different purposes and very different permitting requirements and procedures. In addition, as other commenters noted, SMCRA and the Clean Water Act differ considerably with respect to jurisdiction. The Clean Water Act focuses on regulating discharges of pollutants into waters of the United States, whereas SMCRA regulates a broad universe of environmental and other impacts of surface coal mining and reclamation operations, including impacts on water quantity, water quality, and terrestrial and aquatic ecosystems. We encourage coordination and cooperation between the SMCRA regulatory authority and the agencies administering the Clean Water Act. See the memorandum of understanding entitled ''Memorandum of Understanding among the U.S. Army Corps of Engineers, the U.S. Office of Surface Mining, the U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service for the Purpose of Providing Concurrent and Coordinated Review and Processing of Surface Coal Mining Applications Proposing Placement of Dredged and/or Fill Material in Waters of the United States,'' which took effect February 8, 2005, and the provisions of this final rule that authorize the SMCRA regulatory authority to accept an analysis of alternatives completed for Clean Water Act purposes as meeting the requirements for an analysis of alternatives under this final rule, when and to the extent appropriate. However, we believe that maintaining the distinction between the SMCRA regulatory program and Clean Water Act programs is both administratively and legally appropriate. That conclusion is supported by the comments that we received from both industry and state regulatory authorities.

Many industry commenters, supported by some, but not all, state regulatory authority commenters, stated that the proposed alternatives analysis requirement would introduce a major new element of uncertainty, and result in costly and wasteful duplication of effort on the part of permit applicants and state regulatory authorities. The commenters stated that this element of our proposed rule was inconsistent with our statement in the preamble to that rule that a primary reason for the rulemaking was to provide improved clarity and reduction of uncertainty regarding the meaning of the regulations. One commenter stated that at best the alternatives analysis requirement ''adds yet another layer of

redundant paperwork and analysis as it duplicates the federally-administered 404 process. At worst, OSM has set the stage for conflicts between the section 404 program and the largely state-implemented SMCRA programs.'' The commenter further stated that by imposing an alternatives analysis requirement on state regulatory authorities, we are ''flirting dangerously'' with creating conflicting alternatives analyses because ''the goals and objectives of SMCRA and corresponding state statutes may be different than those of the Corps and EPA under section 404.''

While we understand the commenters' apprehensions, these comments are speculative in nature. There may be some initial uncertainty as regulatory authorities establish procedures and criteria for implementing the alternative analysis requirements and determining least overall adverse impact on fish, wildlife, and related environmental values under this rule, but that uncertainty should subside once those procedures and criteria are in place.

The Interstate Mining Compact Commission, writing on behalf of member state regulatory authorities, argued that the alternatives analysis requirement is duplicative of requirements under the Clean Water Act that are already encompassed by the SMCRA permitting scheme. As discussed elsewhere in this preamble, we believe that the alternatives analysis requirement that we are adopting as part of this final rule differs from and serves a somewhat different purpose than the alternatives analysis requirement under the regulations and other documents implementing section 404 of the Clean Water Act. To the extent that duplication may exist, we encourage states to coordinate the processing of coal mining permit applications with the U.S. Army Corps of Engineers in accordance with a memorandum of understanding entitled ''Memorandum of Understanding among the U.S. Army Corps of Engineers, the U.S. Office of Surface Mining, the U.S. Environmental Protection Agency, and the U.S. Fish and Wildlife Service for the Purpose of Providing Concurrent and Coordinated Review and Processing of Surface Coal Mining Applications Proposing Placement of Dredged and/or Fill Material in Waters of the United States,'' which took effect February 8, 2005. In addition, this final rule authorizes the SMCRA regulatory authority to accept an analysis of alternatives completed for Clean Water Act purposes as meeting the requirements for an analysis of alternatives under this final rule, when and to the extent appropriate.

The Commission and some, but not all, commenters representing individual state regulatory authorities also opposed the alternatives analysis requirement in the proposed rule because of state fiscal constraints and fear of the ''potentially overwhelming'' time and effort that would be required for state permitting personnel to adequately review and analyze alternatives.

We anticipate that few, if any, state regulatory authorities will experience a significant increase in demands on their resources as a result of the alternatives analysis requirement in the final rule. West Virginia, one of the states most impacted by the rule, supported the proposed rule. Kentucky, another state that would be significantly impacted, estimated that, on average, the new requirement would add ten hours to the time required to process a permit application. We believe that the intangible environmental benefits of the rule (increased scrutiny of efforts to minimize adverse impacts on fish, wildlife, and related environmental values associated with perennial and intermittent streams) will outweigh what we anticipate will be a modest increase in demand on state regulatory authority resources.

The U.S. Fish and Wildlife Service requested that we work with the Service to build a process into the alternative analysis requirements in the final rule to protect unique and high value fish and wildlife resources. In response, we note that our fish and wildlife protection rules at 30 CFR 816.97(f) and 817.97(f) already require that the operator ''avoid disturbances to, enhance where practicable, or restore habitats of unusually high value for fish and wildlife.'' In addition, our permitting rules at 30 CFR 780.16 and 784.21 provide a role for the Service in determining fish and wildlife data collection requirements and reviewing the fish and wildlife protection plan in the permit application. Therefore, addition of the provision requested by the Service is not necessary.

Discussion of Specific Provisions of Final Paragraph (a)(3)

In the final rule, the first sentence of paragraph (a)(3) provides that the permit applicant must design the operation to avoid placement of excess spoil in or within 100 feet of perennial and intermittent streams to the extent possible. We added this provision in response to EPA concerns and numerous comments urging greater protection for headwater streams because of their ecological importance and contribution to the function of the stream as a whole. In effect, the new sentence identifies avoiding placement of excess spoil in or within 100 feet of perennial or intermittent streams as the preferred method of complying with the SMCRA requirement to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values with respect to those streams. That is, whenever avoidance of disturbance is reasonably possible, the final rule establishes avoidance as the best technology currently available to comply with the provisions of sections 515(b)(24) and 516(b)(11) of SMCRA, which require minimization of disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available. This provision of the final rule is consistent with our stream buffer zone rules at 30 CFR 816.57 and 817.57, which establish maintenance of an undisturbed buffer for perennial and intermittent streams as the best technology currently available to meet the requirements of sections 515(b)(24) and 516(b)(11) of SMCRA, provided maintenance of an undisturbed buffer is reasonably possible.

However, the final rule does not and cannot mandate avoidance in all cases for all stream segments. The provisions of SMCRA underlying this rule require minimization of disturbances and adverse impacts on fish, wildlife, and related environmental values only ''to the extent possible.'' Avoiding disturbance of the stream and maintenance of an undisturbed buffer zone for that stream is the ultimate means of minimizing adverse impacts on fish, wildlife, and related environmental values and hence is the default best technology currently available to comply with the statutory minimization requirement. However, there is sometimes no alternative to the construction of excess spoil fills in perennial or intermittent streams and their buffer zones if the proposed surface coal mining operation is to be viable. Prohibiting the construction of excess spoil fills would in effect preclude coal recovery in those situations. Under those circumstances, SMCRA—and hence this final rule—do not require avoidance of disturbance because avoidance is not reasonably possible. Instead, the applicant must propose other methods of complying with the minimization requirement that are consistent with the proposed surface coal mining operations. We do not interpret SMCRA as authorizing us to prohibit surface coal mining operations

in situations other than those specifically set forth in the Act. However, SMCRA does not override prohibitions that apply under other laws and regulations, so we will also recognize those prohibitions in reaching a decision on a permit application.

As proposed, paragraph (a)(3) would have required an alternatives analysis for all operations that propose to generate excess spoil. In response to comments citing the probable lack of environmental benefits of the proposed alternatives analysis requirement and the burden that it would impose, we have reconsidered this requirement and paragraph (a)(3) of the final rule restricts the alternatives analysis requirement to those situations in which the applicant proposes to place excess spoil in or within 100 feet of a perennial or intermittent stream. We believe that this restriction is appropriate because those lands are likely to be the most significant in terms of fish, wildlife, and related environmental values. In addition, this limitation may facilitate coordination with permitting requirements under section 404 of the Clean Water Act, which apply whenever a permit applicant proposes to place fill material in waters of the United States.

Paragraph (a)(3)(i) of the final rule requires that the permit applicant explain, to the satisfaction of the regulatory authority, why an alternative that does not involve placement of excess spoil in or within 100 feet of a perennial or intermittent stream is not reasonably possible. We added this requirement to reinforce the provision in paragraph (a)(3) of the final rule establishing avoidance of placement of excess spoil in or within 100 feet of a perennial or intermittent stream, whenever avoidance is reasonably possible, as the best technology currently available to comply with the statutory requirement for minimization of disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available.

Paragraph (a)(3)(ii) of the final rule provides that, if the permit applicant is unable to design the operation to avoid placement of excess spoil in or within 100 feet of a perennial or intermittent stream, the application must identify a reasonable range of alternatives that vary with respect to the number, size, location, and configuration of proposed excess spoil fills. A number of commenters on the proposed rule expressed concern that the requirement to identify a reasonable range of alternatives was too vague and could be interpreted as requiring an unlimited number of alternatives, including those that have no possibility of being implemented. In response to this concern, we have added language clarifying that paragraph (a)(3)(ii) does not require identification of all potential alternatives and that only those reasonably possible alternatives that are likely to differ significantly in terms of impacts on fish, wildlife, and related environmental values (either in degree or in watersheds affected) need be identified and considered. The latter provision is consistent with the policies to which EPA and the Corps adhere in implementing section 404 of the Clean Water Act. See the EPA/COE memorandum entitled ''Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements.''

In response to commenters' concerns, we also added language to paragraph (a)(3)(ii) of the final rule specifying that an alternative is reasonably possible if it conforms to the safety, engineering, design, and construction requirements of the regulatory program; is capable of being done after consideration of cost, logistics, and available technology; and is consistent with the coal recovery provisions of sections 816.59 and 817.59. In other words, nothing in the rule should be construed as elevating environmental concerns over safety considerations, as prohibiting the conduct of surface coal mining operations that are not otherwise prohibited under SMCRA or other laws or regulations, or as requiring consideration of unreasonably expensive or technologically infeasible alternatives.

The portion of this rule that refers to ''consideration of cost, logistics, and available technology'' is derived from the EPA regulations at 40 CFR 230.10(a)(2), which define a practicable alternative for purposes of section 404 of the Clean Water Act. In interpreting this provision, the EPA/COE memorandum entitled ''Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements'' states that ''[t]he determination of what constitutes an unreasonable expense should generally consider whether the projected cost is substantially greater than the costs normally associated with this particular type of project.'' We have included similar language in paragraph (a)(3)(ii)(B) of the final rule because (1) the concept of a practicable alternative for purposes of section 404 of the Clean Water Act is in some ways analogous to the determination of reasonably possible alternatives under this rule, and (2) the principle is consistent with the phrase ''to the extent possible'' in sections 515(b)(24) and 516(b)(11) of SMCRA. See Part VI.D. of this preamble for a more extensive discussion of the rationale for our use of the term ''reasonably possible'' and its consistency with statutory provisions.

The final rule does not include the provision in paragraph (a)(3)(iii) of the proposed rule stating that the least costly alternative may not be selected at the expense of environmental protection solely on the basis of cost. One commenter objected to the proposed provision as being too extreme and subject to misinterpretation, noting that there may be situations in which cost could and should be the determining factor. We agree. Nothing in SMCRA would compel adoption of this provision. In lieu of this provision, we have added language to paragraph (a)(3)(ii)(B) of the final rule clarifying that the fact that one alternative may cost somewhat more than a different alternative does not necessarily warrant exclusion of the more costly alternative from consideration. We believe that the revised language is more consistent with sections 515(b)(24) and 516(b)(11) of SMCRA, which require use of the best technology currently available, but only to the extent possible.

Paragraph (a)(3)(iii) of the final rule provides that any application proposing to place excess spoil in or within 100 feet of a perennial or intermittent stream must include an analysis of the impacts of the alternatives identified in paragraph (a)(3)(ii) on fish, wildlife, and related environmental values. The analysis must consider impacts on both terrestrial and aquatic ecosystems. For example, depending on the topography and geology of the area, the analysis could compare the impacts of constructing a few large excess spoil fills versus a greater number of small fills, as well as the relative impacts of concentrating fills in one or a few watersheds as opposed to placing them in multiple watersheds. In addition, the quality of the receiving waters must be taken into consideration in that it may be environmentally preferable to concentrate fills and their impacts in watersheds with the lowest water quality, to the extent that it is possible to do so.

Paragraph (a)(3)(iii)(A) of the final rule provides that, for every alternative that proposes placement of excess spoil in a perennial or intermittent stream, the analysis must include an evaluation of impacts on the physical, chemical, and biological characteristics of the stream downstream of the proposed fill, including seasonal variations in

temperature and volume, changes in stream turbidity or sedimentation, the degree to which the excess spoil may introduce or increase contaminants, and the effects on aquatic organisms and the wildlife that is dependent upon the stream. As discussed below, this paragraph of the final rule includes a number of changes from the proposed rule as a result of the comments that we received on the proposed rule.

One commenter on a virtually identical provision in the proposed coal mine waste disposal rules stated that—

> [T]he components of an alternatives analysis for a coal mine disposal activity, as set forth in proposed 30 CFR 784.16(d)(1)(ii), should be subdivided for clarity and certain of the components should be reconsidered in terms of their purpose or value. As written, 30 CFR 784.16(d)(1)(ii) requires ''* * * an evaluation of short-term and long-term impacts on the aquatic ecosystem, both individually and on a cumulative basis'' and goes on to specify that the evaluation ''must consider impacts on the physical, chemical, and biological characteristics of downstream flow, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the coal mine waste may introduce or increase contaminants, the effects on aquatic organisms and the extent to which wildlife is dependent upon those organisms.'' As strung together, these requirements create a number of ambiguities, which will lead to problems in interpretation. The list also includes terms that have no recognized meaning, such as ''biological characteristics of downstream flows.'' In addition to these ambiguities, this section also requires assessments that are new to the regulation of mining activities, including assessments of the effects of turbidity and of secondary impacts on wildlife that may be dependent on aquatic organisms in a potentially affected water body. In the absence of commonly recognized guidelines, the results of these assessments will be virtually impossible to validate.

We have revised the rule to replace the potentially confusing phrase ''biological characteristics of downstream flows'' with clearer language requiring information on the biological characteristics of the stream downstream of the proposed excess spoil fill. See paragraph (a)(3)(iii)(A) of final sections 780.35 and 784.19. We also replaced the requirement for an evaluation of the extent to which wildlife is dependent upon aquatic organisms with a requirement for an evaluation of the effects of the proposed operation on wildlife that is dependent upon the stream.

In addition, we decided not to adopt the portion of proposed paragraph (a)(3)(ii) requiring that the analysis include an evaluation of the short-term and long-term impacts of each alternative on the aquatic ecosystem, both individually and on a cumulative basis. This proposed requirement is subsumed within the other analytical requirements of the final rule and would not likely result in the submission of any meaningful additional information.

However, we did not make further changes in response to this comment because the commenter did not explain how the requirements should be subdivided for clarity or why or how they create ambiguity. With respect to the commenter's statement that the assessments required by this rule will be impossible to validate in the absence of commonly recognized guidelines, we believe that the commenter may have misunderstood the purpose of the evaluation required by this rule. The data and analyses required by this rule are intended only to facilitate comparisons of the relative impacts of various alternatives on fish, wildlife, and related environmental values, not to establish reclamation standards. To the extent that the commenter may have meant that there are no generally accepted protocols for evaluating some of the listed characteristics, we believe that regulatory authorities have the technical capability to develop any needed protocols specific to conditions within their states.

One state regulatory authority urged us to revise the rule to include consideration of impacts such as traffic, dust and noise on local residents who may be affected by a proposed operation. While we encourage permit applicants to consider these factors in designing their operations, we do not consider them to be disturbances or adverse impacts on fish, wildlife, and related environmental values within the context of sections 515(b)(24) and 516(b)(11) of SMCRA. Therefore, we are not including those factors as required components of the alternatives analysis under paragraph (a)(3)(iii) of the final rule.

Paragraph (a)(3)(iii)(B) of the final rule allows the applicant to submit an analysis of alternatives prepared under 40 CFR 230.10 for Clean Water Act purposes in lieu of the analysis of impacts on fish, wildlife, and related environmental values required under paragraph (a)(3)(iii)(A) of the final rule. The regulatory authority will determine the extent to which that analysis satisfies the requirements of paragraph (a)(3)(iii)(A) of the final rule. These provisions of the final rule are similar to their counterparts in the proposed rule.

One commenter expressed dismay that the rule did not require that the regulatory authority accept the Clean Water Act analysis of alternatives as fully meeting the requirements of this rule. We do not believe that addition of this requirement to our rules would be appropriate because the alternatives analysis required under the final rule must address all environmental impacts (both aquatic and terrestrial) of surface coal mining and reclamation operations, whereas the analysis of alternatives required under Clean Water Act regulations focuses on impacts to waters of the United States. However, under the final rule, the SMCRA regulatory authority has the discretion to determine that an analysis of alternatives conducted for Clean Water Act purposes satisfies the requirements for an analysis of alternatives under this final rule, in whole or in part, as appropriate.

Paragraph (a)(3)(iv) of the final rule requires selection of the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems, to the extent possible. The proposed rule included an additional sentence specifying that if the applicant proposes to select a different alternative, the applicant must demonstrate, to the satisfaction of the regulatory authority, why implementation of the more environmentally protective alternative is not possible. The final rule does not include this sentence because we have determined that it is neither needed nor appropriate in view of the other changes that we have made to the rule. Specifically, we have added language to paragraph (a)(3)(ii) of the final rule limiting the alternatives that the applicant must identify to only those alternatives that are reasonably possible. In addition, we have added paragraph (a)(3)(i), which requires that the permit applicant explain, to the satisfaction of the regulatory authority, why an alternative that does not involve placement of excess spoil in or within 100 feet of a perennial or intermittent stream is not reasonably possible. The combination of these two changes means that the sentence in the proposed rule is no longer logical or appropriate because the only alternatives considered under the final rule are those that are reasonably possible, which means that, within the universe of reasonably possible alternatives identified, the applicant must select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values. In other words, the sentence in the proposed rule no longer has any relevance or meaning because, under the final rule, the applicant does not

have the option of proposing alternatives that are not reasonably possible. Given that change, the final rule provides that the applicant must select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values.

Some commenters requested that we define or explain the term ''least overall adverse environmental impact.'' We do not believe that a meaningful definition is possible, given the somewhat subjective nature of the term and the site-specific nature of determinations under this rule. We expect that persons preparing permit applications and regulatory authority personnel reviewing those applications will use their best professional judgment in applying the requirements of this paragraph of the rule. Consistent with the commonly accepted meaning of the words ''overall'' and ''environmental,'' we have modified the rule to clarify that the scope of the term includes impacts to terrestrial ecosystems, not just impacts to water quality and aquatic ecosystems. The relative importance of these three components, as well as the constituents of each of those components, will vary from site to site. Therefore, they are not readily defined in a national rule. However, we have replaced the term ''least overall adverse environmental impact'' in the proposed rule with the term ''least overall impact on fish, wildlife, and related environmental values'' to be consistent with the terminology that appears in the underlying statutory provisions at sections 515(b)(24) and 516(b)(11) of SMCRA and to provide greater clarity.

EPA encouraged both permit applicants and SMCRA regulatory authorities to use a watershed approach in determining which alternative would have the least overall adverse impact on fish, wildlife, and related environmental values:

> A watershed approach expands the informational and analytic basis of site selection decisions to ensure impacts are considered on a watershed scale rather than only project by project. The idea being locational factors (e.g., hydrology, surrounding land use) are important to evaluating the indirect and cumulative impacts of the project. Watershed planning efforts can identify and prioritize where preservation of existing aquatic resources are important for maintaining or improving the quality (and functioning) of downstream resources. The objective of this evaluation is to maintain and improve the quantity and quality of the watershed's aquatic resources and to ensure water quality standards (numeric and narrative criteria, anti-degradation, and designated uses) are met in downstream waters.
>
> Permit applicants should work with federal and state regulatory authorities to identify appropriate and available information, such as existing watershed plans, or in the absence of such plans, existing information on current watershed conditions and needs, past and current mining (and other development) trends, cumulative impacts of past, present, and reasonable foreseeable future mining activities, and chronic environmental problems (e.g., poor water quality, CWA 303(d)—listed streams, etc.) in the watershed. The regulatory authorities can also provide information on the appropriate watershed scale to consider. The level of data and analysis for implementing a watershed approach should be commensurate with the scale of the project, to the extent appropriate and reasonable.

We agree that the analysis of potential alternatives required under paragraph (d)(1)(ii) should appropriately consider the overall condition of the aquatic resources in the watershed, including any impacts from previous mining activities.

4. Proposed Paragraph (a)(4)

Proposed paragraph (a)(4) of section 780.35 provided that each application for an operation that will generate and dispose of excess spoil must describe the steps to be taken to avoid the adverse environmental impacts that may result from the construction of excess spoil fills or, if avoidance is not possible, to minimize those impacts. The preamble to the proposed rule explained that this requirement applied to construction, maintenance, and reclamation of the alternative selected under proposed paragraph (a)(3)(iii).

EPA recommended that we revise the rule to incorporate the concepts of avoidance and minimization of adverse environmental impacts into the alternatives analysis required by proposed paragraphs (a)(3)(i) and (ii) rather than placing them in a separate paragraph. EPA stated that the intended purpose of the alternatives analysis is to determine the means by which excess spoil could be disposed of with the least adverse environmental impact. EPA further recommended removal of the preamble language in the proposed rule that specified that the avoidance and minimization requirements in proposed paragraph (a)(4) only applied to the alternative selected under proposed paragraph (a)(3)(iii). According to EPA, these changes would reduce potential uncertainty regarding the appropriate factors to consider in the alternatives analysis and would reinforce the requirement to evaluate different project locations and design elements when assessing the viability and environmental impacts of each location.

After considering these comments and the changes that we made to paragraph (a)(3) in the final rule, we have decided not to adopt proposed paragraph (a)(4) because provisions of that paragraph are now redundant and unnecessary. Under 30 CFR 816.97(a) and 817.97(a), the operator must, to the extent possible, using the best technology currently available, minimize disturbances and adverse impacts on fish and wildlife and related environmental values and must achieve enhancement of those resources where practicable. Paragraph (f) of 30 CFR 816.97 and 817.97 provides that the operator must avoid disturbances to, enhance where practicable, restore, or replace wetlands and riparian vegetation along rivers and streams and bordering ponds and lakes. That paragraph also requires that the operator avoid disturbances to, enhance where practicable, or restore habitats of unusually high value for fish and wildlife. Paragraph (b)(1) of 30 CFR 780.16 and 784.21 requires that the fish and wildlife protection and enhancement plan in the permit application be consistent with the requirements of 30 CFR 816.97 and 817.97, respectively. Therefore, proposed paragraph (a)(4) would not add any requirements that are not already found in 30 CFR 816.97 and 817.97.

In addition, as revised in the final rule, paragraph (a)(3) of section 780.35 provides that permit applicants should design their operations to avoid placement of excess spoil in or within 100 feet of a perennial or intermittent stream to the extent possible. This new provision establishes avoidance of disturbance of perennial and intermittent streams and their buffer zones as the best technology currently available to comply with the requirement under sections 515(b)(24) and 516(b)(11) of SMCRA to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values. However, the statutory minimization requirement applies only ''to the extent possible,'' and, given the realities of geology (which dictates where coal is located), topography, and mining mechanics and economics, it is not always possible to implement the ultimate form of minimization, which is avoidance of disturbances, and still conduct surface coal mining operations. Consequently, paragraph (a)(3) of the final rule requires that the applicant avoid disturbance only to the extent possible. Paragraph (a)(3)(i) of the revised final rule provides that, when a permit applicant proposes to place excess spoil in or within 100 feet of a perennial or intermittent stream, the applicant must explain, to the satisfaction of the regulatory authority,

why an alternative that does not involve placement of excess spoil in or within 100 feet of a perennial or intermittent stream is not reasonably possible. Therefore, adoption of proposed paragraph (a)(4) is no longer appropriate because, as revised, paragraph (a)(3) of the final rule requires consideration of avoidance as part of the alternatives analysis and selection process.

In the preamble to the proposed rule, we stated that we anticipated that the steps mentioned in proposed paragraph (a)(4) would include provisions in the operation plan to require that, when consistent with prudent engineering practice and applicable regulatory requirements, excess spoil placement begin at the highest elevation of the planned fill and proceed down the valley to the toe of the fill, thus minimizing both impacts to waters of the United States and the area affected in the event that the full design capacity of the fill is not needed because of changes in mining plans or other reasons. We requested comment on whether this approach should be incorporated into the rule language.

We received very few comments and those that we did receive were split on this question. In this final rule, we have decided against endorsing or adopting a ''top-down'' construction requirement because the technique raises serious stability issues. In addition, it would be inconsistent with provisions in the West Virginia Code of State Regulations (CSR) adopted to address fill stability problems that the state encountered. West Virginia requires that all durable rock fills either be constructed from the toe up as provided by CSR 38–2–14.14.g.3 or that an erosion protection zone be established below the toe of the single-lift fill in accordance with CSR 38–2–14.14.g.2. That zone is a flat area of durable rock equal in length to half the height of the fill. The height of the erosion protection zone must be sufficient to accommodate designed flow from the underdrain of the fill. Because section 515(b)(22) of the Act focuses on stability considerations in the disposal of excess spoil, we do not believe that it would be appropriate to adopt a regulation that could be in conflict with existing state program requirements intended to ensure fill stability and protect downstream residents and structures. Furthermore, top-down construction is feasible only for durable rock fills under 30 CFR 816.73 and 817.73 and not all excess spoil qualifies for placement under those sections of our rules. Other regulations that we are adopting today as part of sections 780.35(a)(1) and (a)(2) and 784.19(a)(1) and (a)(2) require that operations be designed both to minimize the creation of excess spoil and in a manner that ensures that the cumulative volume of all proposed excess spoil fills does not exceed the capacity needed to accommodate the anticipated amount of excess spoil that the operation will produce. We believe that those provisions should be adequate to minimize the areas affected by excess spoil disposal.

5. Final Paragraph (a)(4)

Final paragraph (a)(4), which appeared as paragraph (a)(5) in the proposed rule, requires that each application for an operation that proposes to generate excess spoil include maps and cross-section drawings showing the location of all proposed disposal sites and structures. It also requires that fills be located on the most moderately sloping and naturally stable areas available, unless the regulatory authority approves a different location based upon the alternatives analysis under paragraph (a)(3) or on other requirements of the Act and regulations. Whenever possible, fills must be placed upon or above a natural terrace, bench, or berm if that location would provide additional stability and prevent mass movement. The final rule differs slightly from the proposed rule in that we have revised the wording to clarify that if the regulatory authority approves a different location, that decision must be based upon the alternatives analysis under paragraph (a)(3) or on other requirements of the Act and regulations The wording of the proposed rule was subject to misinterpretation because it allowed approval of a different location based upon the alternatives analysis ''or other factors, taking into account other requirements of the Act and regulations.''

The requirement for maps and cross-section drawings formerly appeared as part of the first sentence of paragraph (a) of section 780.35, while the fill location requirements formerly appeared in 30 CFR 816.71(c). Those location requirements are more logically included as part of the planning and design requirements in the permitting regulations rather than as part of the performance standards. As formerly codified in 30 CFR 816.71(c), the rule required that fills be located on the most moderately sloping and naturally stable areas available. However, as proposed, the final rule allows the regulatory authority to approve different locations, based upon the analysis of alternatives required under proposed paragraph (a)(3) of section 780.35 or on other requirements of the Act and regulations. This change is needed to ensure that the analysis of alternatives and consideration of impacts on fish, wildlife, and related environmental values are a meaningful part of the site selection process. The change is consistent with section 515(b)(22)(E) of SMCRA, which requires that excess spoil be placed ''upon the most moderate slope among those upon which, in the judgment of the regulatory authority, the spoil could be placed in compliance with all the requirements of the Act.'' One of the requirements of the Act is the provision in section 515(b)(24) specifying that surface coal mining and reclamation operations must be conducted so as to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available. Implementation of that requirement may entail placement of spoil on slopes other than the most moderate ones available.

6. Final Paragraph (a)(5)

Final paragraph (a)(5), which appeared as paragraph (a)(6) in the proposed rule, requires that an application for an operation that would generate excess spoil include detailed design plans for each excess spoil disposal structure, prepared in accordance with the requirements of sections 780.35 and 816.71 through 816.74. These requirements correspond to a portion of the first sentence of the former version of section 780.35(a). As proposed, we have added language requiring compliance with the requirements of section 780.35 in recognition of the other revisions to that section. Paragraph (a)(5) also includes a requirement to design the fill and appurtenant structures using current prudent engineering practices and any additional design criteria established by the regulatory authority. This requirement is not new. It formerly appeared in the first sentence of 30 CFR 816.71(b)(1). As proposed, we are moving it to 30 CFR 780.35(a)(5) because it is a design requirement, not a performance standard.

7. Final Paragraph (a)(6)

Final paragraph (a)(6), which appeared as paragraph (a)(7) in the proposed rule, requires that the application include the results of a geotechnical investigation of each proposed excess spoil disposal site, with the exception of those sites at which spoil will be placed only on a preexisting bench under 30 CFR 816.74. This requirement formerly appeared in section 780.35(b). As proposed, final paragraph (a)(6) also includes the

requirement to conduct sufficient foundation investigations that formerly appeared in 30 CFR 816.71(d)(1). This shift is consistent with our effort to consolidate design requirements in the permitting rules rather than splitting them between the permitting rules and the performance standards. The foundation investigation is an element of the geotechnical investigation that is required for approval of a proposed excess spoil fill in a permit application.

8. Final Paragraph (a)(7)

Final paragraph (a)(7), which appeared as paragraph (a)(8) in the proposed rule, requires that each application include plans for the construction, operation, maintenance, and reclamation of all excess spoil disposal structures (fills) in accordance with the requirements of 30 CFR 816.71 through 816.74. This requirement corresponds to a similar provision formerly located in section 780.35(a). However, that provision included a requirement for plans for the ''removal, if appropriate, of the site and structures.'' Because excess spoil fills are permanent, it is not appropriate to include plans for their removal in the application. Consequently, as proposed, we have replaced the requirement for plans for removal of the fills with a requirement for plans for their reclamation, which would consist of final site preparation and revegetation consistent with the approved postmining land use.

9. Final Paragraph (a)(8)

Final paragraph (a)(8), which appeared as paragraph (a)(9) in the proposed rule, combines overlapping requirements formerly found in 30 CFR 780.35(c) and 816.71(d)(2) concerning application and design requirements for keyway cuts or rock-toe buttresses. We made no substantive changes in those requirements.

10. Final Paragraph (b)

As proposed, final paragraph (b) requires that the application include a certification by a qualified registered professional engineer experienced in the design of earth and rock fills that the design of all fills and appurtenant structures meets the requirements of section 780.35. This requirement formerly appeared in the second sentence of 30 CFR 816.71(b)(1). We have moved it to section 780.35 consistent with our effort to consolidate design requirements in the permitting rules rather than splitting them between the permitting rules and the performance standards. We made no substantive changes to this provision.

E. Section 784.19: Disposal of Excess Spoil (Underground Mines)

As proposed, we are revising section 784.19 to be consistent with the definition of coal mine waste in 30 CFR 701.5, which we adopted on September 26, 1983 (48 FR 44006). Among other things, that definition reclassified underground development waste as coal mine waste, which means that fills constructed of underground development waste must adhere to the requirements for refuse piles instead of the requirements applicable to excess spoil fills. At the same time that we adopted the definition of coal mine waste in 1983, we revised our performance standards at 30 CFR 817.71 through 817.74 to eliminate the language that combined underground development waste with excess spoil for purposes of performance standards for underground mines. Because the definition of coal mine waste includes underground development waste, the disposal of underground development waste is subject to the performance standards for refuse piles at 30 CFR 817.83 rather than the performance standards for the disposal of excess spoil that applied under the pre-1983 rules.

Prior to the adoption of today's final rule, the design requirements for fills in section 784.19 applied to both underground development waste and excess spoil, which means that the permitting requirements were inconsistent with the 1983 changes to the corresponding performance standards. We have revised section 784.19 to apply only to the disposal of excess spoil, consistent with the 1983 changes to our definitions and performance standards regarding coal mine waste. For the same reason, we removed all references to underground development waste and revised the section heading to read ''Disposal of excess spoil'' instead of ''Underground development waste.'' Under the final rule that we are adopting today, the disposal of underground development waste is now governed by the permitting requirements for refuse piles in 30 CFR 784.16.

As proposed, final section 784.19 parallels the language of section 780.35, which contains the permit application requirements for the disposal of excess spoil generated by surface mining activities. The previous rule incorporated those requirements by reference. Adding specific language in place of the cross-reference to section 780.35 makes this rule consistent with the pattern established in most of our other rules for surface and underground mines, in which the provisions for surface and underground mines are in separate parts, but are nearly identical except for cross-references and the type of operation to which they apply. In addition, adding specific language in place of the cross-reference to section 780.35 allows the incorporation of cross-references to the appropriate underground mining performance standards in part 817 rather than having to use the cross-references in section 780.35 to the surface mining performance standards in part 816.

A few commenters stated that, because of the limited amount of excess spoil generated by underground mines, we should use our authority under section 516(d) of SMCRA to develop less stringent permitting requirements for the disposal of that spoil. We decline to accept that recommendation. We find nothing unique about the type of excess spoil fills constructed as part of underground mining operations. The number of fills constructed as part of underground mining operations may be fewer than the number constructed as part of surface mines and the size of those fills may be smaller than those associated with surface mines, but that is not always true. In addition, we find no reason that fills associated with underground mines should be subject to lesser safety, stability, or environmental protection requirements than fills associated with surface mines.

Some industry commenters on the proposed rule also opposed the September 26, 1983, rule changes that classified underground development waste as coal mine waste and required that coal mine waste (including underground development waste) disposed of outside the mine workings and excavations be placed in accordance with 30 CFR 817.83, which contains the performance standards for refuse piles. The commenters argued that underground development waste should be treated as excess spoil, not coal mine waste. The commenters' objections are untimely. The definition of coal mine waste in 30 CFR 701.5 is now a matter of settled law, as is the removal of the applicability of the excess spoil performance standards at 30 CFR 817.71 through 817.73 to underground development waste. The performance standard at 30 CFR 817.81(a), which requires that coal mine waste disposed of outside the mine workings and excavations be placed in designated coal mine waste disposal areas within the permit area, also is settled law. The existing regulations at 30 CFR 817.71(i) allow coal mine waste to be placed in excess spoil fills with the approval of the regulatory authority,

but only if the waste is nontoxic and non-acid-forming and only if the waste is placed in accordance with 30 CFR 817.83 (the requirements for refuse piles).

Several commenters expressed concern that the 1983 rule's classification of underground development waste as coal mine waste could prohibit the use of underground development material for construction of face-up areas, support facilities, and other beneficial uses. Underground development waste is unlikely to be used for the construction of face-up areas because the face-up of the mine must be completed and construction of mine adits must begin before underground development waste would be produced. Perhaps the commenters are interpreting the 1983 rules as classifying material removed as part of the face-up of the underground mine as underground development waste. If so, the commenters are misreading those rules. Nothing in the definitions of coal mine waste or underground development waste classifies face-up materials as either coal mine waste or underground development waste. In addition, nothing in our existing rules or the rules that we are adopting today would prohibit the use of underground development waste for construction of support facilities or other mining-related uses, provided the use of the waste for those purposes complies with all regulatory program requirements applicable to those uses. The final rules that we are adopting today apply only to the permanent disposal of coal mine waste (including underground development waste), not to the temporary use of those materials for mining-related purposes. In other words, our excess spoil rules do not apply to the temporary storage of material removed during face-up of an underground mine if that material must be returned or regraded upon the completion of mining to restore the approximate original contour. The excess spoil rules apply only to permanent placement.

The rationale for the specific provisions concerning excess spoil that we are adopting as part of section 784.19 today is the same as the rationale for the changes to section 780.35 that we are also adopting as part of this final rule. See Part VIII.D. of this preamble for a discussion of those rules and the rationale for them, substituting section 516(b)(11) for references to section 515(b)(24) and replacing references to the surface mining performance standards in part 816 with references to the corresponding underground mining performance standards in part 817.

F. Sections 816.11 and 817.11: Signs and Markers

Prior to adoption of this final rule, the requirement that the operator mark buffer zones for perennial and intermittent streams appeared in both the stream buffer zone rules in sections 816.57(b) and 817.57(b) and the rules concerning signs and markers in sections 816.11(e) and 817.11(e). As proposed, we are consolidating our buffer zone marking requirements in sections 816.11(e) and 817.11(e). As revised, section 816.11(e), which applies to surface mines, provides that the boundaries of any buffer to be maintained between surface mining activities and perennial or intermittent streams in accordance with sections 780.28 and 816.57(a) must be clearly marked to avoid disturbance by surface mining activities. Similarly, section 817.11(e), which applies to underground mines, provides that the boundaries of any buffer to be maintained between surface activities and perennial or intermittent streams in accordance with sections 784.28 and 817.57(a) must be clearly marked to avoid disturbance by surface operations and facilities resulting from or in connection with an underground mine.

We received no comments on these changes.

G. Sections 816.43 and 817.43: Diversions

Before adoption of this final rule, sections 816.43(b)(1) and 817.43(b)(1) provided that the regulatory authority may approve diversion of perennial and intermittent streams within the permit area after making the finding relating to stream buffer zones that the diversion will not adversely affect the water quantity and quality and related environmental resources of the stream. The referenced finding was the second part of the finding formerly located in sections 816.57(a)(1) and 817.57(a)(1).

As proposed, in this final rule we are replacing that finding with a provision that is more consistent with the underlying provisions of SMCRA. Sections 515(b)(10), 515(b)(24), 516(b)(9), and 516(b)(11) of SMCRA do not establish or authorize a ''will not adversely affect'' standard like the one formerly found in our stream buffer zone rules at 30 CFR 816.57(a)(1) and 817.57(a)(1). Section 515(b)(10) requires that surface coal mining and reclamation operations be conducted to ''minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation.''

Section 516(b)(9), which pertains to underground coal mining operations, contains similar language with the exception that it does not mention water quality. Sections 515(b)(24) and 516(b)(11) require that surface coal mining and reclamation operations be conducted to ''minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values'' ''to the extent possible using the best technology currently available.'' As demonstrated by these quotes, SMCRA establishes a minimization standard rather than an absolute ''will not adversely affect'' standard with respect to disturbance of the hydrologic balance and disturbances and adverse impacts on fish, wildlife, and related environmental values.

Consequently, we proposed to revise paragraph (b) of sections 816.43(b)(1) and 817.43(b)(1) to provide that the regulatory authority may approve the diversion of perennial and intermittent streams within the permit area if the diversion is located, designed, constructed, and maintained using the best technology currently available to minimize adverse impacts to fish, wildlife, and related environmental values to the extent possible. This provision is consistent with sections 515(b)(24) and 516(b)(11) of SMCRA. Nothing in this rule should be construed as superseding the performance standards for the protection of fish, wildlife, and related environmental values in 30 CFR 816.97 and 817.97 or the related permitting requirements at 30 CFR 780.16 and 784.21.

No counterpart to sections 515(b)(10) or 516(b)(9) is necessary because paragraph (a)(1) of sections 816.43 and 817.43, which applies to diversions of all types, including stream-channel diversions, already provides that ''[a]ll diversions shall be designed to minimize adverse impacts to the hydrologic balance within the permit and adjacent areas.'' Furthermore, paragraph (a)(2)(iii) of sections 816.43 and 817.43 requires that all diversions be designed, located, constructed, maintained, and used to prevent, to the extent possible, using the best technology currently available, additional contributions of suspended solids to streamflow outside the permit area.'' The language of that paragraph closely resembles the language of sections 515(b)(10)(B)(i) and 516(b)(9)(B) of the Act, which are two of the statutory provisions underlying the existing stream buffer zone rules. Furthermore, our permitting regulations

at 30 CFR 780.29 and 784.29 require that each permit application include a description of how stream-channel diversions and other diversions are to be constructed in compliance with 30 CFR 816.43 and 817.43, respectively.

In this final rule, we are adopting the proposed revisions to sections 816.43(b)(1) and 817.43(b)(1) with one editorial change. Instead of stating that the regulatory authority may approve the diversion of perennial and intermittent streams within the permit area if the diversion is located, designed, constructed, and maintained using the best technology currently available to minimize adverse impacts to fish, wildlife, and related environmental values to the extent possible, the final rule applies that provision only to the location and design of the diversion. This limitation is appropriate because those are the elements that would be included in the permit application. Construction and maintenance are more appropriately included in a separate performance standard, which we have accomplished by adding a sentence to the end of paragraph (b)(1) stating that the permittee must construct and maintain the diversion in accordance with the approved design.

The U.S. Fish and Wildlife Service stated that we were adopting a less protective standard by revising the standard from one that required a finding that ''the diversion will not adversely affect the water quantity and quality and related environmental resources of the stream'' to a requirement that the diversion use the best technology currently available to minimize adverse impacts to fish, wildlife, and related environmental values to the extent possible. We do not dispute this characterization. However, the new standard is one that reflects the provisions of SMCRA whereas the previous standard has no direct connection to SMCRA and is neither appropriate nor practicable. The Service recommended that we work with them to develop state or regional design standards that are practicable and effective. We accept this recommendation. We also intend to invite EPA to participate because that agency also expressed an interest in this process.

The last sentence of paragraph (a)(3) of sections 816.43 and 817.43 as published on September 26, 1983 (48 FR 43993), provides that ''[a] permanent diversion or a stream channel reclaimed after the removal of a temporary diversion shall be designed and constructed so as to restore or approximate the premining characteristics of the original stream channel including the natural riparian vegetation to promote the recovery and enhancement of the aquatic habitat.'' In the preamble to the proposed rule, we stated that the sentence pertained only to stream-channel diversions. Therefore, we proposed to move that sentence to paragraph (b) of sections 816.43 and 817.43 because those sections contain all other performance standards that pertain only to stream-channel diversions. As proposed, the final rule that we are adopting today inserts that sentence in revised form as paragraph (b)(4) of sections 816.43 and 817.43 and redesignates former paragraph (b)(4) as paragraph (b)(5).

However, EPA noted that the effect of the proposed changes would be to limit the requirements of that sentence to diversions of perennial and intermittent streams, thus excluding diversions of ephemeral streams. EPA stated that nothing in the existing rules limited the scope of the last sentence of paragraph (a)(3) to perennial and intermittent streams. While supporting new paragraph (b)(4), EPA urged us to also retain the last sentence of paragraph (a)(3) in paragraph (a) to ensure that its requirements continue to apply to permanent diversions of miscellaneous flows (including ephemeral streams) under paragraph (c).

After considering this comment, we have decided not to implement our proposal to remove the last sentence of paragraph (a)(3). We recognize that there will be situations in which permanent diversions of ephemeral streams are constructed and that some ephemeral streams may have riparian vegetation or aquatic habitats that must be replaced or restored to the extent required under paragraphs (a) and (f) of 30 CFR 816.97 and 817.97. However, because all other elements of paragraph (a)(3) pertain only to temporary diversions, we are redesignating that sentence as new paragraph (a)(4) and are redesignating existing paragraph (a)(4) as paragraph (a)(5). In addition, for clarity and consistency with new paragraph (b)(4), we have slightly revised new paragraph (a)(4) by replacing the phrase ''stream channel reclaimed after the removal of a temporary diversion'' with ''stream channel restored after the completion of mining'' to avoid creating the impression that the temporary diversion must be removed before constructing a restored stream channel. We also inserted the modifier ''any'' in front of ''riparian vegetation'' because not all ephemeral streams have riparian vegetation.

We have decided not to adopt our proposed editorial revisions to paragraph (a)(3) of sections 816.43 and 817.43 because we have determined that they would not improve the clarity of that paragraph.

Revised paragraph (b)(4) provides that a permanent stream-channel diversion or a stream channel restored after the completion of mining must be designed and constructed using natural channel design techniques so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation and the natural hydrological characteristics of the original stream, to promote the recovery and enhancement of the aquatic habitat and to minimize adverse alteration of stream channels on and off the site, including channel deepening or enlargement, to the extent possible. The final rule is similar to the proposed rule, although, to improve clarity, we replaced the phrase ''stream channel reclaimed after the removal of a temporary diversion'' in the proposed rule with the more accurate phrase ''stream channel restored after the completion of mining.'' The revised language reflects the facts that, in the context of this rule, a stream channel is restored, not reclaimed (in 30 CFR 701.5, we define reclamation in terms of the postmining land use), and that the restored stream channel must be in place before the temporary stream-channel diversion is removed.

As proposed, paragraph (b)(4) includes new language concerning natural channel design and adverse alteration of stream channels. This language reinforces and clarifies the meaning of the requirement to restore or approximate the premining characteristics of the original stream. The goals of natural channel design include creating a stream channel that will maintain the equilibrium of a natural stream, neither downcutting (degrading) nor filling in (aggrading). A natural channel is not stable in the sense that a concrete, trapezoidal channel is stable. Depending on the stream type, a natural channel may meander, eroding and depositing sediment at natural rates as part of its dynamic equilibrium. The channel must pass the water and sediment that it receives downstream, and the channel must maintain a connection to the stream's floodplain. The new provisions are consistent with sections 515(b)(24) and 516(b)(11) of SMCRA, which require use of the best technology currently available to minimize disturbances and adverse impacts to fish, wildlife, and related environmental values to the extent possible.

In a final rule on compensatory mitigation for losses of aquatic

resources, published on April 10, 2008 (73 FR 19594), EPA and the Corps promulgated standards for compensatory mitigation for adverse impacts on streams under section 404 of the Clean Water Act. The provisions of the EPA/Corps mitigation rule related to mitigation work plans for streams are contained in 33 CFR 332(c)(7) and include concepts of natural stream channel design. In certain situations, mine operators may find it advantageous to design, construct, and maintain stream-channel diversions in a manner that satisfies both the requirements of sections 816.43 and 817.43 of this rule and the requirements of the EPA/Corps compensatory mitigation rule.

In the preamble to the proposed rule, we sought comment on whether the revisions to sections 816.43(b) and 817.43(b) were sufficient to meet the requirements of SMCRA, or whether we should also revise our permitting rules to include a requirement for submission of alternatives and an analysis of the environmental impacts of each alternative whenever the applicant proposes to mine through waters of the United States or divert perennial or intermittent streams. The requirements would be similar to the corresponding requirements for excess spoil fills and coal mine waste disposal facilities in sections 780.25(d)(1) and 780.35(a)(3) for surface mines or sections 784.16(d)(1) and 784.19(a)(3) for underground mines. Potential alternatives could involve the number and length of stream segments diverted, diversion design, construction technique, location of the diversion, and whether the diversion is temporary or permanent.

EPA supported requiring an alternatives analysis for both stream-channel diversions and mining through streams, stating that the potential for significant stream degradation as a result of these activities would be minimized by doing so. The agency stated that stream diversions and mining through streams often have adverse impacts including direct losses of stream function and resulting alteration of downstream hydrology, water chemistry, and biotic communities. The agency noted the preamble listed no examples of alternatives to mining through streams and suggested that those alternatives could consist of variations in the number and length of stream segments impacted, construction techniques, reclamation design, and location.

One state regulatory authority opposed requiring an alternatives analysis for mining through streams and stream-channel diversions. The commenter stated that doing so would exceed the requirements of both SMCRA and the Clean Water Act and that the Corps does not require an analysis of alternatives in these situations. The commenter supported the natural-channel design requirement.

After evaluating these comments, we have decided not to require an alternatives analysis either for stream diversions or mining through streams. First, when coal reserves exist beneath a stream and those reserves could be extracted by surface mining methods, they are either mined or they are not. Under SMCRA, an operator's decision on whether to mine through a stream will be determined by geology, topography, and economics. We have no authority under SMCRA to prevent diversion of a stream or mining through a stream unless SMCRA prohibits surface coal mining operations on the land where the stream is located. (However, SMCRA does not override prohibitions that apply under other laws and regulations. Any such prohibitions will continue to apply according to the terms of those laws and regulations.) Therefore, an alternatives analysis for mining through a stream is not appropriate under SMCRA. With respect to stream diversions, this final rule strengthens the requirement that diversions approximate natural stream characteristics by adding a requirement for the use of natural-channel design techniques. Construction of stream-channel diversions in accordance with these rules should minimize damage to undisturbed areas of the stream and should result in only temporary adverse impacts to the diverted segment. Because the rule already requires the use of natural-channel design techniques, an alternatives analysis for stream diversions would add no value to the decision-making process.

Finally, as proposed, we are redesignating former paragraph (b)(4) of sections 816.43 and 817.43 as paragraph (b)(5). In accordance with the proposed rule, we are revising that paragraph to require that a qualified registered professional engineer certify both the design and construction of all stream-channel restorations. The former rule applied that requirement only to diversions of perennial and intermittent streams. We are adding the additional requirement because stream-channel restorations are even more significant in terms of stability and environmental concerns than temporary diversions that exist only for the duration of mining; i.e., reconstructed stream channels should be safe and stable and should approximate premining conditions regardless of whether the channel is a temporary or permanent diversion or a restoration of the original channel. In addition, we are making editorial revisions to this paragraph to clarify that separate certifications are required for the design and construction of stream-channel diversions and stream restorations and to specify which requirements apply to the design certification and which apply to the construction certification.

H. Sections 816.46 and 817.46: Siltation Structures

Paragraph (b)(2) of 30 CFR 816.46 and 817.46 (1983) required that all surface drainage from the disturbed area be passed through a siltation structure before leaving the permit area. In essence, that paragraph prescribed siltation structures (sedimentation ponds and other treatment facilities with point-source discharges) as the best technology currently available for sediment control. However, paragraph (b)(2) was struck down upon judicial review because the court found that the preamble to the rulemaking in which it was adopted did not articulate a sufficient basis for the rule under the Administrative Procedure Act. The court stated that the preamble did not adequately discuss the benefits and drawbacks of siltation structures and alternative sediment control methods and did not enable the court ''to discern the path taken by [the Secretary] in responding to commenters'' concerns'' that siltation structures in the West are not the best technology currently available. See *In re: Permanent Surface Mining Regulation Litigation II, Round III,* 620 F. Supp. 1519, 1566–1568 (D.D.C. July 15, 1985).

On November 20, 1986 (51 FR 41961), we suspended the rules struck down by the court. To avoid any confusion that may result from the continuing publication of those rules in the Code of Federal Regulations, we proposed to remove paragraph (b)(2) of sections 816.46 and 817.46 and redesignate the remaining paragraphs of those sections accordingly. The continued presence of the suspended paragraphs in the published version of the rules has been a source of ongoing confusion.

We received no comments opposing this proposal. Therefore, we are removing paragraph (b)(2) of sections 816.46 and 817.46 as proposed. This action supersedes the 1986 suspension of the paragraph being removed. Sections 816.45 and 817.45, which remain unchanged by this rule, set forth various measures and techniques that may constitute the best technology currently available for sediment control,

although applicants and regulatory authorities are not limited to those measures and techniques.

I. Sections 816.57 and 817.57: Activities in or Adjacent to Perennial or Intermittent Streams

1. Background

Perennial and intermittent streams overlie coal deposits in all regions of the nation. To the extent economically feasible and allowed by law, surface mining operations often relocate those streams as part of the process of recovering the underlying coal. Streams also may be relocated to facilitate the construction of mine-related facilities such as coal preparation plants. In other cases, steep slopes, narrow valleys and other topographical limitations may result in the construction of excess spoil fills, refuse piles, sedimentation ponds, and coal mine waste impoundments in streams because the stream valley is the only logical and technologically and economically feasible location for those structures. All types of surface coal mining and reclamation operations may experience the need to construct bridge abutments, culverts, or other structures in or near perennial or intermittent streams to facilitate crossing of those streams by roads, railroads, conveyors, pipelines, utilities, or similar facilities. Neither SMCRA nor the Clean Water Act precludes any of these activities, provided the activities comply with all applicable requirements of those laws and their implementing regulations. Parts II and III.A. of this preamble explain the extent to which either SMCRA or its legislative history contemplates the activities listed above. For example, section 515(b)(22)(D) mentions the construction of excess spoil fills in areas containing natural watercourses, springs, and wet-weather seeps. In addition, the legislative history of SMCRA indicates that Congress anticipated the continued construction of coal mine waste impoundments in streams.

As discussed in Part III.A. of this preamble, Congress, in developing the legislation that ultimately became SMCRA, specifically considered and rejected inclusion of an absolute prohibition on disturbance of land within 100 feet of certain streams. While we subsequently adopted stream buffer zone rules as part of our initial and permanent program regulations implementing SMCRA, we and the state regulatory authorities have historically interpreted those rules as allowing placement of fill material, including coal mine waste, in waters of the United States, subject to approval of that placement under the Clean Water Act. As discussed at length in Part III.E. of this preamble, our historical interpretation and application of the stream buffer zone rule is in harmony with statements in the decision of the U.S. Court of Appeals for the Fourth Circuit in *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh,* 317 F.3d 425, 442 (4th Cir. 2003). The rules that we are adopting today are intended to clarify any lingering ambiguity regarding the appropriate interpretation of the stream buffer zone rules.

The stream buffer zone rule effectively prescribes maintenance of a 100-foot undisturbed zone between perennial or intermittent streams and surface mining activities (or, for underground mines, surface activities on the surface of lands) as the best technology currently available to fulfill the sediment control and fish and wildlife protection requirements of sections 515(b)(10)(B)(i), 515(b)(24), 516(b)(9)(B), and 516(b)(11) of SMCRA. However, the concept of maintenance of an undisturbed buffer zone as the best technology currently available for purposes of those sections of the Act applies only to activities that do not involve disturbance of the streambed and do not inherently occur within the buffer zone. When the regulatory authority and other pertinent government agencies approve the conduct of activities within the stream and/or its buffer zone, an undisturbed buffer between those activities and the stream inherently cannot be maintained. Construction of fills and impoundments in streams inherently involves disturbance of all or part of what would have been the buffer zone for the affected stream segment, as does construction of most stream-crossing structures. In addition, when a stream is diverted, the original streambed and what would have been its buffer zone typically are mined through or used for construction of mining-related facilities. Nothing in this discussion should be construed as meaning that all sedimentation ponds, excess spoil fills, refuse piles, coal mine waste slurry impoundments, and stream crossing structures are automatically exempt from the requirement to maintain an undisturbed buffer zone. Only those structures and activities (or portions thereof) for which there is no reasonable alternative location qualify for this exception.

Section 827.12 of our rules does not apply the stream buffer zone rule in sections 816.57 and 817.57 to coal preparation plants not located within the permit area of a mine. See 48 FR 20399, May 5, 1983. We proposed no changes to section 827.12 and nothing in the final rule that we are adopting today alters that situation. As part of this final rule, we are moving the permitting aspects of the previous version of the stream buffer zone rule in sections 816.57 and 817.57 to new sections 780.28 and 784.28. Existing section 785.21(c) provides that coal preparation plants not located within the permit area of a mine are subject not only to the special permitting requirements of section 785.21, but also to ''all other applicable requirements of this subchapter.'' ''This subchapter'' refers to subchapter G of chapter VII, which contains the permitting requirements for all surface coal mining and reclamation operations. Thus, to ensure that section 785.21(c) is not now interpreted as including the newly added permitting requirements related to the stream buffer zone rule, we are adding paragraph (a)(2)(i) of sections 780.28 and 784.28 to specify that the requirements of those sections do not apply to applications under section 785.21 for coal preparation plants not located within the permit area for a mine. See Part VIII.C. of this preamble. However, the other permitting rules that we are adopting today, including the new informational and analytical requirements for proposed excess spoil fills and coal mine waste disposal facilities, typically will apply to those applications, either through operation of section 785.21(c) or through cross-references in the performance standards listed in section 827.12. In addition, section 827.12(b) specifically requires that any stream-channel diversion comply with section 816.43.

2. General Description of Changes

The revised version of sections 816.57 and 817.57 that we are adopting today attempts to minimize disputes and misunderstandings associated with application of the 1983 version of the stream buffer zone rules in sections 816.57 and 817.57. The language of the rules that we are adopting today better conforms to the underlying provisions of SMCRA. The revised rules distinguish between those situations in which maintenance of an undisturbed buffer between surface activities and perennial and intermittent streams constitutes the best technology currently available to implement the underlying statutory provisions (sections 515(b)(10)(B)(i) and (b)(24) and 516(b)(9)(B) and (b)(11) of SMCRA) and those situations in which maintenance of a buffer is neither feasible nor appropriate because the stream segment will be diverted, altered by a culvert or other stream-crossing structure,

impounded, or filled. In the case of stream crossings involving bridges, pipelines, utilities, or conveyors, the stream itself may sometimes remain undisturbed, but the crossing will then most likely require installation of abutments within the buffer zone. Construction of fills and impoundments in streams inherently involves disturbance of all or part of what would have been the buffer zone for the affected stream segment, as does construction of most stream-crossing structures. In addition, when a stream is diverted, the original streambed and what would have been its buffer zone typically are mined through or used for construction of mining-related facilities.

As proposed, we are reorganizing our rules to separate permitting requirements from performance standards. The previous version of paragraph (a) of sections 816.57 and 817.57 contained both permitting requirements and performance standards. The rules that we are adopting today separate the two for clarity and consistency. Revised sections 816.57 and 817.57 include only performance standards. As proposed, we are moving the permitting aspects of the stream buffer zone rules, which were formerly codified in paragraph (a)(1) of sections 816.57 and 817.57 as part of the performance standards in subchapter K, to new sections 780.28 and 784.28, which are part of the permitting requirements of subchapter G.

As proposed, we are deleting former paragraph (a)(2) of sections 816.57 and 817.57, which required the regulatory authority to make a finding that any proposed temporary or permanent stream-channel diversion will comply with section 816.43 or 817.43. This provision is unnecessary because the obligation to comply with the stream-channel diversion requirements of sections 816.43 and 817.43 is independent of any cross-reference in section 816.57 or 817.57. We are consolidating the permitting requirements for stream-channel diversions in sections 816.43 and 817.43, which we are revising as proposed. See Part VIII.G. of this preamble.

We also are deleting former paragraph (b) of sections 816.57 and 817.57, which provided that the area not to be disturbed must be designated as a buffer zone and marked as specified in section 816.11 or 817.11. This deletion is not a substantive change because the requirement to mark the area to be left undisturbed as a buffer zone also appears in sections 816.11(e) and 817.11(e), which we have revised for clarity and consistency as discussed in Part VIII.F. of this preamble. We received no response to our request in the preamble to the proposed rule for comment on whether a formal regulatory definition of ''buffer'' or ''buffer zone'' would be useful. We did not include a definition in the proposed rule and we are not adopting a definition as part of this final rule because we find the meaning of those terms to be clear without a regulatory definition.

Commenters representing industry and state regulatory authorities generally supported the proposed revisions to sections 816.57 and 817.57 as much-needed and appropriate clarifications of those rules. However, one commenter stated that the proposed rule did not go far enough:

> We agree with how the clarification more explicitly reflects the historic interpretation by distinguishing between activities that are not planned to occur in streams where a buffer zone does apply and those activities that inherently involve placement of fill or the disturbance of the stream channel. However, the text of the rule uses new terminology such as ''prohibition'' and ''exceptions'' which incorrectly implies that the rule (and therefore the statute) prohibits disturbances in stream channels. As the agency correctly notes in the preamble, coal mining involves activities that inherently involve disturbances or placement of fill in the stream so a buffer zone is neither feasible nor appropriate. Accordingly, for those activities, there is no buffer zone at all. As OSM explains, ''those activities are governed by other regulations.'' The conduct of those types of activities is approved in the permit in accordance with the ''other regulations'' which specifically govern those activities.
>
> The rule as presently structured by setting forth the buffer zone requirement and then listing exceptions will inevitably prove to be inflexible or quickly obsolete since there are many types of activities where a buffer zone is infeasible or inappropriate. Of course this can be remedied by simply adding a catch-all provision to the exceptions that recognizes any other activity planned and approved to occur in the stream. However, we believe it far better to restructure the rule so that it more straightforwardly reflects the underlying functional and operational distinction that has guided the rule's application historically: (1) activities that occur in the streams and, (2) activities that are not designed to occur in the streams.

The commenter provided a suggested rewrite of sections 816.57 and 817.57, which we are not adopting, for the most part. We appreciate the commenter's support of the basic principle underlying our revisions to the stream buffer zone rule, but we disagree with the commenter's arguments against use of the terms ''prohibitions'' and ''exceptions.'' We find that those terms accurately describe the pertinent portions of the stream buffer zone rule. We have revised the rule to eliminate the term ''prohibitions'' from the rule text, but we continue to characterize paragraph (a) of sections 816.57 and 817.57 as a prohibition in the preamble.

We also continue to use the term ''exception'' as the heading for paragraph (b) of sections 816.57 and 817.57, but, in response to this comment and a desire to improve the clarity of the proposed rule, we have revised the introductory text of that paragraph to clarify that the term ''exception'' means that the buffer requirement of paragraph (a) of sections 816.57 and 817.57 does not apply to those segments of a perennial or intermittent stream for which the regulatory authority, in accordance with sections 780.28(d), 784.28(d), 816.43(b)(1), or 817.43(b)(1), approves one or more of the activities listed in paragraphs (b)(1) through (b)(4) of sections 816.57 and 817.57. Thus, as used in the final rule and this preamble, the term ''exception'' does not apply to the activity itself.

The term ''exception'' in the proposed rule and its preamble sometimes refers to the activities listed in paragraphs (b)(1) through (b)(4) of sections 816.57 and 817.57 (most of which refer only to activities in the stream itself, not to activities in the buffer zone). At other times, it refers to land within 100 feet of the stream segment directly impacted by those activities. However, in this final rule, the term exception refers only to what would otherwise be the buffer zone for stream segments for which the regulatory authority approves one or more of the activities listed in paragraphs (b)(1) through (b)(4). This usage is consistent with the preamble to the proposed rule, which describes paragraph (b) of sections 816.57 and 817.57 as ''providing an exception from the prohibition on conducting activities that would disturb the surface of lands within 100 feet of waters of the United States.'' 72 FR 48908–48909, August 24, 2007. In addition, it is consistent with the intent of the proposed rule, which as stated in the introductory clause of proposed paragraph (b), was to specify the circumstances in which the requirement to avoid disturbance of land within 100 feet of waters of the United States did not apply.

Under the final rule, with the exception of stream-channel diversions, for which all requirements appear in sections 816.43(b) and 817.43(b), application requirements for activities that take place in perennial or intermittent streams appear in sections 780.28(b) and 784.28(b), regulatory authority approval standards for those activities appear in sections 780.28(d)

and 784.28(d), and performance standards for those activities appear in paragraphs (b)(1) through (b)(4) and (c) of sections 816.57 and 817.57. With respect to activities that will take place within 100 feet of a perennial or intermittent stream segment, but will not disturb the stream segment itself, the final rule establishes application requirements in sections 780.28(c) and 784.28(c), regulatory authority approval standards in sections 780.28(e) and 784.28(e), and performance standards in paragraph (c) of sections 816.57 and 817.57.

We are not adopting the commenter's recommendation that we revise paragraph (b) of sections 816.57 and 817.57 to exclude buffer zones for stream segments affected by any activity planned and approved to occur in the stream. We find this exception to be too broad. We believe that the activities that we list in paragraphs (b)(1) through (b)(4) include all situations in which it may be inherently necessary to conduct activities in a stream segment to facilitate surface coal mining and reclamation operations. We also have reviewed our rules to ensure that, for those activities, the obligation to minimize disturbances and adverse impacts to fish, wildlife, and related environmental values to the extent possible using the best technology currently available has been applied through other requirements. To the extent that a SMCRA permit applicant may receive authorization under the Clean Water Act to place fill material in the stream as part of an activity other than those listed in paragraphs (b)(1) through (b)(4), we will take that approval into consideration during the SMCRA permitting process. However, any activities conducted in the buffer zone for the stream segment affected by the Clean Water Act authorization will remain subject to the pertinent provisions of sections 780.28 and 816.57 or sections 784.28 and 817.57.

Many commenters strongly opposed our proposed revisions to sections 816.57 and 817.57, characterizing paragraph (b) in particular as creating new and unwarranted exceptions. We disagree with this characterization. The 1983 version of the stream buffer zone rule has historically been applied—and continues to be applied—to allow each of the activities listed in paragraphs (b)(1) through (b)(4) to occur. As other commenters emphasize, the requirement to maintain an undisturbed buffer between the stream and surface activities related to surface coal mining and reclamation operations has not been applied and does not apply to activities planned and approved to occur in intermittent or perennial streams—and in those situations the rationale for maintaining an undisturbed buffer ceases to exist. As discussed at length in Part III.E. of this preamble, our historical approach to application of the stream buffer zone rule is in harmony with statements of the U.S. Court of Appeals for the Fourth Circuit in its decision in *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh,* 317 F.3d 425, 442–443 (4th Cir. 2003) (''it is beyond dispute that SMCRA recognized the possibility of placing excess spoil material in waters of the United States'').

The final rule that we are adopting today clarifies, but in this regard does not alter, the basic historical and current application of the 1983 stream buffer zone rule. Consistent with the application of the 1983 stream buffer zone rule, paragraph (b) of final sections 816.57 and 817.57 recognizes that the conduct of surface coal mining and reclamation operations sometimes requires the diversion of perennial and intermittent streams, the construction of fills in streams, and other disturbances of stream segments for sediment control and construction of stream crossings. Therefore, the final rule provides that the requirement to maintain an undisturbed buffer zone for perennial and intermittent streams does not apply to those stream segments for which the regulatory authority approves one or more of the activities listed in paragraphs (b)(1) through (b))(4) of sections 816.57 and 817.57.

3. Paragraph (a)

Final paragraph (a)(1) of sections 816.57 and 817.57 specifies that, except as provided in paragraph (b) and consistent with paragraph (a)(2), the permittee or operator may not conduct surface activities that would disturb the surface of land within 100 feet, measured horizontally, of a perennial or intermittent stream unless the regulatory authority authorizes the disturbance under paragraph (e) of section 780.28 or 784.28. With the exception of the addition of a new paragraph (a)(2), paragraph (a) of final sections 816.57 and 817.57 is substantively identical to the proposed rule, although we have made minor editorial revisions for clarity and brevity.

The final rule adds a new paragraph (a)(2) to sections 816.57 and 817.57 to address Clean Water Act requirements. We are also adding a citation to the new paragraph in paragraph (a)(1). New paragraph (a)(2) provides that surface mining activities in perennial or intermittent streams may be authorized only where those activities would not cause or contribute to the violation of applicable State or Federal water quality standards developed pursuant to the Clean Water Act, as determined through certification under section 401 of the Clean Water Act (33 U.S.C. 1341) or a permit under section 402 or 404 of the Clean Water Act (33 U.S.C. 1342 and 1344, respectively). This language does not establish a general prohibition against mining activities in intermittent or perennial streams, including the placement of excess spoil or other fill materials in those streams. Instead, it reiterates that mining-related discharges are subject to the permitting requirements of sections 402 and 404 of the Clean Water Act and the water quality certification requirement under section 401 of the Clean Water Act. These requirements are independently applicable under the Clean Water Act.

Paragraph (a)(2) does not require the SMCRA regulatory authority to make a determination that a particular mining activity is consistent with applicable water quality standards. The determination that a particular mining activity is consistent with applicable water quality standards will be made only by the appropriate Federal or State entity responsible for the issuance of permits under sections 402 and 404 of the Clean Water Act and certification under section 401 of that law. The rule anticipates that a SMCRA permit will typically be issued prior to issuance of any permits or certifications required under the Clean Water Act. However, in those circumstances, new paragraph (d)(2) of sections 780.28 and 784.28 provides that a SMCRA permit authorizing mining activities in perennial or intermittent streams must include a condition requiring that the permittee obtain all required approvals under the Clean Water Act before initiating those activities. As the rule itself makes clear, this provision of the stream buffer zone rule is not applicable to any water not subject to jurisdiction under the Clean Water Act. Further, any discharges to waters not covered by the stream buffer zone rule that are jurisdictional ''waters of the United States'' under the Clean Water Act must still comply with all applicable permitting requirements under that law. As discussed in more detail in Part IV of this preamble, none of the revisions to the stream buffer zone rule or other elements of this final rule affect a mine operator's responsibility to comply with water quality standards, effluent limitations, or other requirements of the Clean Water Act.

A few commenters argued that a 100-foot buffer zone [see paragraph (a)(1) of

the final rule] was insufficient to ensure protection of fish, wildlife, and related environmental values associated with the streams. Those comments are not germane to this rulemaking because we did not propose any changes to the 100-foot distance, which has long been a matter of settled law, nor did we seek comments on the adequacy of that distance. To the extent that commenters provided scientific data to support their suggestions, they did so primarily in the context of the value of buffers for terrestrial species. However, the width of the buffer that we established in our rules is based upon sediment control and protection of aquatic ecosystems.

In developing the stream buffer zone rule for the initial regulatory program, we selected the 100-foot width based primarily on sediment control considerations. See the preamble to 30 CFR 715.17(d)(3) at 42 FR 62652, December 13, 1977, which states that ''[t]he 100-foot limit is based on typical distances that should be maintained to protect stream channels from abnormal erosion.'' Preambles to subsequent versions of the stream buffer zone rule mention the benefits that buffer zones provide to wildlife, but those benefits are ancillary to the primary purpose of the buffer zone, which is to protect the integrity of the stream. In the preamble to the 1983 version of the stream buffer zone rule at 30 CFR 816.57 and 817.57, we rejected comments suggesting buffer widths other than 100 feet, stating that—

> The 100-foot width is used to protect streams from sedimentation and help preserve riparian vegetation and aquatic habitats. Since the 100-foot zone provides a simple and valuable standard for enforcement purposes, OSM has chosen not to change the general rule.

48 FR 30314, June 30, 1983.

Expanding the stream buffer zone based on the needs of terrestrial species has no sound scientific basis for the purpose of the stream buffer zone rule, which focuses on protection of water quality and aquatic habitats. Furthermore, establishing a buffer zone width based on the needs of terrestrial species is not practical because the optimal width of the buffer zone for each species varies considerably. In addition, as discussed in section III.I.1.a) of the final environmental impact statement (FEIS) for this rulemaking, a 100-foot buffer zone has considerable value as a connecting corridor for terrestrial species. Also, as discussed in section III.I.1 of the FEIS, scientific studies generally support the current 100-foot width for purposes of sediment control and protection of aquatic ecosystems. Other existing rules, including those at 30 CFR 780.16, 784.21, 816.97, and 817.97, provide sufficient protection for terrestrial wildlife.

One commenter stated that section 817.57(a) should apply to subsidence resulting from underground mining activities beneath the stream. We disagree. In response to litigation concerning the 1983 version of 30 CFR 817.57, we stipulated that the stream buffer zone requirement for underground mines ''is directed only to disturbance of surface lands by surface activities associated with underground mining.'' *In re: Permanent Surface Mining Regulation Litigation II-Round II*, 21 ERC 1725, 1741, footnote 21 (D.D.C. 1984). In addition, only one provision of SMCRA prohibits the conduct of underground mining operations that could result in the subsidence of streams. That provision [section 516(c)] requires the regulatory authority to suspend underground coal mining adjacent to ''permanent streams'' if the mining activities present an ''imminent danger to inhabitants of the urbanized areas, cities, towns, and communities.'' Our regulations at 30 CFR 817.121(f) clarify that the term ''permanent streams'' means perennial streams. Neither section 516(c) of the Act nor 30 CFR 817.121(f) mention environmental impacts as a threshold for the prohibition of mining.

Subsidence impacts are regulated under section 516(b)(1) of SMCRA, which provides, in relevant part, that the permit must require the operator to—

> Adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of such surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: Provided, That nothing in this subsection shall be construed to prohibit the standard method of room and pillar mining.

Our definition of ''material damage'' in this context in 30 CFR 701.5 includes a functional impairment of surface lands or features. Perennial and intermittent streams are considered surface features. As stated in the preamble to that definition, ''[t]he definition of 'material damage' covers damage to the surface and to surface features, such as wetlands, streams, and bodies of water, and to structures or facilities.'' 60 FR 16724, March 31, 1995. Therefore, the subsidence control plan for the underground mine prepared under section 784.20(b) and implemented under section 817.121(a) and (b) must address impacts on perennial and intermittent streams and the extent to which the operation can be and has been designed to prevent subsidence causing material damage to the extent technologically and economically feasible (or, for planned subsidence operations, the extent to which the operation has been designed to minimize material damage to the extent technologically and economically feasible).

4. Paragraph (b)

Paragraph (b) of the proposed rule provided that the prohibition in paragraph (a) on disturbance of the buffer zone did not apply to certain activities in waters of the United States. Those activities were listed in paragraphs (b)(1) through (b)(4). We have extensively revised paragraph (b) in response to comments. First, as discussed in Part VII of this preamble, we did not adopt the proposed change in scope from perennial and intermittent streams to waters of the United States. Second, as discussed above in Part VIII.I.2. of this preamble, we have revised the introductory language of paragraph (b) to clarify that the buffer requirement of paragraph (a) does not apply to those segments of a perennial or intermittent stream for which the regulatory authority, in accordance with sections 780.28(d), 784.28(d), 816.43(b)(1), or 817.43(b)(1), approves one or more of the activities listed in paragraphs (b)(1) through (b)(4) of sections 816.57 and 817.57. There is no need or reason to apply the buffer requirements of paragraph (a)(1) to a stream segment that will cease to exist because of construction of a stream-channel diversion, excess spoil fill, refuse pile, slurry impoundment, or sedimentation pond.[2] In those situations, there is no longer any stream segment to protect. Furthermore, construction of those diversions, fills, and impoundments inherently requires disturbance of the buffer for the stream segment as well as the stream segment itself. With respect to stream crossings

[2] In *Ohio Valley Environmental Council* v. *U.S. Army Corps of Engineers*, Civ. Action No. 3:05–0784 (S.D. W. Va., June 13, 2007), the district court held that discharges of sediment-laden water from the toe of a fill into stream segments leading to a sedimentation pond embankment require a permit under section 402 of the Clean Water Act. That decision is on appeal to the U.S. Court of Appeals for the Fourth Circuit as of the date of writing of this preamble. However, we believe this rule, as finalized here, is sufficient to accommodate the ultimate outcome of this litigation because the issuance of a SMCRA permit does not relieve the permittee of the obligation to comply with all requirements of the Clean Water Act. See section 702(a) of SMCRA.

under paragraph (b)(2), culverts, low-water crossings, and excavations for buried pipelines and utilities necessarily disturb the streambed. The road, pipeline, conveyor, or other utility will necessarily disturb portions of the buffer zone adjacent to the crossing, even when a bridge is constructed to avoid directly disturbing the stream itself. Third, in addition to removing references to waters of the United States, we have modified paragraphs (b)(1) through (b)(4) as explained in the following discussion of those paragraphs.

As proposed, for informational purposes, paragraphs (b)(1) through (b)(4) specify that persons conducting the activities listed in those paragraphs must comply with all other applicable requirements of the regulatory program. Each of those paragraphs also cross-references some of the most directly relevant regulatory program requirements.

Paragraph (b)(1)

Proposed paragraph (b)(1) applied to mining through waters of the United States. It specified that such activities must comply with the requirements of section 816.43(b) or 817.43(b) if the mining involves the temporary or permanent diversion of a perennial or intermittent stream. One commenter suggested that, to avoid creating the misapprehension that the stream buffer zone rule could operate to prohibit underground mining beneath streams, paragraph (b)(1) of section 817.57 should either be eliminated or be revised to refer only to the diversion of perennial or intermittent streams rather than to mining through streams. In response to this comment, we have revised paragraph (b)(1) of both sections 816.57 and 817.57 by deleting the reference to mining through waters of the United States and replacing it with a reference to diverting perennial or intermittent streams.

We find the commenter's suggestion compelling with respect to underground mining operations, which may require diversion of some perennial or intermittent stream segments to facilitate the construction of mining-related facilities, but which are unlikely to involve mining through those streams. We also find the change in terminology appropriate for surface mining operations because, in view of our decision not to revise the scope of this rule to include waters of the United States, there is no longer any need to refer to mining through waters other than perennial or intermittent streams. Sections 816.43(b) and 817.43(b) effectively require that the permittee divert perennial or intermittent streams before mining through them.

Therefore, we have revised paragraph (b)(1) of sections 816.57 and 817.57 to refer to diversions of perennial or intermittent streams rather than to mining through waters of the United States. As in the proposed rule, the final rule contains a reminder that all stream-channel diversions must comply with sections 816.43(b) and 817.43(b), which contain approval, design, and construction requirements specific to stream-channel diversions and stream-channel restorations.

Paragraph (b)(2)

Proposed paragraph (b)(2) applied to the placement of bridge abutments, culverts, or other structures in or near waters of the United States to facilitate crossing those waters. One commenter requested that the rule also apply to stream crossings for utilities, pipelines, and conveyors. We intended for this rule to apply to all stream crossings, not just those for roads. Therefore, we have revised paragraph (b)(2) to apply to the placement of bridge abutments, culverts, or other structures in or within 100 feet of a perennial or intermittent stream to facilitate the crossing of the stream by roads, railroads, conveyors, pipelines, utilities, or similar facilities. As applicable, activities under this paragraph must comply with the road design, construction, and maintenance requirements of sections 816.150 and 816.151 or, for railroad spurs, pipelines, utilities, and conveyors, with the support facility requirements of section 816.181. For underground mining operations, the appropriate cross-references are sections 817.150, 817.151, and 817.181, respectively.

Sections 816.151(d)(6) and 817.151(d)(6) contain standards governing the types of structures that primary mine roads may use to cross perennial and intermittent streams. Any low-water crossings must be designed, constructed, and maintained to prevent erosion of the structure or the streambed and additional contributions of suspended solids to streamflow. Sections 816.151(c)(2) and 817.151(c)(2) prohibit the use of stream fords for primary roads unless they are approved by the regulatory authority as temporary routes during road construction. All mine access and haul roads, whether primary or not, must comply with section 816.150(b) or 817.150(b). Those regulations include language similar to the sedimentation control and fish and wildlife protection requirements of sections 515(b)(10)(B)(i), 515(b)(24), 516(b)(9)(B), and 516(b)(11) of SMCRA.

Also, under our existing regulations, support facilities, which may include railroads, pipelines, utilities, and conveyor systems, must comply with sections 816.181 and 817.181. Paragraph (b) of sections 816.181 and 817.181 includes language similar to the sedimentation control and fish and wildlife protection requirements of sections 515(b)(10)(B)(i), 516(b)(9)(B), 515(b)(24), and 516(b)(11) of SMCRA.

Paragraph (b)(3)

Proposed paragraph (b)(3) applied to the construction of sedimentation pond embankments in waters of the United States. One commenter requested that this provision be expanded to include the pool or storage area for the sedimentation pond. We believe that the proposed rule implied the inclusion of those areas because they are an unavoidable result of the construction of sedimentation pond embankments in perennial or intermittent streams. However, in response to this comment, we have revised paragraph (b)(3) to clarify that it applies to the construction of sedimentation pond embankments in a perennial or intermittent stream and, by extension, to the pool or storage area created by the embankment. As proposed, final paragraph (b)(3) provides that activities under this paragraph must comply with the sediment control requirements of section 816.45(a) or 817.45(a). In response to a different comment, we have added a reminder that, under sections 816.56 and 817.56, all sedimentation pond embankments must be removed and reclaimed before abandoning the permit area or seeking final bond release unless the regulatory authority approves retention of the pond as a permanent impoundment under section 816.49(b) or 817.49(b) and provisions have been made for sound future maintenance by the permittee or the landowner in accordance with 30 CFR 800.40(c)(2).

Both the 1979 and 1983 versions of our permanent regulatory program regulations prohibit the placement of sedimentation ponds in perennial streams unless approved by the regulatory authority. See 30 CFR 816.46(a)(2) (1979) and 816.46(c)(1)(ii) (1983). However, the preamble to the 1979 rules explains that construction of sedimentation ponds in streams typically is a necessity in steep-slope mining conditions:

> Sedimentation ponds must be constructed prior to any disturbance of the area to be drained into the pond and as near as possible to the area to be disturbed. [Citation omitted.] Generally, such structures should be located out of perennial streams to facilitate the

clearing, removal and abandonment of the pond. Further, locating ponds out of perennial streams avoids the potential that flooding will wash away the pond. However, under design conditions, ponds may be constructed in perennial streams without harm to public safety or the environment. Therefore, the final regulations authorize the regulatory authority to approve construction of ponds in perennial streams on a site-specific basis to take into account topographic factors. [Citation omitted.]

* * * * *

Commenters suggested allowing construction of sedimentation ponds in intermittent and perennial streams. Because of the physical, topographic, or geographical constraints in steep slope mining areas, the valley floor is often the only possible location for a sediment pond. Since the valleys are steep and quite narrow, dams must be high and must be continuous across the entire valley in order to secure the necessary storage.

* * * * *

The Office recognizes that mining and other forms of construction are presently undertaken in very small perennial streams. Many Soil Conservation Service (SCS) [now the Natural Resources Conservation Service] structures are also located in perennial streams. Accordingly, OSM believes these cases require thorough examination. Therefore, the regulations have been modified to permit construction of sedimentation ponds in perennial streams only with approval by the regulatory authority.

44 FR 15159–60, March 13, 1979.

In short, sedimentation ponds must be constructed where there is sufficient storage capacity, which, in narrow valleys lacking natural terraces, typically means in the stream.

In the preamble to the proposed rule, we stated our belief that our existing rules at 30 CFR 816.46(c)(1)(ii) and 817.46(c)(1)(ii) can be applied in a manner consistent with a March 1, 2006, letter from Benjamin Grumbles, Assistant Administrator of the Environmental Protection Agency, to John Paul Woodley, Assistant Secretary of the Army (Civil Works).[3] Among other things, that letter states that the sedimentation pond must be constructed as close to the toe of the fill as practicable to minimize temporary adverse environmental impacts associated with construction and operation of the waste treatment system. In particular, 30 CFR 816.46(c)(1)(ii) and 817.46(c)(1)(ii) require that all sedimentation ponds be placed as near as possible to the disturbed area that they serve. We interpret this provision as meaning that sedimentation ponds collecting runoff from excess spoil fills must be constructed as close to the toe of the fill as possible. We also stated our belief that application of the existing rules in this manner will properly implement the intent of Congress in enacting SMCRA, as expressed in section 102(f) of the Act, which provides that one of the purposes of the Act is to strike a balance between energy production and environmental protection. However, we sought comment on whether it would be appropriate or helpful to revise those rules by replacing the term ''perennial streams'' with ''waters of the United States'' or whether we should more clearly specify the conditions under which the regulatory authority may approve placement of sedimentation ponds in perennial streams or other waters of the United States.

We received one comment recommending that we take both actions. The comment advocating replacement of ''perennial streams'' with ''waters of the United States'' is moot in light of our decision, as explained in Part VII of this preamble, not to adopt the term ''waters of the United States'' as a replacement for perennial and intermittent streams. With respect to the second part of the comment, the commenter provided no suggestions on what specifications we should adopt. Therefore, we are not making any changes in response to this comment.

Paragraph (b)(4)

Proposed paragraph (b)(4) applied to the construction of excess spoil fills and coal mine waste disposal facilities in waters of the United States. The final rule is identical to the proposed rule with the exception that we have replaced ''waters of the United States'' with ''a perennial or intermittent stream'' for reasons discussed in Part VII of this preamble. As proposed and adopted, paragraph (b)(4) also provides a reminder that excess spoil fills must comply with the requirements of paragraphs (a) and (f) of section 816.71or 817.71. It also provides a reminder that coal mine waste disposal facilities must comply with the pertinent requirements of sections 816.81(a), 816.83(a), and 816.84, or, for underground mining operations, sections 817.81(a), 817.83(a), and 817.84, respectively.

As discussed in Parts VIII.B., VIII.D., and VIII.E. of this preamble, we are extensively revising our rules governing the disposal of excess spoil and coal mine waste. In both cases, we are adding provisions designed to ensure use of the best technology currently available, to the extent possible, to minimize the adverse impacts on fish, wildlife, and related environmental values that may result from construction of excess spoil and coal mine waste disposal facilities. See sections 780.25(d)(1), 780.35(a)(3), 784.16(d)(1), and 784.19(a)(3). In addition, we are adding paragraphs (a)(1) and (a)(2) of sections 780.35 and 784.19 to require that operations be designed to minimize the creation of excess spoil and to ensure that fills are no larger than necessary to accommodate the anticipated volume of excess spoil.

Other Comments Received on Proposed Paragraph (b)

The preamble to the proposed rule stated that we intended that the list of activities in paragraph (b) would include the universe of activities that inherently involve placement of fill material into waters of the United States as part of surface coal mining and reclamation operations. We invited comment on whether the list met that goal and, if not, how any other activities that involve placement of fill material into waters of the United States as part of surface coal mining and reclamation operations should be regulated under SMCRA with respect to this rule.

The few commenters who responded to this request expressed concern that the list was not all-inclusive. They recommended that it be revised to universally include all activities that are planned and approved to occur in the stream. We have not adopted this recommendation. We believe that the activities that we list in paragraphs (b)(1) through (b)(4) include all situations in which it may be inherently necessary to conduct activities in a stream segment to facilitate surface coal mining and reclamation operations. To the extent that a SMCRA permittee or permit applicant may receive authorization under the Clean Water Act to place fill material in a stream as part of an activity other than those listed in paragraphs (b)(1) through (b)(4), we will consider that approval and its implications when reviewing a SMCRA permit application. However, surface activities conducted in the buffer zone of a stream segment are subject to the stream buffer zone rule regardless of

[3] In *Ohio Valley Environmental Council* v. *U.S. Army Corps of Engineers*, Civ. Action No. 3:05–0784 (S.D. W. Va., June 13, 2007), the district court held that discharges of sediment-laden water from the toe of a fill into a stream segments leading to a sedimentation pond embankment requires a permit under section 402 of the Clean Water Act. That decision is on appeal to the U.S. Court of Appeals for the Fourth Circuit as of the date of writing of this preamble. However, we believe this rule, as finalized here, is sufficient to accommodate the ultimate outcome of this litigation because the issuance of a SMCRA permit does not relieve the permittee of the obligation to comply with all requirements of the Clean Water Act. See section 702(a) of SMCRA.

whether that segment is also subject to a Clean Water Act authorization.

One commenter recommended that we add a list of other activities to paragraph (b). Our responses to the suggested additions are set forth below:

• Pool or storage area for sedimentation ponds and impoundments

As discussed above, we have added a sentence to paragraph (b)(3) to clarify that the provisions of that paragraph extend to the pool or storage area created by the construction of a sedimentation pond embankment in a perennial or intermittent stream.

• Stream reaches between the toe of an excess spoil fill, refuse pile, or slurry impoundment and the sediment or drainage control structure for that fill, refuse pile, or impoundment

Historically, we and the state regulatory authorities have considered stream reaches of this nature to be part of the mining operation and included them within the permit area because they no longer function as a stream, but as a channel directing runoff from the face of the fill, refuse pile, or slurry pond embankment to the sediment pond for that structure. Our approach is consistent with the historical practice of Clean Water Act permitting authorities, which have issued NPDES permits for discharges from sediment ponds located in a perennial or intermittent stream. Inherent in that practice is the assumption that flows in the stream segment between the toe of the fill and the sediment pond embankment are not considered to be waters of the United States. EPA and the Corps have adopted policies classifying the stream segment between the toe of the fill or impounding structure and the sediment pond to be to be a channel conveying industrial waste water from the mining operation to a treatment facility before discharge into waters of the United States.[4] These waste treatment systems are designed to assure that the water flowing from the sediment pond into waters of the United States will meet effluent limitations.

However, in 2007, the U.S. District Court for the Southern District of West Virginia held that these stream segments are in fact waters of the United States, that sediment washing off the face of the fill does not qualify as fill material, and that the discharge of pollutants such as sediment into the stream segments between the toe of the fill and the sedimentation pond embankment is impermissible unless the discharge is authorized in a permit issued under section 402 of the Clean Water Act. See *Ohio Valley Environmental Council* v. *U.S. Army Corps of Engineers*, Civ. Action No. 3:05–0784 (S.D. W. Va., June 13, 2007). That decision is on appeal to the U.S. Court of Appeals for the Fourth Circuit as of the date of writing of this preamble. Regardless of the outcome of that litigation, we see no need to revise our rules in response to the commenter's concern. We recognize that the litigation has the potential to affect the implementation of sediment control for excess spoil fills, the extent to which sediment ponds continue to be constructed in intermittent or perennial streams below fills and impounding structures, and the classification of stream segments between the toe of the fill and the sediment pond embankment. However, we believe this rule, as finalized here, is sufficiently flexible to accommodate any shift in implementation of the Clean Water Act. As stated in paragraph (f)(2) of sections 780.28 and 784.28 and paragraph (d) of sections 816.57 and 817.57, issuance of a SMCRA permit does not relieve the permittee of the obligation to comply with all requirements of the Clean Water Act.

• Erosion protection zones

These features, which are primarily the result of recent changes in West Virginia regulations (see West Virginia Code of State Regulations 38–2–14.14.g.2.) and are intended to promote fill stability, are considered part of the fill. No rule change is needed.

• Diversions

With the exception of stream-channel diversions, which are already included in paragraph (b)(1), the construction of diversions generally does not involve placement of fill material in a perennial or intermittent stream or other direct disturbance of the stream. Therefore; we see no reason to add them to the list of activities in paragraph (b).

• Stream crossings involving roads, conveyors, pipelines, or power lines

We have revised paragraph (b)(2) to clarify that it applies to the placement of bridge abutments, culverts, or other structures in or within 100 feet of a perennial or intermittent stream to facilitate the crossing of the stream by roads, railroads, conveyors, pipelines, utilities, or similar facilities.

• Ephemeral streams and isolated waters of the United States

These features are not subject to the stream buffer zone rule, which applies only to perennial and intermittent streams. However, their exclusion from the stream buffer zone rule does not mean that they need not be considered during the SMCRA permitting process. In some cases, the provisions of sections 816.97(f) and 817.97(f) concerning wetlands and habitats of unusually high value for fish and wildlife may apply.

• Activities listed in 33 CFR 323.4 for which no permit is required under section 404 of the Clean Water Act

The fact that certain activities do not require a permit for purposes of section 404 of the Clean Water Act is not sufficient justification for excluding those activities from the requirement to maintain an undisturbed buffer between surface activities and perennial and intermittent streams for purposes of regulation under SMCRA.

5. Paragraph (c)

As proposed, paragraph (c) of sections 816.57 and 817.57 would have provided that activities exempt from the prohibition on disturbance of the surface of lands within 100 feet of waters of the United States must comply with paragraphs (b)(10)(B)(i) and (b)(24) of section 515 of the Act (or, for underground mining operations, paragraphs (b)(9)(B) and (b)(11) of section 516 of the Act) and the regulations implementing those provisions of the Act. However, the referenced statutory provisions and regulations apply to all surface coal mining and reclamation operations, not just to those described in the proposed rule. Therefore, as adopted in the final rule, paragraph (c) applies to all activities conducted either in perennial or intermittent streams or within 100 feet of those streams.

Paragraphs (c)(1) through (c)(4) of the final rule reference and describe the OSM regulations, other than the stream buffer zone rules, that most directly relate to implementation of sections 515(b)(10)(B)(i) and (b)(24) and 516(b)(9)(B) and (b)(11) of SMCRA. Those regulations include the requirement in 30 CFR 816.41(d)(1) and 817.41(d)(1) that activities be conducted

[4] See, e.g., a letter dated March 1, 2006, from Benjamin Grumbles, Assistant Administrator of the Environmental Protection Agency, to John Paul Woodley, Assistant Secretary of the Army (Civil Works), which states that, for surface coal mining operations in the Appalachian Mountain states, the stream segment between the toe of the fill and the sedimentation pond will be considered part of the waste treatment system, not waters of the United States, for purposes of the Clean Water Act. The sedimentation pond must be constructed as close to the toe of the fill as practicable to minimize temporary adverse environmental impacts associated with construction and operation of the waste treatment system. The letter notes that, as a condition of approval, the Corps also requires that the stream segment be restored as soon as the mining operation is completed and the pond is no longer needed for treatment purposes. At that time, the stream segment will once again be classified as waters of the United States. Therefore, based on this provision of the letter, it may be prudent for the permittee to maintain an undisturbed buffer for the affected stream segment to the extent possible.

according to the plan approved under 30 CFR 780.21(h) or 784.14(g) and that earth materials, groundwater discharges, and runoff be handled in a manner that prevents, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution. They also include the requirement in 30 CFR 816.45(a) and 817.45(a) that appropriate sediment control measures be designed, constructed, and maintained using the best technology currently available to prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area. And they include the requirement in 30 CFR 816.97(a) and 817.97(a) that the operator must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish and wildlife and related environmental values and achieve enhancement of those resources where practicable. In the final rule, we are adding paragraph (c)(4) to incorporate a reference to 30 CFR 816.97(f) and 817.97(f). Those rules require that the operator avoid disturbances to, enhance where practicable, restore, or replace wetlands, habitats of unusually high value for fish and wildlife, and riparian vegetation bordering rivers, streams, lakes, and ponds.

Paragraph (c) does not impose any new requirements. Instead, it reiterates that the referenced rules apply to all surface coal mining and reclamation operations, including those activities that occur in or within 100 feet of a perennial or intermittent stream under paragraph (b) of sections 816.57 and 817.57.

6. Proposed Paragraph (d)

Proposed paragraph (d) of sections 816.57 and 817.57 provided that the permittee may not initiate any activities under paragraph (b) until the permittee obtains all necessary certifications and authorizations under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344. The preamble to the proposed rule stated that we considered that provision informational. We requested comment on whether the provision should remain informational or whether we should revise our rules to require its inclusion as a SMCRA permit condition, which would mean that the prohibition on initiation of activities before obtaining all necessary Clean Water Act authorizations and certifications would be independently enforceable under SMCRA. See 72 FR 48910, August 24, 2007.

Commenters were divided on this issue. The U.S. Fish and Wildlife Service and the Geologic and Water Resources Divisions of the National Park Service supported adoption of a rule requiring a permit condition under SMCRA. The EPA also supported adoption of a requirement for a permit condition under SMCRA, stating that such a requirement would enhance compliance with Clean Water Act requirements. One state regulatory authority opposed adoption of a requirement for a permit condition; the commenter instead recommended that coordination of permitting and enforcement of Clean Water Act requirements be left to the states and the Corps. Comments from the mining industry strongly opposed adoption of a rule that would impose a permit condition under SMCRA, expressing the fear that it would only result in more duplication and confusion in regulation of the coal mining industry. One commenter stated that, if the permittee needs to comply with the Clean Water Act, then the requirements of that statute should be enforced according to the statutory scheme specified in the Clean Water Act.

After reviewing the comments, we have decided not to adopt proposed paragraph (d). Instead, we are adopting new paragraph (a)(2), which provides that surface activities, including those activities identified in paragraphs (b)(1) through (b)(4) of sections 816.57 and 817.57, may be authorized in perennial or intermittent streams only where those activities would not cause or contribute to the violation of applicable State or Federal water quality standards developed pursuant to the Clean Water Act, as determined through certification under section 401 of the Clean Water Act or a permit under section 402 or 404 of the Clean Water Act. We are also adopting a new paragraph (d)(2) of sections 780.28 and 784.28. That paragraph provides that before approving a permit application in which the applicant proposes to conduct surface activities in a perennial or intermittent stream, the regulatory authority must include a permit condition requiring a demonstration of compliance with the Clean Water Act in the manner specified in paragraph (a)(2) of sections 816.57 and 817.57 before the permittee may conduct those activities. This requirement applies to the extent that the activities require authorization or certification under the Clean Water Act.

However, in adopting these rules, we reiterate that nothing in SMCRA provides the SMCRA regulatory authority with jurisdiction over the Clean Water Act or the authority to determine when a permit or authorization is required under the Clean Water Act. Under paragraphs (a) and (a)(2) of section 702 of SMCRA, nothing in SMCRA (and, by extension, regulations adopted under SMCRA) may be construed as superseding, amending, modifying, or repealing the Clean Water Act or any state laws or state or federal rules adopted under the Clean Water Act. In addition, nothing in the Clean Water Act vests SMCRA regulatory authorities with the authority to enforce compliance with the permitting and certification requirements of that law.

J. Sections 816.71 and 817.71 General Requirements for Disposal of Excess Spoil

As proposed, we have added a new paragraph (a)(4) to sections 816.71 and 817.71 to implement, in part, the requirements of sections 515(b)(24) and 516(b)(11) of the Act. Sections 515(b)(24) and 516(b)(11) require that surface coal mining and reclamation operations be conducted to ''minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values'' ''to the extent possible using the best technology currently available.''

The new paragraph requires that excess spoil be placed in designated disposal areas within the permit area in a controlled manner to minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible using the best technology currently available.

As previously discussed in Parts VIII.D. and VIII.E. of this preamble, we have moved paragraphs (b)(1) (design certification), (c) (location), and (d)(1) (foundation investigations) of the former version of sections 816.71 and 817.71 to sections 780.35 and 784.19 as part of our effort to place provisions that are solely design considerations and requirements in our permitting regulations rather than in the performance standards.

As proposed, in this final rule we are deleting the last sentence of paragraph (d)(2) of the former version of sections 816.71 and 817.71. That sentence required a stability analysis for rock toe buttresses and keyway cuts. We have deleted it because it duplicates requirements included in sections 780.35 and 784.19. Final paragraph (d) of sections 816.71 and 817.71 retains the requirement that keyway cuts or rock-toe buttresses be constructed to ensure fill stability when the slope in the disposal area exceeds either 2.8h:1v (36

percent) or any lesser slope designated by the regulatory authority based on local conditions.

As proposed, this final rule redesignates former paragraph (b)(2) of sections 816.71 and 817.71 as paragraph (b) of those sections. It revises that paragraph to require that the fill not only be designed to attain a minimum static safety factor of 1.5 as required by the former version of these rules, but that the fill actually be constructed to attain that safety factor. This change is consistent with section 515(b)(22)(A) of the Act, which requires that all excess spoil be placed in a way that ensures mass stability and prevents mass movement.

Consistent with the proposed rule, we are adding a new paragraph (c) to sections 816.71 and 817.71 to require that the permittee construct the fill in accordance with the design and plans submitted under section 780.35 or 784.19 and approved as part of the permit. This provision emphasizes that fills must be built on the sites selected under section 780.35 or 784.19 in a manner consistent with the designs submitted under those sections and approved as part of the permit. It is a companion to the new provisions concerning environmental protection and excess spoil minimization that we have added to sections 780.35 and 784.19.

Finally, as proposed, we are removing former section 817.71(k), which provided that spoil resulting from face-up operations for underground coal mine development may be placed at drift entries as part of a cut-and-fill structure if that structure is less than 400 feet in length and is designed in accordance with section 817.71. We removed this paragraph because spoil excavated as part of face-up operations and used to construct a mine bench is not excess spoil. As defined in 30 CFR 701.5, excess spoil consists of spoil material disposed of in a location outside the mined-out area, but it does not include spoil needed to achieve restoration of the approximate original contour. In most cases, spoil used to construct the bench for an underground mine will later be used to reclaim the face-up area when the underground mine is finished. That is, the bench will be regraded to cover the mine entry and eliminate any highwall once mining is completed and the bench is no longer needed for mine offices, parking lots, equipment storage, conveyor belts, and other mining-related purposes. Consequently, this paragraph of the regulations does not belong in a section devoted to disposal of excess spoil.

We are not moving the requirements of section 817.71(k) to another part of our rules because we do not find it necessary to impose the design requirements for excess spoil fills (which are permanent structures) on temporary spoil storage structures and support facilities, such as the benches to which section 817.71(k) applies. Nor do we find it necessary or appropriate to limit those benches to 400 feet in length. Bench length and configuration are more appropriately determined by operational, topographic, geologic, and other site-specific considerations. However, the regulatory authority has the right to impose design and construction requirements on a case-by-case basis when it determines that those requirements are a necessary prerequisite to making the permit application approval findings specified in 30 CFR 773.15.

In the preamble to the proposed rule, we sought comment on (1) whether this approach is adequate to accomplish the purposes and requirements of SMCRA, (2) whether we should codify the sentence concerning the right of the regulatory authority to impose requirements, or (3) whether more specific rules are needed or appropriate. We received no comments in response to this request.

We also received no comments on any of the proposed changes to sections 816.71 and 817.71.

K. What does the phrase ''to the extent possible'' mean in these rules?

Sections 515(b)(10)(B)(i), 515(b)(24), 516(b)(9)(B), and 516(b)(11) of SMCRA include the proviso that the requirements of those sections apply ''to the extent possible.'' Some of the rules that we are adopting today include similar language because they are based upon those provisions of the Act. Given the wide array of circumstances to which these requirements apply and the paucity of legislative history, we did not propose and are not adopting a definition of the phrase ''to the extent possible'' as part of this rulemaking. Instead, we and the State regulatory authorities will continue to determine the meaning of that phrase on a case-by-case basis in a manner consistent with section 102(f) of SMCRA. That section of the Act provides that one of the purposes of SMCRA is to ''assure that the coal supply essential to the Nation's energy requirements and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.'' One comment from a State regulatory authority supported this approach.

In addition, section 515(b)(1) of SMCRA requires that surface coal mining operations be conducted ''so as to maximize the utilization and conservation of the solid fuel resource being recovered so that reaffecting the land in the future through surface coal mining can be minimized.'' We believe that the ''to the extent possible'' clause in paragraphs (b)(10)(B)(i) and (b)(24) of section 515 of SMCRA is properly interpreted in part by applying the environmental protection requirements of those paragraphs so as to give full force and effect to the coal recovery performance standard in section 515(b)(1), as reflected in the regulations at 30 CFR 816.59 and 817.59.

As adopted in this final rule, sections 780.25(d)(1), 780.35(a)(3), 780.16(d)(1), and 784.19(a)(3) require that permit applicants conduct an analysis of alternatives for excess spoil fills and coal mine waste disposal structures if those fills and structures involve the placement of excess spoil or coal mine waste in or within 100 feet of a perennial or intermittent stream. Those rules provide that, when evaluating all reasonably possible alternatives, permit applicants must select the alternative that would have the least overall adverse environmental impact. The final rules specify that an alternative is reasonably possible if it conforms to the safety, engineering, design, and construction requirements of the regulatory program; is capable of being done after consideration of cost, logistics, and available technology; and is consistent with the coal recovery provisions of section 816.59 or 817.59. In other words, nothing in the rule should be construed as elevating environmental concerns over safety considerations, as prohibiting the conduct of surface coal mining operations that are not otherwise prohibited under SMCRA or other laws or regulations, or as requiring consideration of unreasonably expensive or technologically infeasible alternatives.

The portion of our rules that refers to ''consideration of cost, logistics, and available technology'' is derived from the EPA regulations at 40 CFR 230.10(a)(2), which define a practicable alternative for purposes of section 404 of the Clean Water Act. In interpreting this provision, the EPA/COE memorandum entitled ''Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements'' states that ''[t]he determination of what constitutes an

unreasonable expense should generally consider whether the projected cost is substantially greater than the costs normally associated with this particular type of project.'' We have included similar language in paragraph (d)(1)(ii)(B) of sections 780.25 and 784.16 and paragraph (a)(3)(ii)(B) of sections 780.35 and 784.19 because (1) the concept of a practicable alternative for purposes of section 404 of the Clean Water Act is in some ways analogous to the determination of reasonably possible alternatives under this rule, and (2) the principle is consistent with the phrase ''to the extent possible'' in sections 515(b)(24) and 516(b)(11) of SMCRA. On the other hand, the fact that one alternative may cost somewhat more than a different alternative does not necessarily warrant exclusion of the more costly alternative from consideration. See Part VI.D. of this preamble for a more extensive discussion of the rationale for our use of the term ''reasonably possible'' and its consistency with statutory provisions.

On January 7, 2004 (69 FR 1036, 1047), we proposed to adopt the phrase ''to the maximum extent possible'' as part of 30 CFR 780.18(b)(3). Several commenters suggested that we replace ''possible'' with ''practicable'' or ''technologically and economically feasible.'' Other commenters stated that the proposed language was too vague, but they did not provide suggested replacement language.

In developing the proposed rule that we published on August 24, 2007, we decided not to propose any of the suggestions that commenters submitted on the 2004 proposed rule. The replacement language suggested by several commenters is no less vague or more specific than the statutory phrase ''to the extent possible.'' Nevertheless, we again solicited suggestions on how we could define the phrase ''to the extent possible.'' We received no suggestions.

We also sought comment on whether we should incorporate 40 CFR 230.70 through 230.75 (part of the 404(b)(1) Guidelines) as part of our rules to provide guidance in interpreting ''to the extent possible.'' We received one comment supporting incorporation and several comments opposing that action. One commenter pointed out the practical and legal problems and difficulties in having the SMCRA regulatory authority interpret and enforce Clean Water Act requirements. In view of those problems, and the fact that our review indicates that 40 CFR 230.70 through 230.75 would have relatively little relevance to surface coal mining and reclamation operations, we have decided not to incorporate those provisions as part of our regulations.

L. What does the phrase ''best technology currently available'' mean in these rules?

Our definition of ''best technology currently available'' at 30 CFR 701.5 embraces a wide range of activities, including those that may not be in routine use, if the regulatory authority determines they are currently available and will work. As such, it is sufficiently flexible to include new techniques developed over time that were not contemplated or in use at the time the definition was promulgated. Similarly, it is sufficiently flexible to include techniques that are not contemplated or in use today. Consequently, we cannot state with specificity what measures would constitute the best technology currently available in all situations.

Our regulations at 30 CFR 816.45 and 817.45 address sediment control measures and requirements for all surface coal mining and reclamation operations. Paragraph (a)(1) of those sections reiterates the requirements of sections 515(b)(10)(B)(i) and 516(b)(9)(B) of SMCRA concerning prevention of additional contributions of suspended solids to streamflow or runoff outside the permit area. Paragraph (b) of those rules lists various measures that may be employed to accomplish the sediment control requirements of paragraph (a).

At one time, paragraph (b)(2) of 30 CFR 816.46 and 817.46 prescribed siltation structures (sedimentation ponds and other treatment facilities with point-source discharges) as the best technology currently available for sediment control. However, that paragraph was struck down upon judicial review because the court found that we did not articulate a sufficient basis for the rule under the Administrative Procedure Act. In particular, the court held that the preamble to the rulemaking did not adequately discuss the benefits and drawbacks of siltation structures and alternative sediment control methods and did not enable the court ''to discern the path taken by [the Secretary] in responding to commenters' concerns'' that siltation structures in the West are not the best technology currently available. See *In re: Permanent Surface Mining Regulation Litigation II, Round III,* 620 F. Supp. 1519, 1566–1568 (D.D.C. July 15, 1985). On November 20, 1986 (51 FR 41961), we suspended the regulations that the court struck down. Therefore, those regulations are no longer dispositive in determining the best technology currently available. To avoid confusion on the part of readers of the Code of Federal regulations, we are removing paragraph (b)(2) of sections 816.46 and 817.46 as part of this rulemaking.

On November 13, 1990 (55 FR 47430–47435), we proposed to revise 30 CFR 816.45, 817.45, 816.46(b)(2), and 817.46(b)(2) to reestablish siltation structures as the best technology currently available for sediment control on surface coal mining and reclamation operations in areas receiving more than 26 inches of average annual precipitation. Regulatory authorities in areas with less than that amount of precipitation would have been able to specify alternative sediment control measures as the best technology currently available through the program amendment process. Most commenters opposed that approach and we never adopted the proposed rule, in part because it could have inhibited the development and implementation of new and innovative practices to control sediment. We decided that the regulatory authority should retain the discretion to determine what sediment control practices constitute the best technology currently available.

In addition to the sediment control regulations at 30 CFR 816.45 and 817.45 and the definition of ''best technology currently available'' in 30 CFR 701.5 discussed above, the legislative history of section 515(b)(15)(B)(i) of SMCRA provides some guidance as to what measures Congress considered to be the best technology currently available at that time to control sedimentation from minesites:

> Similarly, technology exists to prevent increased sediment loads resulting from mining from reaching streams outside the permit area. Sediment or siltation control systems are generally designed on a mine-by-mine basis which could involve several drainage areas or on a small-drainage-area basis which may serve several mines. There are a number of different measures that when applied singly or in combination can remove virtually all sediment or silt resulting from the mining operation. A range of individual siltation control measures includes: erosion and sediment control structures, chemical soil stabilizers, mulches, mulch blankets, and special control practices such as adjusting the timing and sequencing of earth movement, pumping drainage, and establishing vegetative filter strips.

H.R. Rep. No. 95–218 at 114 (April 22, 1977).

Furthermore, in Directive TSR–3, ''Sediment Control Using the Best Technology Currently Available,'' dated November 2, 1987, we state that we anticipate ''that in most cases sedimentation ponds or some other siltation structure will be BTCA [the

best technology currently available]'' for sedimentation control. Finally, the preamble to the 1990 proposed rule lists numerous literature resources concerning the best technology currently available for sedimentation control. See the footnotes at 55 FR 47431–47433, November 13, 1990. The preamble notes that ''[t]he effectiveness of specific practices may be restricted to specific areas and be dependent upon variables such as geomorphology, hydrology, climate and engineering design.'' *Id.* at 47342, col. 1.

In addition, the outcome of *Ohio Valley Environmental Council* v. *U.S. Army Corps of Engineers*, Civ. Action No. 3:05–0784 (S.D. W. Va., June 13, 2007), may affect what we consider to be the best technology currently available for sediment control below fills and impounding structures. The district court held that the stream segment between the toe of the fill or impounding structure and the sediment pond embankment must be considered waters of the United States rather than part of a waste treatment system designed to remove sediment prior to discharge into waters of the United States below the sediment pond. That decision is on appeal to the U.S. Court of Appeals for the Fourth Circuit as of the date of writing of this preamble.

As previously noted, SMCRA does not limit use of the term ''best technology currently available'' to the sediment control requirements of sections 515(b)(10)(B)(i) and 516(b)(9)(B). Sections 515(b)(24) and 516(b)(11) of SMCRA also require use of the best technology currently available to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible. Sections 515(b)(24) and 516(b)(11) are primarily implemented by the fish and wildlife protection performance standards at 30 CFR 816.97 and 817.97. Like the other regulations discussed in this part of the preamble, those performance standards and the related permitting requirements at 30 CFR 780.16 and 784.21 apply to all aspects of surface coal mining and reclamation operations, including those activities that are conducted in perennial and intermittent streams and activities that occur on the surface of lands within 100 feet of perennial or intermittent streams.

The preamble to 30 CFR 816.97(a) and 817.97(a) states that those rules ''allow an operator to consult any technical authorities on conservation methods to assure their compliance with the statutory requirement for use of the best technology currently available.'' 48 FR 30317, June 30, 1983. We anticipate that state and federal fish and wildlife, land management, and conservation agencies will be a useful resource in assisting the permittee and the regulatory authority in determining the best technology currently available under 30 CFR 780.16, 784.21, 816.97(a), and 817.97(a). For example, the Bureau of Land Management within the U.S. Department of the Interior has developed best management practices relating to stream crossings (see *http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/best_management_practices/technical_information.html*) and the Utah Division of Oil, Gas and Mining has published ''The Practical Guide to Reclamation in Utah'' (see *https://fs.ogm.utah.gov/PUB/MINES/Coal_Related/RecMan/Reclamation_Manual.pdf*). Chapter 2 of the latter document discusses stream restoration and streambank bioengineering.

In some cases, the best technology currently available may consist primarily of minimizing the amount of land and waters affected. We anticipate that the analysis of alternatives and site selection requirements that we are adopting as part of the permitting requirements for disposal of coal mine waste and excess spoil in sections 780.25(d)(1), 784.16(d)(1), 780.35(a)(3), and 784.19(a)(3) would be the primary means of demonstrating use of the best technology currently available for those activities. The excess spoil minimization and fill design and construction requirements of paragraphs (a)(1) and (a)(2) of sections 780.35 and 784.19 are also significant. In addition, construction methodology and mining and reclamation techniques may play a role.

IX. Procedural Matters and Required Determinations

A. Executive Order 12866—Regulatory Planning and Review

This rule is considered a ''significant regulatory action'' under Executive Order 12866 and is subject to review by the Office of Management and Budget (OMB) because it may raise novel legal or policy issues, as discussed in the preamble.

With respect to other determinations required under Executive Order 12866—

a. This rule will not have an annual effect of $100 million or more on the economy. As discussed in the final environmental impact statement and, to a lesser extent, this preamble, it will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This rule will not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

With respect to the assessment required by section 6(a)(3)(B)(ii) of the executive order, the preamble discusses how the regulatory action is consistent with the statutory mandate in sections 515(b) and 516(b) of SMCRA to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area and to minimize, to the extent possible using the best technology currently available, disturbances and adverse impacts on fish, wildlife, and related environmental values. To the extent permitted by law, the regulatory action also promotes the President's priorities, including energy production, and avoids undue interference with state, local, and tribal governments in the exercise of their governmental functions. See Parts IX.B. and IX.G. of this preamble.

We anticipate that the principal benefits of this rule will be (1) minimization of the adverse environmental impacts stemming from the construction of excess spoil fills and coal mine waste impoundments and fills and (2) clarification of the circumstances in which the prohibition in the stream buffer zone rule applies. As discussed in the final environmental impact statement, we cannot quantify these benefits.

The revisions are not expected to have an adverse economic impact on states and Indian tribes or the regulated industry, although some of the regulatory changes will result in an increase in the costs and burdens placed on coal operators and state regulatory authorities. Based on surveys conducted to prepare the supporting statements for this rule under the Paperwork Reduction Act, we estimate that the total annual cost increase for operators will be approximately $240,500, while the total annual cost increase for state regulatory authorities will be approximately $24,200. These increases are a result of the requirement to prepare and document the plans, analyses and findings required by the revised rules. The cost increases will principally affect those coal operators and states (Kentucky, Virginia, and West Virginia) located in the steep-slope terrain of the central Appalachian

coalfields, where the bulk of excess spoil is generated. Because all regulatory authorities in the Appalachian coalfields have implemented policies to minimize the volume of excess spoil disposed of outside the mined-out area, and because many operators already conduct alternative analyses to satisfy requirements under section 404 of the Clean Water Act, we expect no significant additional costs of implementing these regulatory changes. There may be other minor increases in costs associated with the new permitting requirements, in particular the alternatives analysis required for the disposal of excess spoil and coal mine waste in or near perennial and intermittent streams.

B. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not considered a significant energy action under Executive Order 13211. The revisions contained in this rule will not have a significant effect on the supply, distribution, or use of energy.

C. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The revisions are expected to have only minimal adverse economic impact on the regulated industry, including small entities. Further, the rule will produce no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets. This determination is based upon the following analysis:

Baseline of Small Coal Mining Entities

The Small Business Administration (SBA) uses the North American Industry Classification System Codes (NAICS) to establish size standards for small businesses in the coal mining industry. The NAICS classification for the coal mining industry is code 2121. Subsets of this sector include Bituminous Coal and Lignite Surface Mining (code 212111), Bituminous Coal Underground Mining (code 212112), and Anthracite Mining (code 212113).

The size standard established for each of these categories is 500 or fewer employees for each business concern and associated affiliates. SBA considers business concerns to be affiliates when one concern ''controls or has the power to control the other, or a third party or parties controls or has the power to control both.''

The U.S. Census Bureau maintains statistics related to business employment, payroll and employment size categories for each NAICS description. Census Bureau data for 2005 show a total of 735 coal-mining firms employing a total of 74,260 persons. Of those firms, 672 had fewer than 500 employees. Those firms employed a total of 22,809 persons.

Data available from MSHA and the Energy Information Administration indicate that in 2006, there were 806 coal-mining firms employing a total of 81,891 persons and producing a total of 1,162,750,000 tons of coal. Within that total, there were 775 coal-mining firms with fewer than 500 employees. Those firms employed a total of 28,749 persons and produced a total of 247,400,000 tons of coal.

Thus, MSHA data indicate that in 2006 small coal-mining firms comprised 96 percent of the total number of coal-mining firms in the United States. Those firms employed 35 percent of the total number of persons engaged in coal mining nationwide and produced 21 percent of the nation's coal.

Baseline of Potentially Affected Entities

The principal change that could impact small coal mining firms is the requirement to minimize the volume of excess spoil generated at a particular mine site. Kentucky, Virginia, West Virginia, and Tennessee account for 98.6 percent of the total number of excess spoil fills approved nationwide in permits issued between October 2001 and June 2005. Thus, the baseline of potentially impacted entities has been limited to the coal-producing region of central Appalachia, which includes eastern Kentucky, Virginia, southern West Virginia, and Tennessee.

According to MSHA data, there were 389 coal-mining firms with fewer than 500 employees operating in central Appalachia in 2006. That number is approximately 23 percent of the total number of small coal-mining firms in the United States. The following data summarize coal production and employment in central Appalachia:

Total coal production: 236,127,000 tons.

Gross revenue from coal production: $11,275,064,250 (average price: $47.75 per ton).

Coal-mining firms with fewer than 500 employees: 389.

Coal produced by those firms: 87,447,368 tons.

Gross revenue from those firms: $4,175,611,822 (average price: $47.75 per ton).

Section 507(c) of SMCRA provides that an operator does not qualify for the small operator assistance program if the total annual production at all locations attributed to that operator exceeds 300,000 tons. We determined that 325 of the 389 firms within central Appalachia that MSHA identified as small entities produced less than 300,000 tons of coal per year.

Number of Potentially Affected Entities

According to MSHA data, in 2006 the 389 small coal-mining entities in central Appalachia operated a total of 765 mines, as shown in this table:

State	Number of small coal-mining entities	Number of mines operated by small entities	Percent of total number of mines operated by small entities in central Appalachia
Kentucky	224	397	51
Tennessee	10	35	5
Virginia	52	107	14
West Virginia	103	226	30
Total	389	765	100

We conducted an evaluation of permits issued in West Virginia between October 2001 and June 2005 to determine the number of stream miles impacted by excess spoil and coal mine waste fills permitted during that time. We used a sample of 110 of the 270 permits issued in West Virginia during that period. The sample included 28 permits for underground mining operations and 82 permits for surface mines and other types of mining-related operations regulated under SMCRA. A review of that data indicated that 4 percent (4) of all permits had refuse disposal facilities, 29 percent (24) of the permits for surface mines had excess spoil fills, and 4 percent (1) of the permits for underground mines had an excess spoil fill.

To collect information on excess spoil, we conducted an evaluation of 92 new permits issued in Kentucky during 2006. The data indicate that 64 percent of small surface mining operations have permits authorizing construction of excess spoil fills. Those fills will generate 32 percent of the total projected volume of fill material to be produced by surface mines in Kentucky. In addition, 67 percent of the small underground operations have permits authorizing construction of excess spoil fills. Those fills will generate 91 percent of the total projected volume of fill material to be produced by underground mines in Kentucky.

Extrapolating the data from the reviews of permits in Kentucky and West Virginia to all mines operated by small entities in central Appalachia, we estimate that the rule will impact 191 of the 389 small coal-mining entities in central Appalachia, based on the assumption that 64% (143) of the small entities in Kentucky will construct excess spoil fills and that 29% (48) of the small entities in West Virginia, Virginia, and Tennessee will do so.

Economic Impact on Potentially Affected Entities

We do not believe there will be any significant economic impact upon small entities. Only two new types of compliance costs would affect operators of coal mines: costs of an alternatives analysis for disposal of coal mine waste and/or excess spoil; and costs of minimizing the volume of excess spoil to the extent possible. It is not possible to quantify compliance costs for all potentially affected small entities because each mine site is unique and the operational costs of complying with the rule will vary.

Under the final rule, an operator must design and construct a mine to minimize both the volume of excess spoil created and the adverse impacts of excess spoil fills and coal mine waste disposal facilities on fish, wildlife, and related environmental values. Whenever a permit application proposes to place excess spoil or coal mine waste in or within 100 feet of a perennial or intermittent stream, the final rule requires the permit applicant to identify a range of reasonably possible alternatives and select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values. In determining whether an alternative is reasonable, the applicant must consider cost, logistics, and the availability of technology.

Based on discussions with mining consultants, developing the alternatives analysis for the permit application will cost between $10,000 and $15,000 per permit. However, most operators will incur little to no additional cost to provide the alternatives analysis because the Corps of Engineers usually requires a similar analysis to satisfy Clean Water Act requirements.

With respect to operational costs, Section IV of a draft environmental impact statement [5] issued in 2003 by the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, OSM, and the West Virginia Department of Environmental Protection contains the following discussion of fill minimization costs:

> Fill minimization may increase operational costs to the mining operator because spoil that must be returned to the mine site has higher handling costs than the current practice of end-dump valley fill construction. * * * While not a direct comparison, and somewhat dated, the regulatory analysis that we used for the permanent program regulations indicated that placing spoil in lifts versus end-dumping to build valley fills added 17 cents/ton to the cost of mining coal in central Appalachia.

The same document estimates the cost of compliance with a West Virginia Department of Environmental Protection policy intended to minimize the volume of excess spoil at 50 cents to one dollar for each cubic yard of spoil that, as a result of the policy, is retained on the mined-out area rather than placed in an excess spoil fill. We will use the West Virginia estimate as the cost of compliance with the fill minimization provisions of this final rule. However, some of those costs are offset by reduced mitigation expenses under other state and federal laws because compliance with the policy typically results in substantially reducing the length of stream segments impacted.

We have analyzed the impact on eastern Kentucky small coal mine operators in more detail because more data is available from that state. We estimate that coal mines operated by the 143 small coal-mining entities in Kentucky with excess spoil fills will generate 32 percent (114,514,880 cubic yards) of the 357,829,000 cubic yards of excess spoil approved in all surface mine permits issued in 2006 in Kentucky. If we assume that the requirement to minimize the placement of spoil outside the mined-out area would require small entities to reduce the volume of excess spoil fills by 25 percent, then those entities will have to retain approximately 28,628,720 additional cubic yards within the mined out area for the permits that they received in 2006. Further assuming that the unit cost for placing this amount of excess spoil within the mined-out area would be the same as in West Virginia (50 cents to one dollar per cubic yard), the total cost of this placement to small coal-mining entities in Kentucky will range from $14 million to $28 million, or an average of $98,000 to $196,000 per small entity with excess spoil.

We do not have sufficient data to perform a similar calculation for small coal-mining entities in the other three states. However, we can use the average cost per small entity with excess spoil in Kentucky to project a reasonable range of costs for small coal-mining entities in the remaining central Appalachian states. Specifically, the 48 potentially impacted small entities in Tennessee, Virginia, and West Virginia could incur an additional cost of $4.7 million to $9.4 million.

Combining the projections for the 143 small entities in Kentucky and the 48 small entities in other states results in an estimated total cost ranging between $18.7 million and $37.4 million for all 191 small entities projected to be impacted.

In the aggregate, the 224 small coal-mining entities in eastern Kentucky produced 41,587,096 tons of coal in 2006. At an average price of $47.75 per ton, the gross revenue from that production equals $1,985,783,800, with $1,270,901,653 of that amount attributable to the 64% (143) of the small entities that we project will be impacted by this rule. Thus, the estimated cost of compliance with the requirement to minimize the placement of spoil outside the mined-out area is projected to range from 1.1 percent to 2.2 percent of the gross revenue for the 143 potentially impacted eastern Kentucky small coal-mining entities.

[5] ''Mountaintop Mining/Valley Fills in Appalachia Draft Programmatic Environmental Impact Statement'' (EPA 9–03–R–00013, EPA Region 3, June 2003).

At the same average price of $47.75 per ton, gross revenue in 2006 for the other 165 small coal-mining entities in central Appalachia equals $2,985,783,834, of which $635,050,116 is attributable to the 29% (48) of those entities that we project will be impacted by this rule. Therefore, at an average price of $47.75 per ton, gross revenue in 2006 totals $1,905,951,769 for the 191 central Appalachian small entities that we project will be impacted by this rule.

Extrapolating this data to the central Appalachian region as a whole, we estimate the cost of compliance will range between $18.7 million and $37.4 million, which translates to a range of 0.98 percent to 1.9 percent of the total gross revenue ($1,905,951,769) generated by potentially impacted small coal-mining entities in central Appalachia. This estimate is based on the assumption that only 48 (29%) of the 165 small coal-mining entities in Tennessee, Virginia, and West Virginia produce excess spoil, while 64% (143) of the 224 Kentucky small coal-mining entities do so.

All regulatory authorities in central Appalachia have already implemented policies to minimize the volume of excess spoil placed outside the mined-out area, which means that, based on surveys conducted under the Paperwork Reduction Act, we expect that operators will incur no significant additional costs to implement these regulatory changes.

We received no comments on the proposed rule from small municipalities (those with 50,000 or fewer residents) or local public entities such as water authorities. We anticipate that the final rule will not have any significant impact on those entities because, as discussed in the final environmental impact statement (EIS) for this rulemaking, we do not expect that the rule will either increase or decrease mining activities, either nationwide or in central Appalachia. Pages IV–165 and IV–166 of the final EIS discuss the lack of impact of this rule on the economy of the coal mining regions.

D. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. Based on the analysis in paragraphs A and C above, we have determined that the rule will not—

a. Have an annual effect on the economy of $100 million or more.

b. Cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions.

c. Have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

E. Unfunded Mandates

This rule will not impose an unfunded mandate on state, local, or tribal governments or the private sector of more than $100 million per year. The rule will not have a significant or unique effect on state, tribal, or local governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1534) is not required.

F. Executive Order 12630—Takings

This rule does not affect property rights. It governs how coal may be mined rather than whether it may be mined. For this reason and based on the discussion in the preamble and the analysis in the final environmental impact statement, we have determined that the rule will not have significant takings implications.

G. Executive Order 13132—Federalism

This rule does not alter or affect the relationship between states and the Federal Government. Therefore, the rule will not have significant Federalism implications. Consequently, there is no need to prepare a Federalism assessment.

H. Executive Order 12988—Civil Justice Reform

The Office of the Solicitor for the Department of the Interior has determined that this rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

I. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

We have evaluated the potential effects of this rule on federally recognized Indian tribes and have determined that no consultation or coordination is required because the rule will not have substantial direct effects 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.

J. Paperwork Reduction Act

In accordance with 44 U.S.C. 3501 *et seq.*, we sought comments on the collections of information contained in the proposed rule for modifications to 30 CFR parts 780, 784, 816, and 817. We received no comments from the public regarding these collections of information. The Office of Management and Budget has approved the information collection activities for these parts and assigned control numbers 1029–0128 for sections 780.25, 780.28, and 780.35 (to be consolidated into 1029–0036 upon approval); 1029–0039 for part 784; and 1029–0047 for parts 816 and 817. The expiration date for these collections of information is December 31, 2011. These collections estimate the burden as follows:

30 CFR Part 780, Sections 780.25, 780.28, and 780.35

Title: Surface Mining Permit Applications-Minimum Requirements for Reclamation and Operation Plan.

OMB Control Number: 1029–0128 (To be consolidated into 1029–0036).

Summary: Section 506(a) of SMCRA, 30 U.S.C. 1256(a), requires that persons obtain a permit before conducting surface coal mining operations. Sections 507 and 508, 30 U.S.C. 1257 and 1258, respectively, establish application requirements, including a reclamation plan. The regulations in 30 CFR 780.25, 780.28, and 780.35 implement these statutory provisions with respect to coal mine waste, excess spoil, impoundments, siltation structures, and mining in or near perennial or intermittent streams. The regulatory authority uses the information submitted in the permit application to determine whether the reclamation plan will achieve the reclamation and environmental protection requirements of the Act and regulatory program. Without this information, OSM and state regulatory authorities could not make the findings that section 510 of SMCRA, 30 U.S.C. 1260, requires before a permit application for surface coal mining operations may be approved.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: Applicants for surface coal mining permits and state regulatory authorities.

Total Annual Respondents: 270 applicants and 24 state regulatory authorities.

Total Annual Burden Hours: 47,380.

SUMMARY OF ANNUAL BURDEN TO RESPONDENTS FOR 30 CFR 780.15, 780.25, 780.28, AND 780.35

Section	Number of applications	Number of state reviews	Hours per application	Hours per state review	Total hours requested	Hours currently approved	Difference
780.15	0	0	0	0	0	8	(8)
780.25	225	221	123	25.2	33,250	14,155	19,095
780.28	270	264	10	10	5,340	0	5,340
780.35	170	168	27	25	8,790	12,660	(3,870)
Totals			160	60.2	47,380	26,823	20,557

Non-Labor Cost Burden: $202,000.

30 CFR Part 784

Title: Underground Mining Permit Applications-Minimum Requirements for Reclamation and Operation Plan.

OMB Control Number: 1029–0039.

Summary: Among other things, section 516(d) of SMCRA, 30 U.S.C. 1266(d), in effect requires applicants for permits for underground coal mines to prepare and submit an operation and reclamation plan for coal mining activities as part of the application. The regulatory authority uses this information to determine whether the plan will achieve the reclamation and environmental protection requirements of the Act and regulatory program. Without this information, OSM and state regulatory authorities could not approve permit applications for underground coal mines and related facilities.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: Applicants for underground coal mine permits and state regulatory authorities.

Total Annual Respondents: 62 applicants and 24 state regulatory authorities.

Total Annual Burden Hours: 21,761.

INFORMATION COLLECTION SUMMARY FOR 30 CFR PART 784

Section	Industry responses	Industry hours per response	State responses	State hours per response	Total hours requested	Currently approved burden hours	Program changes	Adjustment	Change to burden hours
784.11	62	4	61	3	431	347	0	84	84
.12	25	6	24	2.25	204	198	0	6	6
.13	62	53	61	4.5	3,561	3,101	0	460	460
.14	62	40	61	8.75	3,014	3,063	0	−49	−49
.15	62	6	61	1	433	398	0	35	35
.16	62	16	61	10	1,602	814	801	−13	788
.17	1	6	1	5	11	99	−95	7	−88
.18	28	8	27	2	278	278	0	0	0
.19	47	9	46	12	975	583	369	23	392
.20	62	12	61	4	988	1,004	0	−16	−16
.21	62	4	61	8	736	245	0	491	491
.22	62	24	61	6	1,854	1,404	0	450	450
.23	62	40	61	7.5	2,938	2,954	0	−16	−16
.24	62	20	61	4.5	1,515	1,392	0	123	123
.25	34	6	33	4	336	346	0	−10	−10
.28	49	10	48	10	970	0	970	0	970
.29	62	16	61	5	1,297	331	0	966	966
.30	62	8	61	2	618	628	0	−10	−10
Totals					21,761	17,185	2,045	2,531	4,576

Non-Labor Cost Burden: $612,106.

30 CFR Parts 816 and 817

Title: Permanent Program Performance Standards—Surface and Underground Mining Activities.

OMB Control Number: 1029–0047.

Summary: Sections 515 and 516 of SMCRA provide that permittees conducting coal mining and reclamation operations must meet all applicable performance standards of the regulatory program approved under the Act. The information collected is used by the regulatory authority in monitoring and inspecting surface coal mining and reclamation operations to ensure that they are conducted in compliance with the requirements of the Act.

Bureau Form Number: None.

Frequency of Collection: Once, on occasion, quarterly and annually.

Description of Respondents: Coal mine operators, permittees, permit applicants, and state regulatory authorities.

Total Annual Respondents: 4764 permittees and 24 state regulatory authorities

Total Annual Burden Hours: 1,092,430.

INFORMATION COLLECTION SUMMARY FOR 30 CFR PARTS 816 AND 817

Section	Industry responses	Industry hours per response	State responses	State hours per response	Total hours requested	Currently ,LI≤ approved burden hours	Changes to burden hours
.41	68,900	6.5	0	0	447,850	447,850	0
.43	616	16	270	5	11,206	4,480	6,726
.49	17,592	6	0	0	105,552	126,144	(20,592)
.57	0	0	0	0	0	30,800	(30,800)
.62	38,480	4	0	0	153,920	101,010	52,910
.64	962	4	0	0	3,848	3,848	0
.67	150,072	1.2	0	0	180,086	180,086	0
.68	962	12	0	0	11,544	11,544	0
.71	9,072	8	0	0	72,576	475,136	(402,560)
.81	0	0	0	0	0	15,528	(15,528)
.83 & .87	7,764	3	0	0	23,292	23,292	0
.116	880	80	2	100	70,600	70,600	0
817.121	80	4	0	0	320	320	0
817.122	1,638	.5	0	0	819	816	3
.131	335	16	331	.5	5,526	5,360	166
.151	481	11	0	0	5,291	5,291	0
Totals	297,834		603		1,092,430	1,502,105	(409,675)

Note: Under 30 CFR 816/817.41, the water monitoring reports required under the National Pollutant Discharge Elimination System (NPDES) are not counted as an OSM burden.

Non-Labor Cost Burden: $371,064.

These burden estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collections of information. We may not conduct or sponsor and you are not required to respond to a collection of information unless we display a currently valid OMB control number. These control numbers are identified in sections 780.10, 784.10, 816.10, and 817.10 of 30 CFR parts 780, 784, 816, and 817, respectively.

You should direct any comments on the accuracy of our burden estimates; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of collection on respondents, to the Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave, NW., Room 202 SIB, Washington, DC 20240.

K. National Environmental Policy Act

This rule constitutes a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act of 1969 (NEPA). Therefore, we have prepared a final environmental impact statement (FEIS) pursuant to section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). The FEIS, which is entitled ''OSM–EIS–34: Proposed Revisions to the Permanent Program Regulations Implementing the Surface Mining Control and Reclamation Act of 1977 Concerning the Creation and Disposal of Excess Spoil and Coal Mine Waste and Stream Buffer Zones,'' is available on the Internet at *www.regulations.gov.* The Docket ID number is OSM–2007–0008. A copy of the FEIS is also available for inspection as part of the administrative record for this rulemaking in the South Interior Building, Room 101, 1951 Constitution Avenue, NW., Washington, DC 20240.

Both we and EPA published notices of availability of the FEIS on October 24, 2008 (73 FR 63510 and 63470, respectively). The wait period for the FEIS under 40 CFR 1506.10(b)(2) expired November 24, 2008. During that period, we received approximately 930 comments. However, the vast majority of commenters did not address the FEIS. Instead, the commenters variously expressed opposition to mountaintop removal operations, the placement of fill material in streams, mining activities adjacent to streams, or all or part of the proposed rule that we published on August 24, 2007, for which the comment period closed almost one year earlier (November 23, 2007). Some commenters opposed EPA concurrence with the final rule. A few commenters urged adoption of a wider buffer zone for streams to provide greater environmental protection. To the limited extent that commenters referred to the FEIS, they generally either expressed a preference for one of the alternatives (usually the no action alternative) or criticized the FEIS for not analyzing in detail the alternative prohibiting all mining activities within the stream buffer zone. There were no comments that raised substantive issues or identified significant errors or admissions that would necessitate reconsideration of the adequacy of the FEIS.

The preamble to this final rule serves as the ''Record of Decision'' under NEPA. Because of the length of the preamble, we have prepared the following concise summary of the FEIS and the decisions made in the final rule relative to the alternatives considered in the FEIS.

Because of the comments we received on the proposed rule and draft EIS, the final rule differs somewhat from the proposed rule, which means that the preferred alternative in the final EIS differs somewhat from the preferred alternative in the draft EIS. In making these changes and in developing the final rule, we used the EIS to understand the potential environmental impacts.

Alternatives Considered

The draft and final environmental impact statements contain an analysis of five rulemaking alternatives, which are summarized below. Alternative 1 is both the preferred alternative and the environmentally preferable alternative; it forms the basis for the final rule that we are adopting today.

No Action Alternative

Under this alternative, we would not adopt any new or revised rules. The current regulations applicable to excess spoil generation, coal mine waste disposal, fill construction, and stream buffer zones would remain unchanged.

One state regulatory authority supported this alternative because it would require no changes in state regulatory programs.

Alternative 1: Preferred Alternative

Under this alternative, as set forth in the draft EIS, we would revise our rules to—

- Require the permit applicant to demonstrate that the operation has been designed to minimize the volume of excess spoil to the extent possible.
- Require that excess spoil fills be designed and constructed to be no larger than needed to accommodate the anticipated volume of excess spoil that the proposed operation will generate.
- Require that permit applicants for operations that would generate excess spoil develop various alternative excess spoil disposal plans in which the size, numbers, configuration, and locations of the fills vary; submit an analysis of the environmental impacts of those alternatives; and select the alternative with the least overall adverse environmental impact or demonstrate to the satisfaction of the regulatory authority why implementation of that alternative is not possible.
- Require that excess spoil fills be constructed in accordance with the plans approved in the permit and in a manner that minimizes disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.
- Require that permit applicants for operations that would include coal mine waste disposal structures identify alternative disposal methods and alternative locations for any disposal structures; analyze the viability and environmental impacts of each alternative; and select the alternative with the least overall adverse environmental impact or demonstrate to the satisfaction of the regulatory authority why implementation of that alternative is not possible.
- Revise the stream buffer zone rules to apply to all waters of the United States and modify the permit application requirements accordingly; identify those activities that are not subject to the prohibition on conducting mining and reclamation activities on the surface of lands within 100 feet of waters of the United States; consolidate and revise requirements for stream-channel diversions in 30 CFR 816.43 and 817.43, and replace the existing findings regarding stream water quantity and quality and State and Federal water quality standards with language that better correlates with the underlying provisions of SMCRA (paragraphs (b)(10)(B)(i) and (b)(24) of section 515 and paragraphs (b)(9)(B) and (b)(11) of section 516).

However, after evaluating the comments that we received on the draft EIS and the proposed rule, we substantially revised the preferred alternative. A description of the modified preferred alternative appears below, organized by subject (excess spoil, coal mine waste, stream buffer zones):

Excess Spoil

This alternative would revise 30 CFR 780.35 and 784.19 to require that a permit application in which the applicant proposes to generate excess spoil include a demonstration, to the satisfaction of the regulatory authority, that the operation is designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate, thus ensuring that spoil is returned to the mined-out area to the extent possible, taking into consideration applicable regulations concerning restoration of the approximate original contour, safety, stability, and environmental protection and the needs of the proposed postmining land use. The revised regulations would also require a demonstration, prepared to the satisfaction of the regulatory authority, that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate, as approved by the regulatory authority.

The revised regulations also would provide that the applicant must design the operation to avoid placement of excess spoil in or within 100 feet of a perennial or intermittent stream to the extent possible. The purpose of this provision is to minimize adverse impacts on fish, wildlife, and related environmental values. If avoidance is not possible, the applicant would have to explain, to the satisfaction of the regulatory authority, why an alternative that does not involve placement of excess spoil in or within 100 feet of a perennial or intermittent stream is not reasonably possible. In addition, the applicant would have to identify a reasonable range of alternatives that vary with respect to the number, size, location, and configuration of proposed fills. The applicant would have to identify only those alternatives that are reasonably possible and that are likely to differ in terms of impacts on fish, wildlife, and related environmental values.

An alternative would be reasonably possible if it conformed to the safety, engineering, design, and construction requirements of the regulatory program and is capable of being done after consideration of cost, logistics, and available technology. The fact that one alternative may cost somewhat more than a different alternative would not necessarily warrant exclusion of the more costly alternative from consideration. However, an alternative generally could be considered unreasonable if its cost was substantially greater than the costs normally associated with this type of project. In addition, to be considered reasonable, a potential alternative would have to be consistent with the coal recovery provisions of 30 CFR 816.59 and 817.59, which provide that mining activities must be conducted so as to maximize the utilization and conservation of the coal, while utilizing the best appropriate technology currently available to maintain environmental integrity, so that reaffecting the land in the future through surface coal mining operations is minimized.

The applicant would have to analyze the impacts of each of the identified alternatives on fish, wildlife, and related environmental values, taking into consideration both terrestrial and aquatic ecosystems. For every alternative that would involve placement of excess spoil in a perennial or intermittent stream, the analysis must include an evaluation of impacts on the physical, chemical, and biological characteristics of the stream downstream of the proposed fill, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the excess spoil may introduce or increase contaminants, and the effects on aquatic organisms and the wildlife that is dependent upon the stream. If the applicant prepared an analysis of alternatives for the proposed fill under 40 CFR 230.10 to meet Clean Water Act requirements, the applicant could initially submit a copy of that analysis with the application in lieu of complying with the analytical requirements detailed in the preceding sentence. The regulatory authority would determine whether and to what extent the analysis prepared for Clean Water Act purposes satisfies the analytical requirements under this alternative.

The applicant would be required to select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and terrestrial and aquatic ecosystems.

Finally, under the preferred alternative, we would revise the performance standards concerning

excess spoil at 30 CFR 816.71 and 817.71 by adding a requirement that the permittee construct the fill in accordance with the design and plans approved in the permit. We also would add a provision requiring the permittee to place excess spoil in a location and manner that would minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

Coal Mine Waste

This alternative would revise our coal mine waste disposal regulations in a fashion similar to what we proposed for excess spoil disposal. The permitting regulations at 30 CFR 780.25 and 784.16 would be revised to provide that the applicant must design the operation to avoid placement of coal mine waste in or within 100 feet of perennial or intermittent stream to the extent possible. If avoidance is not reasonably possible, the applicant would have to identify a reasonable range of alternative locations or configurations for any proposed refuse piles or coal mine waste impoundments. The applicant would have to identify only alternatives that are reasonably possible and that are likely to differ in terms of impacts on fish, wildlife, and related environmental values. The fact that one alternative may cost somewhat more than a different alternative would not necessarily warrant exclusion of the more costly alternative from consideration. However, an alternative generally could be considered unreasonable if its cost is substantially greater than the costs normally associated with this type of project. In addition, to be considered reasonable, a potential alternative would have to be consistent with the coal recovery provisions of 30 CFR 816.59 and 817.59, which provide that mining activities must be conducted so as to maximize the utilization and conservation of the coal, while utilizing the best appropriate technology currently available to maintain environmental integrity, so that reaffecting the land in the future through surface coal mining operations is minimized.

The applicant would have to analyze the impacts of each of the identified alternatives on fish, wildlife, and related environmental values, taking into consideration both terrestrial and aquatic ecosystems. For every alternative that would involve placement of coal mine waste in a perennial or intermittent stream, the analysis would have to include an evaluation of the impacts on the physical, chemical, and biological characteristics of the stream downstream of the proposed refuse pile or slurry impoundment, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the coal mine waste may introduce or increase contaminants, and the effects on aquatic organisms and the wildlife that is dependent upon the stream. If the applicant prepared an analysis of alternatives for the proposed refuse pile or slurry impoundment under 40 CFR 230.10 to meet Clean Water Act requirements, the applicant could initially submit a copy of that analysis with the application in lieu of complying with the analytical requirements detailed in the preceding sentence. The regulatory authority would then determine whether and to what extent the analysis prepared for Clean Water Act purposes satisfies the analytical requirements under this alternative.

The applicant would be required to select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems.

Stream Buffer Zones

This alternative would add new regulations at 30 CFR 780.28 and 784.28 to establish permit application requirements and regulatory authority review responsibilities if mining or related regulated activities are proposed in or within 100 feet of a perennial or intermittent stream. The new requirements, which would reflect the SMCRA provisions upon which the stream buffer zone rule is based, would replace the findings that the regulatory authority must make under existing 30 CFR 816.57(a)1) and 817.57(a)(1) before authorizing activities within 100 feet of a perennial or intermittent stream. The findings in the existing rule include several Clean Water Act-related provisions that would be removed under this alternative.

When an applicant proposes to conduct activities in the stream itself, the preferred alternative would require that the applicant demonstrate that avoiding disturbance of the stream is not reasonably possible. The applicant also would have to demonstrate that the activities would comply with all applicable regulations concerning use of the best technology currently available to prevent contributions of additional suspended solids to streamflow or runoff outside the permit area to the extent possible and to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible. Before approving the proposed activities in the stream, the regulatory authority would have to prepare written findings concurring with those demonstrations.

When an applicant proposes to conduct activities within the buffer zone but not within the stream itself, the preferred alternative would require that the applicant demonstrate that avoiding disturbance of the stream buffer zone either is not reasonably possible or is not necessary to meet the hydrologic balance and fish and wildlife protection requirements of the regulatory program. The applicant also would have to identify any lesser buffer zone that he or she proposes to maintain and explain how the lesser buffer zone, together with any other protective measures proposed, constitute the best technology currently available to prevent contributions of additional suspended solids to streamflow or runoff outside the permit area to the extent possible and to minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible. Before approving the applicant's proposed activities in the stream buffer zone, the regulatory authority would have to prepare written findings concurring with the demonstration and explanation in the application.

In all cases, the new rules would require that the applicant identify the authorizations and certifications that would be needed under the Clean Water Act and its implementing regulations. The preferred alternative would clarify that, while the SMCRA permit may be issued in advance of any necessary Clean Water Act authorization, issuance of a SMCRA permit does not allow the permittee to initiate any activities for which Clean Water Act authorization or certification is needed.

Under the preferred alternative, we also would revise the stream buffer zone performance standards at 30 CFR 816.57 and 817.57 to provide that the requirement to maintain an undisturbed buffer around a perennial or intermittent stream does not apply to those stream segments for which the regulatory authority approves one or more of the following activities:

- Diversion of a perennial or intermittent stream.
- Placement of bridge abutments, culverts, or other structures in or within 100 feet of a perennial or intermittent stream to facilitate crossing of the stream by roads, railroads, conveyors, pipelines, utilities, or similar facilities.
- Construction of sedimentation pond embankments in a perennial or

intermittent stream, including the pool or storage area created by the embankment.

• Construction of excess spoil fills and coal mine waste disposal facilities in a perennial or intermittent stream.

Each of these activities would remain subject to all other existing performance standards, including standards that regulate the environmental impacts of the activities. Thus, for example, all surface activities conducted in or within 100 feet of a perennial or intermittent stream must comply with SMCRA sections 515(b)(10)(B)(i) and 515(b)(24) and various regulations implementing those statutory provisions. Also, paragraph (b) of 30 CFR 816.57 and 817.57 (1983), which requires that buffer zones be marked, would be deleted and merged with our other signs and markers requirements at 30 CFR 816.11(e) and 817.11(e).

In the draft EIS, we also sought comment on a variant of this alternative, which would revise the buffer zone rule to apply to all waters of the United States and would eliminate paragraph (a)(2) of 30 CFR 816.57 and 817.57 (1983), which contained a redundant requirement for a finding that stream-channel diversions will comply with 30 CFR 816.43 or 817.43. However, the variant otherwise would retain much of the 1983 stream buffer zone rule language at 30 CFR 816.57(a) and 817.57(a), with several modifications. The first modification would revise paragraph (a)(1), which required that the regulatory authority find that the ''mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream,'' by inserting the clause ''as indicated by issuance of a certification under section 401 of the Clean Water Act or a permit under section 402 or 404 of the Clean Water Act'' after ''State or Federal water quality standards,'' by replacing the phrase ''adversely affect'' with ''significantly degrade,'' and by replacing the phrase ''of the stream'' with ''of the waters outside the permit area.'' In addition, this variant would add a new finding that would require minimization of disturbances and adverse impacts on fish, wildlife, and other related environmental values of the waters to the extent possible using the best technology currently available.

Apart from its expansion to include all waters of the United States, this variant would largely preserve the status quo in terms of application of the 1983 stream buffer zone rule. The revised rule language would be more consistent than the existing rule language with the historical application of the 1983 stream buffer zone rule, which we discussed earlier in Parts III.D. and III.E. of this preamble. The change from ''adversely affect'' to ''significantly degrade'' would replace language of uncertain provenance with language similar to that found in the 404(b)(1) Guidelines at 40 CFR 230.10(c), which pertains to placement of dredged or fill materials in waters of the United States under section 404 of the Clean Water Act. The proposed new finding in paragraph (a)(3) would reiterate the requirements of section 515(b)(24) of SMCRA.

We sought comment on the benefits and drawbacks of this variant as contrasted with the buffer zone rule changes that we proposed. In particular, we invited comment on the extent to which our rules can or should incorporate broad references to Clean Water Act requirements and use Clean Water Act terminology in place of SMCRA terminology. We also invited comment on whether and how our preferred alternative and this variant differ in terms of impact on the ability of proposed surface coal mining and reclamation operations to qualify for a nationwide permit under section 404 of the Clean Water Act.

We received very few comments in response to this request. Those that we did receive generally opposed adoption of the variant because of the change from ''adversely affect'' to ''significantly degrade'' and, in one case, replacing the phrase ''of the stream'' with ''of the waters outside the permit area.''

Alternative 2: January 7, 2004, Proposed Rule

Under this alternative, we would revise our regulations in a manner similar to that set forth in our January 7, 2004, proposed rule (69 FR 1036). In essence, the changes to our excess spoil regulations would be generally analogous to the changes described in Alternative 1, but we would not make similar changes to our coal mine waste disposal rules. With respect to the stream buffer zone rules, we would retain the prohibition on disturbance of land within 100 feet of a perennial or intermittent stream, but alter the findings that the regulatory authority must make before granting a variance to this requirement. The revised rule would replace the findings in the 1983 stream buffer zone rule with a requirement that the regulatory authority find in writing that the activities would, to the extent possible, use the best technology currently available to—

(1) Prevent additional contributions of suspended solids to the section of stream within 100 feet downstream of the mining activities, and outside the area affected by mining activities; and

(2) Minimize disturbances and adverse impacts on fish, wildlife, and other related environmental values of the stream.

Under this alternative, persons seeking to conduct surface mining activities (or, for underground mines, surface activities) on the surface of lands within the buffer zone of a perennial or intermittent stream would have to seek and obtain a variance from the regulatory authority in all cases, even if the stream segment is to be diverted or filled. There would be no categorical exceptions for certain activities as there are under Alternative 1.

Essentially, Alternative 2 differs from Alternative 1 in the following respects: Under Alternative 2, the changes to the excess spoil regulations would be generally analogous to the changes described in Alternative 1, with the exception that an alternatives analysis would be required in every case in which an operation generated excess spoil, not just those for those operations that propose to place excess spoil in or within 100 feet of a perennial or intermittent stream. In addition, Alternative 2 would not amend the coal mine waste disposal rules. With respect to the stream buffer zone rule, Alternative 2, unlike Alternative 1, would not establish separate permitting requirements for proposed activities in or within 100 feet of a perennial or intermittent stream. Unlike Alternative 1, Alternative 2 provides no exception from the requirement to either avoid the buffer zone or obtain a variance from the regulatory authority. The findings required for a variance also differ. Most significantly, under Alternative 2, applicants would not need to demonstrate—and the regulatory authority would not need to find—that it is not reasonably possible to avoid disturbing the stream or its buffer zone.

Several industry commenters supported adoption of this alternative, primarily because it would reduce ambiguity associated with the 1983 stream buffer zone rule and included more modest excess spoil minimization and alternatives analysis requirements than Alternative 1. In addition, they noted favorably that, unlike the preferred alternative, Alternative 2 would not use the term ''waters of the United States'' in lieu of perennial or intermittent streams in defining the scope of the stream buffer zone rule, and did not include requirements for an

alternatives analysis of proposals to place coal mine waste in or near waters of the United States.

Alternative 3: Change Only the Excess Spoil Regulations

Under this alternative, we would revise our excess spoil regulations as described in Alternative 1. We would not revise our coal mine waste disposal rules or the stream buffer zone regulations.

This alternative received little support from commenters. One industry commenter opposed it because it included requirements for an alternatives analysis of proposals to place coal mine waste and excess spoil in or near waters of the United States.

Alternative 4: Change Only the Stream Buffer Zone Regulations

Under this alternative, we would revise our stream buffer zone regulations as described in Alternative 1. We would not revise our excess spoil or coal mine waste disposal regulations.

This alternative received some support from those commenters who saw no benefit and many difficulties with our proposed excess spoil and coal mine waste disposal requirements, as described in the preferred alternative, but who wanted to see the controversy surrounding the stream buffer zone rule resolved.

Decision

We are adopting the preferred alternative as described in the final EIS. The final rule and the preferred alternative in the final EIS differ from the proposed rule and the preferred alternative in the draft EIS in several respects. The most significant differences are summarized below:

1. In the final rule, we retained the scope of the 1983 stream buffer zone rule, which included only perennial and intermittent streams, rather than adopting those provisions of our proposed rules that would have applied the buffer zone restrictions to waters of the United States. As discussed in Part VII of this preamble, almost all commenters who opined on this issue opposed the proposed change to waters of the United States. In general, commenters preferred the relatively well-understood concept of perennial and intermittent streams as opposed to the uncertain meaning of the term waters of the United States.

2. In response to concerns that the proposed rule did not adequately protect headwater streams, we added a requirement that the operation be designed to avoid placement of excess spoil or coal mine waste in or within 100 feet of perennial or intermittent streams to the extent possible.

3. We extensively revised the rule to clearly differentiate between permit application requirements and findings required for approval of activities that would take place in perennial or intermittent streams and the requirements and findings for those activities that would disturb only the buffer zone for those streams. Specifically, in the final rule, new sections 780.28 and 784.28 provide that, as a prerequisite for approval of activities in a perennial or intermittent stream, the permit applicant must demonstrate, and the regulatory authority must find, that it is not reasonably possible to avoid disturbance of the stream or its buffer zone. In addition, the SMCRA permit must include a condition requiring a demonstration of compliance with all applicable Clean Water Act authorization or certification requirements before the permittee may conduct any activities in the stream for which authorization or certification is required under the Clean Water Act. For activities that would occur within the buffer zone, but not in the stream itself, the final rule provides that the permit applicant must demonstrate, and the regulatory authority must find, that avoiding disturbance of the buffer zone either is not reasonably possible or is not necessary to meet the fish and wildlife and hydrologic balance protection requirements of the regulatory program.

4. We revised the rules governing the disposal of coal mine waste and placement of excess spoil to require identification and analysis of alternatives only when the applicant proposes to place coal mine waste or excess spoil in or within 100 feet of a perennial or intermittent stream. In addition, as revised, the final rule provides that the permit applicant need identify only those reasonably possible alternatives that are likely to differ significantly in terms of impacts on fish, wildlife, and related environmental values. The proposed rule would have required identification of a reasonable range of alternatives, which could have included alternatives that are possible from a technological perspective, but are impracticable because of cost or other considerations. The final rule specifies that an alternative is reasonably possible if it—

(A) Conforms to the safety, engineering, design, and construction requirements of the regulatory program.

(B) Is capable of being done after consideration of cost, logistics, and available technology. The fact that one alternative may cost somewhat more than a different alternative does not necessarily warrant exclusion of the more costly alternative from consideration. However, an alternative generally may be considered unreasonable if its cost is substantially greater than the costs normally associated with that type of project.

(C) Is consistent with the provisions of 30 CFR 816.59/817.59, which require maximization of coal recovery to minimize the likelihood that the land will be reaffected by mining operations in the future.

5. The final rule requires a permit applicant proposing to place excess spoil or coal mine waste in or within 100 feet of a perennial or intermittent stream to select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values. The proposed rule would have allowed an applicant to select a less protective alternative based upon a demonstration that the most protective alternative was not possible. However, under the revised final rule, an applicant need only identify and consider reasonably possible alternatives, which means that this provision of the proposed rule is no longer appropriate or relevant.

6. The final rule clarifies that the stream buffer zone requirement does not apply to any stream segment for which a stream-channel diversion is approved and constructed. The proposed rule would have applied the exception only to mining through streams, which has limited utility in the context of underground mines. Furthermore, it would be illogical to apply the buffer zone requirement to any stream segment that has been diverted, regardless of the reason for the diversion, because there is no longer a need or purpose for a buffer zone for a former stream channel from which all flows have been diverted.

Environmental Effects of the Alternatives

The information obtained in the course of preparing this EIS indicates that the proposed Federal action may have the most significant effects in the central Appalachian coal fields, particularly eastern Kentucky, southwestern Virginia, and southern West Virginia. The steep-slope terrain, ample rainfall, and abundant surface-minable reserves of high quality bituminous coal in these areas help explain why 98% of all excess spoil fills nationally and approximately 61 percent of the stream miles directly impacted by mining are located in these areas.

Alternatives 1, 2, and 3 would revise the excess spoil regulations to enhance consideration of the environmental effects of fill construction by requiring that applicants minimize the volume of spoil placed outside the mined-out area, design and construct excess spoil fills to reduce the amount of land and water directly affected outside the mined-out area, and configure fills to minimize adverse impacts on fish, wildlife, and related environmental values. States in the central Appalachian coalfields (Kentucky, Virginia, Tennessee, and West Virginia) have taken various steps in accordance with their approved SMCRA regulatory programs to implement similar actions, so the impacts of the excess spoil elements of alternatives likely would be limited by the changes already made by those states.

We do not anticipate that the revisions that Alternatives 1, 2, and 4 would make to the stream buffer zone rule would have any major on-the-ground consequences because we do not expect that those revisions would alter the rate at which surface coal mining and reclamation operations are impacting perennial and intermittent streams. Between 1992 and 2002, we estimate that coal mining operations directly impacted 1,208 miles of stream in the central Appalachian coal fields, which constitutes 2.05 percent of the total stream miles in the central Appalachian coal fields. At this rate, 4.1% of the total stream miles in central Appalachia would be directly impacted within the subsequent 10 years. The miles of stream directly impacted by excess spoil fills for permits issued between 1985 and 2001 is 724 miles, which is approximately 1.2 percent of the streams in central Appalachia. If fill construction continued at this rate, an additional 724 miles of headwater streams would be buried in the next 17 years (by 2018). This trend likely would decline as surface-minable coal reserves in central Appalachia are depleted in the next few decades.

Alternative 1 is uniquely different from the other alternatives in that it incorporates changes to reduce the adverse impacts of coal mine waste disposal facilities (refuse piles and slurry impoundments) on fish, wildlife, and related environmental values. We anticipate that these changes would positively impact the environment.

We estimate that the combination of the excess spoil and coal mine waste provisions in Alternative 1 would result in slight positive effects on the human environment with respect to direct hydrologic impacts, water quality, and aquatic fauna when compared to the ''no action'' alternative. In the final rule, we are adopting this alternative, which is both the most environmentally protective alternative and the preferred alternative.

Mitigation, Monitoring and Enforcement

We have adopted all practicable means to avoid or minimize environmental harm from the alternative selected. SMCRA's permitting requirements and performance standards generally require avoidance or minimization of adverse impacts to important environmental resources, and our regulations do likewise. In particular, this final rule requires that surface coal mining operations be designed to minimize the amount of spoil placed outside the mined-out area, thus minimizing the amount of land disturbed. The final rule also requires that, to the extent possible, surface coal mining and reclamation operations be designed to avoid disturbance of perennial or intermittent streams and the surface of lands within 100 feet of those streams. If avoidance is not reasonably possible, the rule requires that the permit applicant develop and analyze a reasonable range of reasonably possible alternatives and select the alternative that would have the least overall adverse impact on fish, wildlife, and related environmental values.

Each SMCRA regulatory program includes five major elements: Permitting requirements and procedures, performance bonds to guarantee reclamation in the event that the permittee defaults on any reclamation obligations, performance standards to which the operator must adhere, inspection and enforcement to maintain compliance with performance standards and the terms and conditions of the permit, and a process for the designation of lands as unsuitable for surface coal mining operations. Under 30 CFR 730.5, 732.15, and 732.17, each state regulatory program must be no less effective than our regulations in achieving the requirements of the Act. We conduct oversight of each state's implementation of its approved regulatory program.

List of Subjects

30 CFR Part 780

Incorporation by reference, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 784

Incorporation by reference, Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 816

Environmental protection, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 817

Environmental protection, Reporting and recordkeeping requirements, Underground mining.

Dated: December 1, 2008,

C. Stephen Allred,

Assistant Secretary, Land and Minerals Management.

■ For the reasons set forth in the preamble, the Department revises 30 CFR parts 780, 784, 816, and 817 as set forth below.

PART 780—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

■ 1. The authority citation for part 780 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

■ 2. The part heading is revised to read as set forth above.

■ 3. Section 780.10 is revised to read as follows:

§ 780.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned clearance number 1029–0036. Sections 507 and 508 of SMCRA contain permit application requirements for surface coal mining activities, including a requirement that the application include an operation and reclamation plan. The regulatory authority uses this information to determine whether the proposed surface coal mining operation will achieve the environmental protection requirements of the Act and regulatory program. Without this information OSM and state regulatory authorities could not approve permit applications for surface coal mines and related facilities. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

■ 4. Amend § 780.14 by revising paragraphs (b)(11) and (c) to read as follows:

§ 780.14 Operation plan: Maps and plans.

* * * * *

(b) * * *

(11) Locations of each siltation structure, permanent water impoundment, refuse pile, and coal mine waste impoundment for which plans are required by § 780.25 of this part, and the location of each fill for the disposal of excess spoil for which plans are required under § 780.35 of this part.

(c) Except as provided in §§ 780.25(a)(2), 780.25(a)(3), 780.35, 816.73(c), 816.74(c), and 816.81(c) of this chapter, cross-sections, maps, and plans required under paragraphs (b)(4), (5), (6), (10), and (11) of this section must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, a professional geologist, or, in any state that authorizes land surveyors to prepare and certify cross-sections, maps, and plans, a qualified, registered, professional land surveyor, with assistance from experts in related fields such as landscape architecture.

■ 5. Amend § 780.25 as follows:

■ A. Revise the section heading, paragraph (a) introductory text, paragraph (a)(1) introductory text, and paragraph (a)(2);

■ B. Revise paragraph (c)(2) and add paragraph (c)(4);

■ C. Revise paragraph (d); and

■ D. Remove paragraphs (e) and (f).

The revisions and addition read as follows:

§ 780.25 Reclamation plan: Siltation structures, impoundments, and refuse piles.

(a) *General.* Each application must include a general plan and a detailed design plan for each proposed siltation structure, impoundment, and refuse pile within the proposed permit area.

(1) Each general plan must—

* * * * *

(2)(i) Impoundments meeting the criteria for Significant Hazard Class or High Hazard Class (formerly Class B or C) dams in ''Earth Dams and Reservoirs,'' Technical Release No. 60 (210–VI–TR60, July 2005), published by the U.S. Department of Agriculture, Natural Resources Conservation Service, must comply with the requirements of this section for structures that meet the criteria in § 77.216(a) of this title. Technical Release No. 60 (TR–60) is hereby incorporated by reference. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may review and download the incorporated document from the Natural Resources Conservation Service's Web site at *http://www.info.usda.gov/scripts/lpsiis.dll/TR/TR_210_60.htm.* You may inspect and obtain a copy of this document which is on file at the Administrative Record Room, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240. For information on the availability of this document at OSM, call 202–208–2823. You also may inspect a copy of this document 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.*

(ii) Each detailed design plan for a structure that meets the criteria in § 77.216(a) of this title must—

(A) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture;

(B) Include any geotechnical investigation, design, and construction requirements for the structure;

(C) Describe the operation and maintenance requirements for each structure; and

(D) Describe the timetable and plans to remove each structure, if appropriate.

* * * * *

(c) * * *

(2) Each plan for an impoundment meeting the criteria in § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title. The plan required to be submitted to the District Manager of MSHA under § 77.216 of this title must be submitted to the regulatory authority as part of the permit application.

* * * * *

(4) If the structure meets the Significant Hazard Class or High Hazard Class criteria for dams in TR–60 or meets the criteria of § 77.216(a) of this chapter, each plan must include a stability analysis of the structure. The stability analysis must include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan also must contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

(d) *Coal mine waste impoundments and refuse piles.* If you, the permit applicant, propose to place coal mine waste in a refuse pile or impoundment, or if you plan to use coal mine waste to construct an impounding structure, you must comply with the applicable requirements in paragraphs (d)(1) through (d)(3) of this section.

(1) *Addressing impacts to perennial and intermittent streams and related environmental values.* You must design the operation to avoid placement of coal mine waste in or within 100 feet of a perennial or intermittent stream to the extent possible. If avoidance is not possible, you must—

(i) Explain, to the satisfaction of the regulatory authority, why an alternative coal mine waste disposal method or an alternative location or configuration that does not involve placement of coal mine waste in or within 100 feet of a perennial or intermittent stream is not reasonably possible.

(ii) Identify a reasonable range of alternative locations or configurations for any proposed refuse piles or coal mine waste impoundments. This provision does not require identification of all potential alternatives. You need identify only those reasonably possible alternatives that are likely to differ significantly in terms of impacts on fish, wildlife, and related environmental values. An alternative is reasonably possible if it meets all the following criteria:

(A) The alternative conforms to the safety, engineering, design, and construction requirements of the regulatory program.

(B) The alternative is capable of being done after consideration of cost, logistics, and available technology. The fact that one alternative may cost somewhat more than a different alternative does not necessarily warrant exclusion of the more costly alternative from consideration. However, an alternative generally may be considered unreasonable if its cost is substantially greater than the costs normally associated with this type of project.

(C) The alternative is consistent with the coal recovery provisions of § 816.59 of this chapter.

(iii) Analyze the impacts of the alternatives identified in paragraph (d)(1)(ii) of this section on fish, wildlife, and related environmental values. The analysis must consider impacts on both aquatic and terrestrial ecosystems.

(A) For every alternative that proposes placement of coal mine waste in a perennial or intermittent stream, the analysis required under paragraph (d)(1)(iii) of this section must include an evaluation of impacts on the physical, chemical, and biological characteristics of the stream downstream of the proposed refuse pile or coal mine waste impoundment, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the

coal mine waste may introduce or increase contaminants, and the effects on aquatic organisms and the wildlife that is dependent upon the stream.

(B) If you have prepared an analysis of alternatives for the proposed impoundment or refuse pile under 40 CFR 230.10 to meet Clean Water Act requirements, you may initially submit a copy of that analysis in lieu of the analysis required under paragraph (d)(1)(iii)(A) of this section. The regulatory authority will determine the extent to which that analysis satisfies the requirements of paragraph (d)(1)(iii)(A) of this section.

(iv) Select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems.

(2) *Design requirements for refuse piles.* Refuse piles must be designed to comply with the requirements of §§ 816.81 and 816.83 of this chapter.

(3) *Design requirements for impoundments and impounding structures.* Impounding structures constructed of or intended to impound coal mine waste must be designed to comply with the requirements of §§ 816.81 and 816.84 of this chapter, which incorporate the requirements of paragraphs (a) and (c) of § 816.49 of this chapter. In addition,—

(i) The plan for each structure that meets the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title; and

(ii) Each plan for a coal mine waste impoundment must contain the results of a geotechnical investigation to determine the structural competence of the foundation that will support the proposed impounding structure and the impounded material. An engineer or engineering geologist must plan and supervise the geotechnical investigation. In planning the investigation, the engineer or geologist must—

(A) Determine the number, location, and depth of borings and test pits using current prudent engineering practice for the size of the impoundment and the impounding structure, the quantity of material to be impounded, and subsurface conditions.

(B) Consider the character of the overburden and bedrock, the proposed abutment sites for the impounding structure, and any adverse geotechnical conditions that may affect the particular impoundment.

(C) Identify all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed impoundment.

(D) Consider the possibility of mudflows, rock-debris falls, or other landslides into the impoundment or impounded material.

■ 6. Add § 780.28 to read as follows:

§ 780.28 Activities in or adjacent to perennial or intermittent streams.

(a) *Applicability.* (1) *In general.* Except as otherwise provided in paragraph (a)(2) of this section, this section applies to applications to conduct surface mining activities in perennial or intermittent streams or on the surface of lands within 100 feet, measured horizontally, of perennial or intermittent streams.

(2) *Exceptions.* (i) *Coal preparation plants not located within the permit area of a mine.* This section does not apply to applications under § 785.21 of this chapter for coal preparation plants that are not located within the permit area of a mine.

(ii) *Stream-channel diversions.* Paragraphs (b) through (e) of this section do not apply to diversions of perennial or intermittent streams, which are governed by § 780.29 of this part and § 816.43 of this chapter.

(b) *Application requirements for surface mining activities in a perennial or intermittent stream.* If you propose to conduct one or more of the activities listed in paragraphs (b)(2) through (b)(4) of § 816.57 of this chapter in a perennial or intermittent stream, your application must demonstrate that—

(1) Avoiding disturbance of the stream is not reasonably possible; and

(2) The proposed activities will comply with all applicable requirements in paragraphs (b) and (c) of § 816.57 of this chapter.

(c) *Application requirements for surface mining activities within 100 feet of a perennial or intermittent stream.* If you propose to conduct surface mining activities within 100 feet of a perennial or intermittent stream, but not in the stream itself, and those activities would occur on land subject to the buffer requirement of § 816.57(a)(1) of this chapter, your application must—

(1) Demonstrate that avoiding disturbance of land within 100 feet of the stream either is not reasonably possible or is not necessary to meet the fish and wildlife and hydrologic balance protection requirements of the regulatory program;

(2) Identify any lesser buffer that you propose to implement instead of maintaining a 100-foot undisturbed buffer between surface mining activities and the perennial or intermittent stream; and

(3) Explain how the lesser buffer, together with any other protective measures that you propose to implement, constitute the best technology currently available to—

(i) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible, as required by §§ 780.21(h) and 816.41(d)(1) of this chapter; and

(ii) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, as required by §§ 780.16(b) and 816.97(a) of this chapter.

(d) *Approval requirements for activities in a perennial or intermittent stream.* Before approving any surface mining activities in a perennial or intermittent stream, the regulatory authority must—

(1) Find in writing that—

(i) Avoiding disturbance of the stream is not reasonably possible; and

(ii) The plans submitted with the application meet all applicable requirements in paragraphs (b) and (c) of § 816.57 of this chapter.

(2) Include a permit condition requiring a demonstration of compliance with the Clean Water Act in the manner specified in § 816.57(a)(2) of this chapter before the permittee may conduct any activities in a perennial or intermittent stream that require authorization or certification under the Clean Water Act.

(e) *Approval requirements for activities within 100 feet of a perennial or intermittent stream.* Before approving any surface mining activities that would disturb the surface of land subject to the buffer requirement of § 816.57(a)(1) of this chapter, the regulatory authority must find in writing that—

(1) Avoiding disturbance of the surface of land within 100 feet of the stream either is not reasonably possible or is not necessary to meet the fish and wildlife and hydrologic balance protection requirements of the regulatory program; and

(2) The measures proposed under paragraphs (c)(2) and (c)(3) of this section constitute the best technology currently available to—

(i) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible, as required by §§ 780.21(h) and 816.41(d)(1) of this chapter; and

(ii) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, as required by §§ 780.16(b) and 816.97(a) of this chapter.

(f) *Relationship to the Clean Water Act.* (1) In all cases, your application must identify the authorizations and certifications that you anticipate will be needed under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, and describe the steps that you have taken or will take to procure those authorizations and certifications.

(2) The regulatory authority will process your application and may issue the permit before you obtain all necessary authorizations and certifications under the Clean Water Act, 33 U.S.C. 1251 et seq., provided your application meets all applicable requirements of subchapter G of this chapter. However, issuance of a permit does not authorize you to initiate any activities for which Clean Water Act authorization or certification is required. Information submitted and analyses conducted under subchapter G of this chapter may inform the agency responsible for authorizations and certifications under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, but they are not a substitute for the reviews, authorizations, and certifications required under those sections of the Clean Water Act.

■ 7. Revise § 780.35 to read as follows:

§ 780.35 Disposal of excess spoil.

(a) If you, the permit applicant, propose to generate excess spoil as part of your operation, you must include the following items in your application—

(1) *Demonstration of minimization of excess spoil.* A demonstration, prepared to the satisfaction of the regulatory authority, that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate, thus ensuring that spoil is returned to the mined-out area to the extent possible, taking into consideration applicable regulations concerning restoration of the approximate original contour, safety, stability, and environmental protection and the needs of the proposed postmining land use.

(2) *Capacity demonstration.* A demonstration, prepared to the satisfaction of the regulatory authority, that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate, as approved by the regulatory authority under paragraph (a)(1) of this section.

(3) *Discussion of how you will address impacts to perennial and intermittent streams and related environmental values.* You must design the operation to avoid placement of excess spoil in or within 100 feet of a perennial or intermittent stream to the extent possible. If avoidance is not possible, you must—

(i) Explain, to the satisfaction of the regulatory authority, why an alternative that does not involve placement of excess spoil in or within 100 feet of a perennial or intermittent stream is not reasonably possible.

(ii) Identify a reasonable range of alternatives that vary with respect to the number, size, location, and configuration of proposed fills. This provision does not require identification of all potential alternatives. You need identify only those reasonably possible alternatives that are likely to differ significantly in terms of impacts on fish, wildlife, and related environmental values. An alternative is reasonably possible if it meets all the following criteria:

(A) The alternative conforms to the safety, engineering, design, and construction requirements of the regulatory program;

(B) The alternative is capable of being done after consideration of cost, logistics, and available technology. The fact that one alternative may cost somewhat more than a different alternative does not necessarily warrant exclusion of the more costly alternative from consideration. However, an alternative generally may be considered unreasonable if its cost is substantially greater than the costs normally associated with this type of project.

(C) The alternative is consistent with the coal recovery provisions of § 816.59 of this chapter.

(iii) Analyze the impacts of the alternatives identified in paragraph (a)(3)(ii) of this section on fish, wildlife, and related environmental values. The analysis must consider impacts on both terrestrial and aquatic ecosystems.

(A) For every alternative that proposes placement of excess spoil in a perennial or intermittent stream, the analysis must include an evaluation of impacts on the physical, chemical, and biological characteristics of the stream downstream of the proposed fill, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the excess spoil may introduce or increase contaminants, and the effects on aquatic organisms and the wildlife that is dependent upon the stream.

(B) If you have prepared an analysis of alternatives for the proposed fill under 40 CFR 230.10 to meet Clean Water Act requirements, you may initially submit a copy of that analysis with your application in lieu of the analysis required by paragraph (a)(3)(iii)(A) of this section. The regulatory authority will determine the extent to which that analysis satisfies the analytical requirements of paragraph (a)(3)(iii)(A) of this section.

(iv) Select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems.

(4) *Location.* Maps and cross-section drawings showing the location of all proposed disposal sites and structures. You must locate fills on the most moderately sloping and naturally stable areas available, unless the regulatory authority approves a different location based upon the alternatives analysis under paragraph (a)(3) of this section or on other requirements of the Act and this chapter. Whenever possible, you must place fills upon or above a natural terrace, bench, or berm if that location would provide additional stability and prevent mass movement.

(5) *Design plans.* Detailed design plans for each structure, prepared in accordance with the requirements of this section and §§ 816.71 through 816.74 of this chapter. You must design the fill and appurtenant structures using current prudent engineering practices and any additional design criteria established by the regulatory authority.

(6) *Geotechnical investigation.* The results of a geotechnical investigation of each proposed disposal site, with the exception of those sites at which spoil will be placed only on a pre-existing bench under § 816.74 of this chapter. You must conduct sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability for each site. The analyses of foundation conditions must take into consideration the effect of underground mine workings, if any, upon the stability of the fill and appurtenant structures. The information submitted must include—

(i) The character of the bedrock and any adverse geologic conditions in the proposed disposal area.

(ii) A survey identifying all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed disposal site.

(iii) A survey of the potential effects of subsidence of subsurface strata as a result of past and future mining operations.

(iv) A technical description of the rock materials to be utilized in the

construction of disposal structures containing rock chimney cores or underlain by a rock drainage blanket.

(v) A stability analysis including, but not limited to, strength parameters, pore pressures, and long-term seepage conditions. This analysis must be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the design specifications and methods.

(7) *Operation and reclamation plans.* Plans for the construction, operation, maintenance, and reclamation of all excess spoil disposal structures in accordance with the requirements of §§ 816.71 through 816.74 of this chapter.

(8) *Additional requirements for keyway cuts or rock-toe buttresses.* If keyway cuts or rock-toe buttresses are required under § 816.71(d) of this chapter, the number, location, and depth of borings or test pits, which must be determined according to the size of the spoil disposal structure and subsurface conditions. You also must provide the engineering specifications used to design the keyway cuts or rock-toe buttresses. Those specifications must be based upon the stability analysis required under paragraph (a)(7)(v) of this section.

(b) *Design certification.* A qualified registered professional engineer experienced in the design of earth and rock fills must certify that the design of all fills and appurtenant structures meets the requirements of this section.

PART 784—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

■ 8. The authority citation for part 784 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 16 U.S.C. 470 *et seq.*

■ 9. Section 784.10 is revised to read as follows:

§ 784.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned clearance number 1029–0039. Collection of this information is required under section 516(d) of SMCRA, which in effect requires applicants for permits for underground coal mines to prepare and submit an operation and reclamation plan for coal mining activities as part of the application. The regulatory authority uses this information to determine whether the plan will achieve the reclamation and environmental protection requirements of the Act and regulatory program. Without this information, OSM and state regulatory authorities could not approve permit applications for underground coal mines and related facilities. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

■ 10. Amend § 784.16 as follows:

■ A. Revise the section heading, paragraph (a) introductory text, paragraph (a)(1) introductory text, and paragraph (a)(2);

■ B. Revise paragraph (c)(2) and add paragraph (c)(4);

■ C. Revise paragraph (d); and

■ D. Remove paragraphs (e) and (f).

The revisions and addition read as follows:

§ 784.16 Reclamation plan: Siltation structures, impoundments, and refuse piles.

(a) *General.* Each application must include a general plan and a detailed design plan for each proposed siltation structure, impoundment, and refuse pile within the proposed permit area.

(1) Each general plan must—

* * * * *

(2)(i) Impoundments meeting the criteria for Significant Hazard Class or High Hazard Class (formerly Class B or C) dams in ''Earth Dams and Reservoirs,'' Technical Release No. 60 (210–VI–TR60, July 2005), published by the U.S. Department of Agriculture, Natural Resources Conservation Service, must comply with the requirements of this section for structures that meet the criteria in § 77.216(a) of this title. Technical Release No.60 (TR–60) is hereby incorporated by reference. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may review and download the incorporated document from the Natural Resources Conservation Service's Web site at *http://www.info.usda.gov/scripts/lpsiis.dll/TR/TR_210_60.htm.* You may inspect and obtain a copy of this document which is on file at the Administrative Record Room, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240. For information on the availability of this document at OSM, call 202–208–2823. You also may inspect a copy of this document 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.*

(ii) Each detailed design plan for a structure that meets the criteria in § 77.216(a) of this title must—

(A) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture;

(B) Include any geotechnical investigation, design, and construction requirements for the structure;

(C) Describe the operation and maintenance requirements for each structure; and

(D) Describe the timetable and plans to remove each structure, if appropriate.

* * * * *

(c) * * *

(2) Each plan for an impoundment meeting the criteria in § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title. The plan required to be submitted to the District Manager of MSHA under § 77.216 of this title must be submitted to the regulatory authority as part of the permit application.

* * * * *

(4) If the structure meets the Significant Hazard Class or High Hazard Class criteria for dams in TR–60 or meets the criteria of § 77.216(a) of this chapter, each plan must include a stability analysis of the structure. The stability analysis must include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan also must contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

(d) *Coal mine waste impoundments and refuse piles.* If you, the permit applicant, propose to place coal mine waste in a refuse pile or impoundment, or if you plan to use coal mine waste to construct an impounding structure, you must comply with the applicable requirements in paragraphs (d)(1) through (d)(3) of this section.

(1) *Addressing impacts to perennial and intermittent streams and related environmental values.* You must design the operation to avoid placement of coal mine waste in or within 100 feet of a perennial or intermittent stream to the extent possible. If avoidance is not possible, you must—

(i) Explain, to the satisfaction of the regulatory authority, why an alternative coal mine waste disposal method or an alternative location or configuration that does not involve placement of coal mine waste in or within 100 feet of a perennial or intermittent stream is not reasonably possible.

(ii) Identify a reasonable range of alternative locations or configurations for any proposed refuse piles or coal mine waste impoundments. This provision does not require identification of all potential alternatives. You need identify only those reasonably possible alternatives that are likely to differ significantly in terms of impacts on fish, wildlife, and related environmental values. An alternative is reasonably possible if it meets all the following criteria:

(A) The alternative conforms to the safety, engineering, design, and construction requirements of the regulatory program.

(B) The alternative is capable of being done after consideration of cost, logistics, and available technology. The fact that one alternative may cost somewhat more than a different alternative does not necessarily warrant exclusion of the more costly alternative from consideration. However, an alternative generally may be considered unreasonable if its cost is substantially greater than the costs normally associated with this type of project.

(C) The alternative is consistent with the coal recovery provisions of § 817.59 of this chapter.

(iii) Analyze the impacts of the alternatives identified in paragraph (d)(1)(ii) of this section on fish, wildlife, and related environmental values. The analysis must consider impacts on both aquatic and terrestrial ecosystems.

(A) For every alternative that proposes placement of coal mine waste in a perennial or intermittent stream, the analysis must include an evaluation of impacts on the physical, chemical, and biological characteristics of the stream downstream of the proposed refuse pile or coal mine waste impoundment, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the coal mine waste may introduce or increase contaminants, and the effects on aquatic organisms and the wildlife that is dependent upon the stream.

(B) If you have prepared an analysis of alternatives for the proposed impoundment or refuse pile under 40 CFR 230.10 to meet Clean Water Act requirements, you may initially submit a copy of that analysis in lieu of the analysis required under paragraph (d)(1)(iii)(A) of this section. The regulatory authority will determine the extent to which that analysis satisfies the requirements of paragraph (d)(1)(iii)(A) of this section.

(iv) Select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems.

(2) *Design requirements for refuse piles.* Refuse piles must be designed to comply with the requirements of §§ 817.81 and 817.83 of this chapter.

(3) *Design requirements for impoundments and impounding structures.* Impounding structures constructed of or intended to impound coal mine waste must be designed to comply with the requirements of §§ 817.81 and 817.84 of this chapter, which incorporate the requirements of paragraphs (a) and (c) of § 817.49 of this chapter. In addition,—

(i) The plan for each structure that meets the criteria of § 77.216(a) of this title must comply with the requirements of § 77.216–2 of this title; and

(ii) Each plan for a coal mine waste impoundment must contain the results of a geotechnical investigation to determine the structural competence of the foundation that will support the proposed impounding structure and the impounded material. An engineer or engineering geologist must plan and supervise the geotechnical investigation. In planning the investigation, the engineer or geologist must—

(A) Determine the number, location, and depth of borings and test pits using current prudent engineering practice for the size of the impoundment and the impounding structure, the quantity of material to be impounded, and subsurface conditions.

(B) Consider the character of the overburden and bedrock, the proposed abutment sites for the impounding structure, and any adverse geotechnical conditions that may affect the particular impoundment.

(C) Identify all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed impoundment.

(D) Consider the possibility of mudflows, rock-debris falls, or other landslides into the impoundment or impounded material.

■ 11. Revise § 784.19 to read as follows:

§ 784.19 Disposal of excess spoil.

(a) If you, the permit applicant, propose to generate excess spoil as part of your operation, you must include the following items in your application—

(1) *Demonstration of minimization of excess spoil.* A demonstration, prepared to the satisfaction of the regulatory authority, that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate, thus ensuring that spoil is returned to the mined-out area to the extent possible, taking into consideration applicable regulations concerning restoration of the approximate original contour, safety, stability, and environmental protection and the needs of the proposed postmining land use.

(2) *Capacity demonstration.* A demonstration, prepared to the satisfaction of the regulatory authority, that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate, as approved by the regulatory authority under paragraph (a)(1) of this section.

(3) *Discussion of how you will address impacts to perennial and intermittent streams and related environmental values.* You must design the operation to avoid placement of excess spoil in or within 100 feet of a perennial or intermittent stream to the extent possible. If avoidance is not possible, you must—

(i) Explain, to the satisfaction of the regulatory authority, why an alternative that does not involve placement of excess spoil in or within 100 feet of a perennial or intermittent stream is not reasonably possible.

(ii) Identify a reasonable range of alternatives that vary with respect to the number, size, location, and configuration of proposed fills. This provision does not require identification of all potential alternatives. You need identify only those reasonably possible alternatives that are likely to differ significantly in terms of impacts on fish, wildlife, and related environmental values. An alternative is reasonably possible if it meets all the following criteria:

(A) The alternative conforms to the safety, engineering, design, and construction requirements of the regulatory program;

(B) The alternative is capable of being done after consideration of cost, logistics, and available technology. The fact that one alternative may cost somewhat more than a different alternative does not necessarily warrant exclusion of the more costly alternative from consideration. However, an alternative generally may be considered unreasonable if its cost is substantially

greater than the costs normally associated with this type of project.

(C) The alternative is consistent with the coal recovery provisions of § 817.59 of this chapter.

(iii) Analyze the impacts of the alternatives identified in paragraph (a)(3)(ii) of this section on fish, wildlife, and related environmental values. The analysis must consider impacts on both terrestrial and aquatic ecosystems.

(A) For every alternative that proposes placement of excess spoil in a perennial or intermittent stream, the analysis must include an evaluation of impacts on the physical, chemical, and biological characteristics of the stream downstream of the proposed fill, including seasonal variations in temperature and volume, changes in stream turbidity or sedimentation, the degree to which the excess spoil may introduce or increase contaminants, and the effects on aquatic organisms and the wildlife that is dependent upon the stream.

(B) If you have prepared an analysis of alternatives for the proposed fill under 40 CFR 230.10 to meet Clean Water Act requirements, you may initially submit a copy of that analysis with your application in lieu of the analysis required by paragraph (a)(3)(iii)(A) of this section. The regulatory authority will determine the extent to which that analysis satisfies the analytical requirements of paragraph (a)(3)(iii)(A) of this section.

(iv) Select the alternative with the least overall adverse impact on fish, wildlife, and related environmental values, including adverse impacts on water quality and aquatic and terrestrial ecosystems.

(4) *Location.* Maps and cross-section drawings showing the location of all proposed disposal sites and structures. You must locate fills on the most moderately sloping and naturally stable areas available, unless the regulatory authority approves a different location based upon the alternatives analysis under paragraph (a)(3) of this section or on other requirements of the Act and this chapter. Whenever possible, you must place fills upon or above a natural terrace, bench, or berm if that location would provide additional stability and prevent mass movement.

(5) *Design plans.* Detailed design plans for each structure, prepared in accordance with the requirements of this section and §§ 817.71 through 817.74 of this chapter. You must design the fill and appurtenant structures using current prudent engineering practices and any additional design criteria established by the regulatory authority.

(6) *Geotechnical investigation.* The results of a geotechnical investigation of each proposed disposal site, with the exception of those sites at which spoil will be placed only on a pre-existing bench under § 817.74 of this chapter. You must conduct sufficient foundation investigations, as well as any necessary laboratory testing of foundation material, to determine the design requirements for foundation stability for each site. The analyses of foundation conditions must take into consideration the effect of underground mine workings, if any, upon the stability of the fill and appurtenant structures. The information submitted must include—

(i) The character of the bedrock and any adverse geologic conditions in the proposed disposal area.

(ii) A survey identifying all springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed disposal site.

(iii) A survey of the potential effects of subsidence of subsurface strata as a result of past and future mining operations.

(iv) A technical description of the rock materials to be utilized in the construction of disposal structures containing rock chimney cores or underlain by a rock drainage blanket.

(v) A stability analysis including, but not limited to, strength parameters, pore pressures, and long-term seepage conditions. This analysis must be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the design specifications and methods.

(7) *Operation and reclamation plans.* Plans for the construction, operation, maintenance, and reclamation of all excess spoil disposal structures in accordance with the requirements of §§ 817.71 through 817.74 of this chapter.

(8) *Additional requirements for keyway cuts or rock-toe buttresses.* If keyway cuts or rock-toe buttresses are required under § 817.71(d) of this chapter, the number, location, and depth of borings or test pits, which must be determined according to the size of the spoil disposal structure and subsurface conditions. You also must provide the engineering specifications used to design the keyway cuts or rock-toe buttresses. Those specifications must be based upon the stability analysis required under paragraph (a)(7)(v) of this section.

(b) *Design certification.* A qualified registered professional engineer experienced in the design of earth and rock fills must certify that the design of all fills and appurtenant structures meets the requirements of this section.

■ 12. Amend § 784.23 by removing ''817.71(b),'' in paragraph (c) and revising paragraph (b)(10) to read as follows:

§ 784.23 Operation plan: Maps and plans.

* * * * *

(b) * * *

(10) Locations of each siltation structure, permanent water impoundment, refuse pile, and coal mine waste impoundment for which plans are required by § 784.16 of this part, and the location of each fill for the disposal of excess spoil for which plans are required under § 784.19 of this part.

* * * * *

■ 13. Add § 784.28 to read as follows:

§ 784.28 Surface activities in or adjacent to perennial or intermittent streams.

(a) *Applicability.* (1) *In general.* Except as otherwise provided in paragraph (a)(2) of this section, this section applies to underground mining permit applications that propose to conduct surface activities in perennial or intermittent streams or on the surface of lands within 100 feet, measured horizontally, of perennial or intermittent streams.

(2) *Exceptions.* (i) *Coal preparation plants not located within the permit area of a mine.* This section does not apply to applications under § 785.21 of this chapter for coal preparation plants that are not located within the permit area of a mine.

(ii) *Stream-channel diversions.* Paragraphs (b) through (e) of this section do not apply to diversions of perennial or intermittent streams, which are governed by § 784.29 of this part and § 817.43 of this chapter.

(b) *Application requirements for activities in a perennial or intermittent stream.* If you propose to conduct one or more of the activities listed in paragraphs (b)(2) through (b)(4) of § 817.57 of this chapter in a perennial or intermittent stream, your application must demonstrate that—

(1) Avoiding disturbance of the stream is not reasonably possible; and

(2) The proposed activities will comply with all applicable requirements in paragraphs (b) and (c) of § 817.57 of this chapter.

(c) *Application requirements for surface activities within 100 feet of a perennial or intermittent stream.* If you propose to conduct surface activities within 100 feet of a perennial or intermittent stream, but not in the stream itself, and those activities would occur on the surface of land subject to

the buffer requirement of § 817.57(a)(1) of this chapter, your application must—

(1) Demonstrate that avoiding disturbance of land within 100 feet of the stream either is not reasonably possible or is not necessary to meet the fish and wildlife and hydrologic balance protection requirements of the regulatory program;

(2) Identify any lesser buffer that you propose to implement instead of maintaining a 100-foot undisturbed buffer between surface activities and the perennial or intermittent stream; and

(3) Explain how the lesser buffer, together with any other protective measures that you propose to implement, constitute the best technology currently available to—

(i) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible, as required by §§ 784.14(g) and 817.41(d)(1) of this chapter; and

(ii) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, as required by §§ 784.21(b) and 817.97(a) of this chapter.

(d) *Approval requirements for activities in a perennial or intermittent stream.* Before approving any surface activities in a perennial or intermittent stream, the regulatory authority must—

(1) Find in writing that—

(i) Avoiding disturbance of the stream is not reasonably possible; and

(ii) The plans submitted with the application meet all applicable requirements in paragraphs (b) and (c) of § 817.57 of this chapter.

(2) Include a permit condition requiring a demonstration of compliance with the Clean Water Act in the manner specified in § 817.57(a)(2) of this chapter before the permittee may conduct any activities in a perennial or intermittent stream that require authorization or certification under the Clean Water Act.

(e) *Approval requirements for surface activities within 100 feet of a perennial or intermittent stream.* Before approving any surface activities that would disturb the surface of land subject to the buffer requirement of § 817.57(a)(1) of this chapter, the regulatory authority must find in writing that—

(1) Avoiding disturbance of the surface of land within 100 feet of the stream either is not reasonably possible or is not necessary to meet the fish and wildlife and hydrologic balance protection requirements of the regulatory program; and

(2) The measures proposed under paragraphs (c)(2) and (c)(3) of this section constitute the best technology currently available to—

(i) Prevent the contribution of additional suspended solids to streamflow or runoff outside the permit area to the extent possible, as required by §§ 784.14(g) and 817.41(d)(1) of this chapter; and

(ii) Minimize disturbances and adverse impacts on fish, wildlife, and related environmental values to the extent possible, as required by §§ 784.21(b) and 817.97(a) of this chapter.

(f) *Relationship to the Clean Water Act.* (1) In all cases, your application must identify the authorizations and certifications that you anticipate will be needed under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, and describe the steps that you have taken or will take to procure those authorizations and certifications.

(2) The regulatory authority will process your application and may issue the permit before you obtain all necessary authorizations and certifications under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, provided your application meets all applicable requirements of subchapter G of this chapter. However, issuance of a permit does not authorize you to initiate any activities for which Clean Water Act authorization or certification is required. Information submitted and analyses conducted under subchapter G of this chapter may inform the agency responsible for authorizations and certifications under sections 401, 402, and 404 of the Clean Water Act, 33 U.S.C. 1341, 1342, and 1344, but they are not a substitute for the reviews, authorizations, and certifications required under those sections of the Clean Water Act.

PART 816—PERMANENT PROGRAM PERFORMANCE STANDARDS—SURFACE MINING ACTIVITIES

■ 14. The authority citation for part 816 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 15. Section 816.10 is revised to read as follows:

§ 816.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned clearance number 1029–0047. Collection of this information is required under section 515 of SMCRA, which provides that permittees conducting surface coal mining and reclamation operations must meet all applicable performance standards of the regulatory program approved under the Act. The regulatory authority uses the information collected to ensure that surface mining activities are conducted in compliance with the requirements of the applicable regulatory program. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

■ 16. In § 816.11, revise paragraph (e) to read as follows:

§ 816.11 Signs and markers.

* * * * *

(e) *Buffer markers.* The boundaries of any buffer to be maintained between surface mining activities and a perennial or intermittent stream in accordance with §§ 780.28 and 816.57 of this chapter must be clearly marked to avoid disturbance by surface mining activities.

* * * * *

■ 17. Amend § 816.43 as follows:

■ A. Remove the last sentence of paragraph (a)(3);

■ B. Redesignate paragraph (a)(4) as paragraph (a)(5) and add a new paragraph (a)(4);

■ C. Revise paragraphs (b)(1) and (b)(4); and

■ D. Add paragraph (b)(5).

The revisions and additions will read as follows:

§ 816.43 Diversions.

(a) * * *

(4) A permanent diversion or a stream channel restored after the completion of mining must be designed and constructed so as to restore or approximate the premining characteristics of the original stream channel, including any natural riparian vegetation, to promote the recovery and enhancement of the aquatic habitat.

* * * * *

(b) * * *

(1) The regulatory authority may approve the diversion of perennial or intermittent streams within the permit area if the diversion is located and designed to minimize adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available. The permittee must construct and maintain the diversion in accordance with the approved design.

* * * * *

(4) A permanent stream-channel diversion or a stream channel restored after the completion of mining must be designed and constructed using natural channel design techniques so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation and the natural hydrological characteristics of the original stream, to promote the recovery and enhancement of the aquatic habitat and to minimize adverse alteration of stream channels on and off the site, including channel deepening or enlargement, to the extent possible.

(5) A qualified registered professional engineer must separately certify both the design and construction of all diversions of perennial and intermittent streams and all stream restorations. The design certification must certify that the design meets the design requirements of this section and any design criteria set by the regulatory authority. The construction certification must certify that the stream-channel diversion or stream restoration meets all construction requirements of this section and is in accordance with the approved design.

* * * * *

§ 816.46 [Amended]

■ 18. In § 816.46, remove paragraph (b)(2) and redesignate paragraphs (b)(3) through (b)(6) as (b)(2) through (b)(5), respectively.

■ 19. Revise § 816.57 to read as follows:

§ 816.57 Hydrologic balance: Activities in or adjacent to perennial or intermittent streams.

(a)(1) *Buffer requirement.* Except as provided in paragraph (b) of this section and consistent with paragraph (a)(2) of this section, you, the permittee or operator, may not conduct surface mining activities that would disturb the surface of land within 100 feet, measured horizontally, of a perennial or intermittent stream, unless the regulatory authority authorizes you to do so under § 780.28(e) of this chapter.

(2) *Clean Water Act requirements.* Surface mining activities, including those activities in paragraphs (b)(1) through (b)(4) of this section, may be authorized in perennial or intermittent streams only where those activities would not cause or contribute to the violation of applicable State or Federal water quality standards developed pursuant to the Clean Water Act, as determined through certification under section 401 of the Clean Water Act or a permit under section 402 or 404 of the Clean Water Act.

(b) *Exception.* The buffer requirement of paragraph (a) of this section does not apply to those segments of a perennial or intermittent stream for which the regulatory authority, in accordance with § 780.28(d) of this chapter or § 816.43(b)(1) of this part, approves one or more of the activities listed in paragraphs (b)(1) through (b)(4) of this section.

(1) Diversion of a perennial or intermittent stream. You must comply with all other applicable requirements of the regulatory program, including the requirements of § 816.43(b) of this part for the permanent or temporary diversion of a perennial or intermittent stream.

(2) Placement of bridge abutments, culverts, or other structures in or within 100 feet of a perennial or intermittent stream to facilitate crossing of the stream by roads, railroads, conveyors, pipelines, utilities, or similar facilities. You must comply with all other applicable requirements of the regulatory program, including the requirements of §§ 816.150, 816.151, and 816.181 of this part, as appropriate.

(3) Construction of sedimentation pond embankments in a perennial or intermittent stream. This provision extends to the pool or storage area created by the embankment. You must comply with all other applicable requirements of the regulatory program, including the requirements of § 816.45(a) of this part. Under § 816.56 of this part, you must remove and reclaim all sedimentation pond embankments before abandoning the permit area or seeking final bond release unless the regulatory authority approves retention of the pond as a permanent impoundment under § 816.49(b) of this part and provisions have been made for sound future maintenance by the permittee or the landowner in accordance with § 800.40(c)(2) of this chapter.

(4) Construction of excess spoil fills and coal mine waste disposal facilities in a perennial or intermittent stream. You must comply with all other applicable requirements of the regulatory program, including the requirements of paragraphs (a) and (f) of § 816.71 of this part for excess spoil fills and the requirements of §§ 816.81(a), 816.83(a), and 816.84 of this part for coal mine waste disposal facilities.

(c) *Additional clarifications.* All surface mining activities conducted in or within 100 feet of a perennial or intermittent stream must comply with paragraphs (b)(10)(B)(i) and (b)(24) of section 515 of the Act and the regulations implementing those provisions of the Act, including—

(1) The requirement in § 816.41(d)(1) of this part that surface mining activities be conducted according to the plan approved under § 780.21(h) of this chapter and that earth materials, ground-water discharges, and runoff be handled in a manner that prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution.

(2) The requirement in § 816.45(a) that appropriate sediment control measures be designed, constructed, and maintained using the best technology currently available to prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area.

(3) The requirement in § 816.97(a) of this part that the operator must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish and wildlife and related environmental values and achieve enhancement of those resources where practicable.

(4) The requirement in § 816.97(f) of this part that the operator avoid disturbances to, enhance where practicable, restore, or replace wetlands, habitats of unusually high value for fish and wildlife, and riparian vegetation along rivers and streams and bordering ponds and lakes.

■ 20. In § 816.71, revise paragraphs (a) through (d) to read as follows:

§ 816.71 Disposal of excess spoil: General requirements.

(a) *General.* You, the permittee or operator, must place excess spoil in designated disposal areas within the permit area in a controlled manner to—

(1) Minimize the adverse effects of leachate and surface water runoff from the fill on surface and ground waters;

(2) Ensure mass stability and prevent mass movement during and after construction;

(3) Ensure that the final fill is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use; and

(4) Minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

(b) *Static safety factor.* The fill must be designed and constructed to attain a minimum long-term static safety factor of 1.5. The foundation and abutments of

the fill must be stable under all conditions of construction.

(c) *Compliance with permit.* You, the permittee or operator, must construct the fill in accordance with the design and plans submitted under § 780.35 of this chapter and approved as part of the permit.

(d) *Special requirement for steep-slope conditions.* When the slope in the disposal area exceeds 2.8h:1v (36 percent), or any lesser slope designated by the regulatory authority based on local conditions, you, the permittee or operator, must construct keyway cuts (excavations to stable bedrock) or rock-toe buttresses to ensure fill stability.

* * * * *

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

■ 21. The authority citation for part 817 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 22. Section 817.10 is revised to read as follows:

§ 817.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part and assigned clearance number 1029–0047. Collection of this information is required under section 516 of SMCRA, which provides that permittees conducting underground coal mining operations must meet all applicable performance standards of the regulatory program approved under the Act. The regulatory authority uses the information collected to ensure that surface mining activities are conducted in compliance with the requirements of the applicable regulatory program. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

■ 23. In § 817.11, revise paragraph (e) to read as follows:

§ 817.11 Signs and markers.

* * * * *

(e) *Buffer markers.* The boundaries of any buffer to be maintained between surface activities and a perennial or intermittent stream in accordance with §§ 784.28 and 817.57 of this chapter must be clearly marked to avoid disturbance by surface operations and facilities.

* * * * *

■ 24. Amend § 817.43 as follows:

■ A. Remove the last sentence of paragraph (a)(3);

■ B. Redesignate paragraph (a)(4) as paragraph (a)(5) and add a new paragraph (a)(4);

■ C. Revise paragraphs (b)(1) and (b)(4); and

■ D. Add paragraph (b)(5).

The revisions and additions will read as follows:

§ 817.43 Diversions.

(a) * * *

(4) A permanent diversion or a stream channel restored after the completion of mining must be designed and constructed so as to restore or approximate the premining characteristics of the original stream channel, including any natural riparian vegetation, to promote the recovery and enhancement of the aquatic habitat.

* * * * *

(b) * * *

(1) The regulatory authority may approve the diversion of perennial or intermittent streams within the permit area if the diversion is located and designed to minimize adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available. The permittee must construct and maintain the diversion in accordance with the approved design.

* * * * *

(4) A permanent stream-channel diversion or a stream channel restored after the completion of mining must be designed and constructed using natural channel design techniques so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation and the natural hydrological characteristics of the original stream, to promote the recovery and enhancement of the aquatic habitat and to minimize adverse alteration of stream channels on and off the site, including channel deepening or enlargement, to the extent possible.

(5) A qualified registered professional engineer must separately certify both the design and construction of all diversions of perennial and intermittent streams and all stream restorations. The design certification must certify that the design meets the design requirements of this section and any design criteria set by the regulatory authority. The construction certification must certify that the stream-channel diversion or stream restoration meets all construction requirements of this section and is in accordance with the approved design.

* * * * *

§ 817.46 [Amended]

■ 25. In § 817.46, remove paragraph (b)(2) and redesignate paragraphs (b)(3) through (b)(6) as (b)(2) through (b)(5), respectively.

■ 26. Revise § 817.57 to read as follows:

§ 817.57 Hydrologic balance: Surface activities in or adjacent to perennial or intermittent streams.

(a)(1) *Buffer requirement.* Except as provided in paragraph (b) of this section and consistent with paragraph (a)(2) of this section, you, the permittee or operator, may not conduct surface activities that would disturb the surface of land within 100 feet, measured horizontally, of a perennial or intermittent stream, unless the regulatory authority authorizes you to do so under § 784.28(e) of this chapter.

(2) *Clean Water Act requirements.* Surface activities, including those activities in paragraphs (b)(1) through (b)(4) of this section, may be authorized in perennial or intermittent streams only where those activities would not cause or contribute to the violation of applicable State or Federal water quality standards developed pursuant to the Clean Water Act, as determined through certification under section 401 of the Clean Water Act or a permit under section 402 or 404 of the Clean Water Act.

(b) *Exception.* The buffer requirement of paragraph (a) of this section does not apply to those segments of a perennial or intermittent stream for which the regulatory authority, in accordance with § 784.28(d) of this chapter or § 817.43(b)(1) of this part, approves one or more of the activities listed in paragraphs (b)(1) through (b)(4) of this section.

(1) Diversion of a perennial or intermittent stream. You must comply with all other applicable requirements of the regulatory program, including the requirements of § 817.43(b) of this part for the permanent or temporary diversion of a perennial or intermittent stream.

(2) Placement of bridge abutments, culverts, or other structures in or within 100 feet of a perennial or intermittent stream to facilitate crossing of the stream by roads, railroads, conveyors, pipelines, utilities, or similar facilities. You must comply with all other applicable requirements of the regulatory program, including the requirements of §§ 817.150, 817.151, and 817.181 of this part, as appropriate.

(3) Construction of sedimentation pond embankments in a perennial or intermittent stream. This provision extends to the pool or storage area created by the embankment. You must

comply with all other applicable requirements of the regulatory program, including the requirements of § 817.45(a) of this part. Under § 817.56 of this part, you must remove and reclaim all sedimentation pond embankments before abandoning the permit area or seeking final bond release unless the regulatory authority approves retention of the pond as a permanent impoundment under § 817.49(b) of this part and provisions have been made for sound future maintenance by the permittee or the landowner in accordance with § 800.40(c)(2) of this chapter.

(4) Construction of excess spoil fills and coal mine waste disposal facilities in a perennial or intermittent stream. You must comply with all other applicable requirements of the regulatory program, including the requirements of paragraphs (a) and (f) of § 817.71 of this part for excess spoil fills and the requirements of §§ 817.81(a), 817.83(a), and 817.84 of this part for coal mine waste disposal facilities.

(c) *Additional clarifications.* All surface activities conducted in or within 100 feet of a perennial or intermittent stream must comply with paragraphs (b)(9)(B) and (b)(11) of section 516 of the Act and the regulations implementing those provisions of the Act, including—

(1) The requirement in § 817.41(d)(1) of this part that surface activities be conducted according to the plan approved under § 784.14(g) of this chapter and that earth materials, ground-water discharges, and runoff be handled in a manner that prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution.

(2) The requirement in § 817.45(a) that appropriate sediment control measures be designed, constructed, and maintained using the best technology currently available to prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area.

(3) The requirement in § 817.97(a) of this part that the operator must, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish and wildlife and related environmental values and achieve enhancement of those resources where practicable.

(4) The requirement in § 817.97(f) of this part that the operator avoid disturbances to; enhance where practicable; restore; or replace wetlands, habitats of unusually high value for fish and wildlife, and riparian vegetation along rivers and streams and bordering ponds and lakes.

■ 27. In § 817.71, remove paragraph (k) and revise paragraphs (a) through (d) to read as follows:

§ 817.71 Disposal of excess spoil: General requirements.

(a) *General.* You, the permittee or operator, must place excess spoil in designated disposal areas within the permit area in a controlled manner to—

(1) Minimize the adverse effects of leachate and surface water runoff from the fill on surface and ground waters;

(2) Ensure mass stability and prevent mass movement during and after construction;

(3) Ensure that the final fill is suitable for reclamation and revegetation compatible with the natural surroundings and the approved postmining land use; and

(4) Minimize disturbances to and adverse impacts on fish, wildlife, and related environmental values to the extent possible, using the best technology currently available.

(b) *Static safety factor.* The fill must be designed and constructed to attain a minimum long-term static safety factor of 1.5. The foundation and abutments of the fill must be stable under all conditions of construction.

(c) *Compliance with permit.* You, the permittee or operator, must construct the fill in accordance with the design and plans submitted under § 784.19 of this chapter and approved as part of the permit.

(d) *Special requirement for steep-slope conditions.* When the slope in the disposal area exceeds 2.8h:1v (36 percent), or any lesser slope designated by the regulatory authority based on local conditions, you, the permittee or operator, must construct keyway cuts (excavations to stable bedrock) or rock-toe buttresses to ensure fill stability.

* * * * *

[FR Doc. E8–29150 Filed 12–11–08; 8:45 am]
BILLING CODE 4310–05–P

Federal Register

Friday,

December 12, 2008

Part III

Commodity Futures Trading Commission

17 CFR Parts 15, 16, 17, et al.

Significant Price Discovery Contracts on Exempt Commercial Markets; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 15, 16, 17, 18, 19, 21, 36, and 40

Significant Price Discovery Contracts on Exempt Commercial Markets

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rules.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is proposing rules to implement the CFTC Reauthorization Act of 2008 (''Reauthorization Act'').[1] In pertinent part, the Reauthorization Act amends the Commodity Exchange Act to significantly expand the CFTC's regulatory authority over exempt commercial markets (''ECMs''), which had heretofore operated largely outside the Commission's regulatory reach, by creating a new regulatory category—ECMs with significant price discovery contracts (''SPDCs'')—and directing the Commission to adopt rules to implement this expanded authority. In addition to proposing regulations mandated by the Reauthorization Act, the Commission is also proposing to amend existing regulations applicable to registered entities in order to clarify that such regulations are now applicable to ECMs with SPDCs.

DATES: Comments must be received by February 10, 2009.

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

- *Federal eRulemaking Portal: http://www.regulations.gov*.
- *Mail/Hand Deliver:* David Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *E-mail: secretary@cftc.gov*.

FOR FURTHER INFORMATION CONTACT: Susan Nathan, Senior Special Counsel, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
A. The Commodity Futures Modernization Act of 2000 Established a New Regulatory Framework
1. Multi-Tiered Regulation
2. Exempt Commercial Markets
3. Differences Between ECMs and DCMs
B. The Changing ECM Landscape
C. The CFTC's Response to the Changing Energy Markets
1. Empirical Study of Trades on ICE and NYMEX
2. Commission Surveillance of Energy Markets
3. The Commission's ECM Hearing
4. The Commission's Findings and Legislative Recommendations
D. The Reauthorization Legislation and the Statutory Scheme
II. The Proposed Rules
A. Part 36—Exempt Markets
1. Required Information
2. Identifying Significant Price Discovery Contracts
(i) Criteria for SPDC Determination
(ii) Notification Requirement for ECMs With a SPDC
3. Procedures
4. Substantive Compliance With the Core Principles
5. Annual Commission Review
B. Market, Transaction and Large Trader Reporting Rules
C. Other Regulatory Provisions
1. Part 40—Provisions Common to Registered Entities
III. Related Matters
A. Cost Benefit Analysis
B. Regulatory Flexibility Act
C. Paperwork Reduction Act
List of Subjects: Proposed Rules

I. Background

A. The Commodity Futures Modernization Act of 2000 Established a New Regulatory Framework

1. Multi-Tiered Regulation

On December 21, 2000, Congress enacted the Commodity Futures Modernization Act (''CFMA''), which amended the Commodity Exchange Act (''Act'' or ''CEA'')[2] to replace the Act's ''one-size-fits-all'' supervisory framework for futures trading with a multi-tiered approach to regulatory oversight of derivatives markets. The CFMA applies different levels of regulatory oversight to markets based primarily on the nature of the underlying commodity being traded and the participants who are trading. In general, the more sophisticated the traders or commercial participants, or the less susceptible a commodity is to manipulation or other market or trading abuses, the less regulatory oversight is required under the CFMA.

Accordingly, designated contract markets (''DCMs''), are subject to the highest level of regulatory oversight because they are open to all participants and may offer all types of commodities.[3] Derivatives Transaction Execution Facilities (''DTEFs'')[4] are subject to less regulatory oversight than DCMs because participants must be sophisticated investors or must be hedging risk associated with their commercial activities. Additionally, the CFMA imposes limitations on the types of commodities that may be traded, and the manner in which they may be traded.[5] Exempt Boards of Trade (''EBOTs'') are subject to virtually no regulatory oversight and are not registered with or designated by the Commission. EBOTs are exempt from most provisions of the CEA other than its antifraud and anti-manipulation prohibitions, but are subject to significant commodity and participant restrictions.[6] In addition to creating these three new categories of trading facility, the CFMA created a broad array of exclusions and exemptions from regulation for certain swaps and other derivatives products traded either bilaterally or on electronic trading facilities.[7] These exclusions and exemptions reflected a view, consistent with Congressional and Commission actions relating to the passage of the CFMA, that transactions between sophisticated counterparties do not necessarily require the protections that the CEA provides for transactions on DCMs and DTEFs.

2. Exempt Commercial Markets

The CFMA established an exemption for transactions in exempt commodities traded on electronic trading facilities, also known as exempt commercial markets (''ECMs'').[8] To qualify as an ECM, a facility must limit its transactions to principal-to-principal transactions executed between ''eligible commercial entities'' (''ECEs'')[9] on an ''electronic trading facility.''[10] Contracts

[1] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1624 (June 18, 2008).

[2] 7 U.S.C. 1 *et seq.*

[3] 7 U.S.C. 7.

[4] To qualify as a DTEF, an exchange must implement certain restrictions on retail market participation and can only trade certain commodities (including excluded commodities and other commodities with very high levels of deliverable supply) and generally must exclude retail participants. *CFTC Glossary (Glossary).*

[5] 7 U.S.C. 7a.

[6] EBOTs may trade only ''excluded commodities'' (7 U.S.C. 1a(13); 17 CFR § 36.2(a)(2)(i)), and are open only to ''eligible contract participants'' (''ECPs'') (7 U.S.C. 1a(12)).

[7] For example, section 2(g) created an exclusion from the CEA for individually negotiated swaps, based on non-agricultural commodities entered into between eligible contract participants, 7 U.S.C. 2(g). Similarly excluded are transactions between ECPs involving excluded commodities that are not executed on a trading facility. 7 U.S.C. 2(d)(1).

[8] 7 U.S.C. 2(h)(3)–(5).

[9] 7 U.S.C. 1a(11) (a subset of ECPs).

[10] 7 U.S.C. 1a(10). For purposes of this proposed rulemaking, the terms electronic trading facility and ECM are used interchangeably. The term ''trading facility'' means a person or group of persons that constitutes, maintains, or provides a physical or

for all commodities except agricultural and excluded commodities (primarily financial commodities but also commodities such as weather) potentially are eligible to trade on an ECM. Examples of commodities traded on ECMs are energy products, metals, chemicals, air emission allowances, paper pulp, and barge freight rates.[11] ECMs fall somewhere between DTEFs and EBOTs on the regulatory oversight spectrum. Like EBOTs, they are neither licensed nor registered with the CFTC and are subject to the Act's antifraud and anti-manipulation provisions.[12] In addition, and different from EBOTs, ECMs are subject to certain recordkeeping and reporting requirements under the CEA.[13]

3. Differences Between ECMs and DCMs

ECMs are not subject to the level of transparency and Commission oversight associated with DCMs. DCMs must satisfy specified criteria to become designated, and then must demonstrate continuing compliance with 18 core principles set out in the Act.[14] The Act provides flexibility with respect to how DCMs may choose to meet the core principles' mandate that DCMs undertake significant supervisory responsibility with respect to trading on their markets. DCMs must, for example, establish rules and procedures for preventing market manipulation and must adopt necessary and appropriate position limit or accountability rules to address the potential for manipulation or congestion. DCMs also must establish compliance and surveillance programs, which the Commission evaluates through rule enforcement reviews,[15] must monitor trading on their markets and must undertake other self-regulatory responsibilities mandated by the CEA.

The CFMA did not impose these obligations on ECMs. While the Commission was given the authority to determine whether an ECM performs a significant price discovery function for transactions in an underlying cash market,[16] such a determination did not trigger any self-regulatory responsibilities for the ECM or confer any additional oversight authority on the Commission. Rather, the presence of a contract performing a significant price discovery function required the ECM to publicly disseminate certain basic information, such as contract terms and conditions and daily trading volume, open interest, and opening and closing prices or price ranges.[17]

B. The Changing ECM Landscape

Following enactment of the CFMA in December 2000, the first ECMs that notified the Commission of their intent to operate generally were simple trading platforms, resembling in many ways business-to-business facilities for large commercial firms. ECMs facilitate the execution of trades between commercial counterparties by offering an anonymous and efficient electronic matching system which many believed to be superior to the existing voice broker system, and to provide a competitive advantage over the bilateral OTC market, especially for energy products. Initially, most ECMs were small operations with low trading volumes that were small relative to DCMs. The first ECMs did not offer centralized clearing, but sought to address counterparty risk through the use of credit filters whereby traders could limit their potential counterparties to a list of traders whose credit they found satisfactory. Significantly, early ECM contracts were not linked to contracts listed on DCMs. Over time, however, ECMs began to offer ''look-alike'' contracts that were linked to the settlement prices of their exchange-traded counterparts, and these look-alike contracts in one case began to garner significant volumes. In recent years, several active ECMs began to offer the option of centralized clearing for their contracts—an option which became widely utilized by their customers to manage counterparty risk.

This evolution, and particularly the linkage of ECM contract settlement prices to DCM futures contract settlement prices, began to raise questions about whether ECM trading activity could impact trading on DCMs and whether the CFTC had adequate authority to address that impact and protect markets from manipulation and abuse. Of special concern to CFTC staff was the existence of the ECM cash-settled ''look-alike'' contracts that could provide an incentive to manipulate the settlement price of an underlying DCM futures contract to benefit positions in the look-alike ECM contract. As discussed more fully below, the Commission subsequently considered and studied these concerns in a variety of ways, culminating, in September 2007, in a public hearing examining trading on regulated exchanges and ECMs.[18]

C. The CFTC's Response to the Changing Energy Markets

1. Empirical Study of Trades on ICE[19] and NYMEX

During the last several years, one ECM in particular—the Intercontinental

electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts or transactions—(i) by accepting bids or offers made by other participants that are open to multiple participants in the facility or system; or (ii) through the interaction of multiple bids or multiple offers within a system with a pre-determined non-discretionary automated trade matching and execution algorithm. 7 U.S.C. 1a(34).

[11] 7 U.S.C. 1a(14).

[12] Sections 2(h)(4)(B) and (C) of the Act, 7 U.S.C. 2(h)(4)(B) and (C).

[13] For example, an ECM must maintain for five years and make available for inspection records of its activities relating to its business as a trading facility. 7 U.S.C. 2(h)(5)(B)(ii). More specifically, Commission rule 36.3, 17 CFR 36.3, requires that an ECM identify to the Commission those transactions for which it intends to rely on the exemption in section 2(h)(3) of the CEA and which averaged five trades per day or more over the most recent calendar quarter. For all such transactions, the ECM must provide to the Commission weekly reports showing certain basic trading information, or provide the Commission with electronic access that would allow it to compile the same information. 17 CFR 36.3(b)(1)(ii). An ECM also must provide to the Commission, upon special call, any information relating to its business that the Commission determines is appropriate to enforce the antifraud and anti-manipulation provisions of the CEA, to evaluate a systemic market event, or to obtain information on behalf of another federal financial regulator. 7 U.S.C. 2(h)(5)(B)(iii); 17 CFR 36.3(b)(3). An ECM must maintain a record of any allegations or complaints it receives concerning suspected fraud or manipulation and must provide the Commission with a copy of the record of each such complaint. 17 CFR 36.3(b)(1)(iii). Finally, an ECM is required to file an annual certification that it continues to operate in reliance on the exemption in section 2(h)(3) of the Act and that the information it previously provided to the Commission remains correct. 17 CFR 36.3(c)(4).

[14] *See* sections 5(d)(1)–(18) of the Act, 7 U.S.C. 7(d)(1)–(18).

[15] The Commission conducts regular rule enforcement reviews of the self regulatory programs operated by DCMs for enforcing exchange rules, preventing market manipulations and customer and market abuses, and ensuring that trade related information is recorded and stored in a manner consistent with the Act.

[16] In 2004, the Commission amended its part 36 rules to include the requirement that an ECM notify the Commission when it has reason to believe that one or more of the markets on which it is conducting agreements, contracts or transactions in reliance on section 2(h)(3) of the CEA has been met or if the market holds itself out to the public as performing a price discovery function for the cash market of a commodity. 17 CFR 36.3(c)(2)(i) and (ii). 69 FR 43285 (July 20, 2004).

[17] *Id.*

[18] *See* Commodity Futures Trading Commission, *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* (October 2007), *http://www.cftc.gov/stellent/groups/public/@newsroom/documents/file/pr5403-07_ecmreport.pdf* for a comprehensive report of the Commission's findings following its September 2007 hearing (''ECM Report'').

[19] Intercontinental Exchange, or ICE, consists of four separate entities: ICE OTC, to which this document refers, is an ECM trading energy products. ICE Future Europe trades energy futures and is regulated by the Financial Services Authority of Great Britain; ICE Futures US focuses primarily on futures based on soft commodities (*e.g.*, coffee, sugar, cocoa, cotton) and financial futures and is regulated by the CFTC; ICE Futures Canada trades

Continued

Exchange (''ICE'')—has become a major trading venue for natural gas contracts in direct competition with the New York Mercantile Exchange (''NYMEX'') natural gas benchmark futures contract, in addition, Commission staff has found that the traders on ICE are virtually the same as the traders on NYMEX. All of the top 25 natural gas traders on NYMEX are also significant traders on ICE. For the Henry Hub natural gas market,[20] market participants generally view ICE and NYMEX as essentially a single market, looking to both ICE and NYMEX when determining where to execute a trade at the best price.

To assess these changes in the marketplace, the Commission's Office of the Chief Economist (''OCE'') conducted an empirical study of the relationship between the natural gas contracts that trade on ICE and NYMEX. OCE collected transaction prices for ICE and NYMEX natural gas contracts from January 3, 2006 through December 31, 2006 and evaluated trading for 12 contract months when trading on each market was appropriately active. OCE examined the timing of price changes on ICE and NYMEX to draw inferences about where information arrives first. If price changes on one venue consistently ''led'' those on the other venue, then OCE concluded that informed traders preferred trading at that ''leading'' venue and inferred that market to be ''discovering'' prices.[21] OCE found that ICE exhibited price leadership with respect to NYMEX on 20 percent of the contract-days, while NYMEX exhibited price leadership on 63 percent of the contract-days. OCE concluded that these results suggested that both ICE and NYMEX are significant price discovery venues for natural gas futures contracts.

2. Commission Surveillance of the Energy Markets

The Commission's surveillance of natural gas energy markets traditionally has focused on the regulated futures markets traded on NYMEX. Prior to the Reauthorization Act, ECMs were not subject to the requirements of the Commission's large trader reporting system (''LTRS'').[22] In order to obtain analogous large trader information from ECMs, the Commission had to issue special calls.[23] Based on the prominent role played by the ICE natural gas contract in the price discovery process and the possible impact on the NYMEX natural gas contract, the Commission determined to issue a series of special calls for information related to ICE's cleared natural gas swap contracts that are cash-settled based on the settlement price of the NYMEX physical delivery natural gas contract.[24]

3. The Commission's ECM Hearing

Following the OCE study and the special calls issued to ICE, the Commission held a public hearing on September 18, 2007, to examine the oversight of DCMs and ECMs. Witnesses at the hearing included Commission staff, representatives of DCMs and ECMs, and representatives of a broad spectrum of market users and consumer groups. The hearing focused on a number of issues, including the tiered regulatory approach of the CFMA and whether it was adequate; the similarities and differences between ECMs and DCMs; the associated regulatory risks of each market category; the types of regulatory or legislative changes that may be appropriate to address identified risks; and the impact that regulatory or legislative changes might have on the U.S. futures industry and the global competitiveness of the U.S. financial industry. In announcing the hearing, CFTC Acting Chairman Lukken observed that:

> The evolution of these energy markets [ECMs] in recent years requires our agency to address whether the level of regulatory oversight is proper given the importance of energy prices to all Americans.* * * This oversight hearing will provide a better understanding of the inter-relationship of these trading venues so policymakers can make informed decisions to protect these vital markets.[25]

4. The Commission's Findings and Legislative Recommendations

Based on information developed through various studies, surveillance, special calls and its public hearing, the Commission published in October 2007 a ''Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets.'' (''ECM Report'').[26] The report was provided to the Commission's Congressional oversight committees, which were then in the process of considering legislation to amend the CEA and reauthorize the Commission.

The ECM Report noted that while some participants disagreed, most witnesses at the September 18 hearing generally supported the tiered regulatory structure of the CFMA, but expressed concern regarding the regulatory provisions governing ECMs and the regulatory disparity between DCMs and ECMs.[27] Witnesses suggested that this disparity made markets more susceptible to manipulation and put regulated exchanges at a competitive disadvantage vis-à-vis ECMs offering virtually identical products. Generally, most witnesses felt that some changes to the ECM provisions might be appropriate, provided those changes

---

futures and options and is regulated by the Manitoba Securities Commission.

[20] Henry Hub is a natural gas pipeline hub in Louisiana that serves as the delivery point for NYMEX natural gas futures contracts and often serves as a benchmark for wholesale natural gas prices across the U.S. *Glossary*.

[21] *See* ECM Report at 11–12. Price discovery is the process of determining the price level for a commodity based on supply and demand conditions. Price discovery may occur in a futures market or cash market. *Glossary*.

[22] The LTRS is the centerpiece of the Commission's market surveillance system. Under the LTRS, clearing members, futures commission merchants and foreign brokers file daily reports with the CFTC showing futures and option positions in accounts they carry that are above reporting levels set by the Commission. The reporting level for the NYMEX natural gas futures market is 200 contracts.

[23] Section 2(h)(5)(B)(iii) of the Act, 7 U.S.C. 2(h)(5)(B)(iii), requires that an electronic trading facility relying on the exemption provided in section 2(h)(3) must, upon a special call by the Commission, provide such information related to its business as an electronic trading facility as the Commission may determine appropriate to enforce the antifraud provisions of the CEA, to evaluate a systemic market event, or to obtain information requested by a Federal financial regulatory authority in connection with its regulatory or supervisory responsibilities.

[24] The special calls were issued primarily to assist the Commission in its surveillance of the NYMEX natural gas contract. They were not issued as part of an investigation of any particular market participant or trading activity on either ICE or NYMEX, nor were they issued to conduct regular market surveillance of ICE. The first special call, issued on September 28, 2006, requested daily clearing member position data for ICE's natural gas swap contracts, broken out between house and aggregate customer positions, which is similar to information that the Commission receives from NYMEX pursuant to Commission rule 16.00. This information permits CFTC market surveillance staff to see all cleared positions at the clearing member level, but it is not possible to determine individual customer positions. To obtain daily individual trader positions, the Commission issued a second special call on December 1, 2006. While the data received is similar to large trader reporting for DCMs, the methodology for reporting is very different. Because ICE is a principal-to-principal market and therefore does not receive position reporting from firms, it was necessary for ICE to develop an algorithm to infer open positions from the sum of all trading by each individual trader. While this approach has provided valuable information, it is less accurate than traditional large trader reporting. The third special call, issued on September 5, 2007, required ICE to provide all cleared transaction data for its Henry Hub swap contracts and identify counterparties for the final two trading sessions prior to the expiration of prompt month Henry Hub natural gas products. This data is similar to transaction data that the Commission receives from NYMEX for all trading days and enables CFTC staff to monitor trading activity on ICE and obtain more complete coverage to counter possible manipulative schemes that could affect trading on ICE.

[25] CFTC Release 5368–07, August 2, 2007 (CFTC Announces September Hearing to Examine Trading on Regulated Exchanges and Exempt Commercial Markets).

[26] *supra* n. 20.

[27] *Id.* at 15.

were prudently targeted and did not adversely affect the ability of ECMs to innovate and grow.[28]

Based on the hearing testimony and its own experience in administering the Act, the Commission at that time concluded that the tiered approach of the CFMA generally had operated effectively. ECMs had proven popular for new start-up markets and had provided competition for DCMs, spurring them toward innovations of their own. The Commission further found that, to the extent that trading volume on an ECM contract remained low and its prices were not significantly relied upon by other markets, the current level of regulation remained appropriate. However, when a futures contract traded on an ECM matured and began to serve a significant price discovery function for transactions in commodities in interstate commerce, the contract warranted increased oversight to deter and prevent price manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. Such increased oversight would also help to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business.

In light of these conclusions, the Commission's ECM Report recommended that the CEA be amended to grant the Commission additional authority over ECM contracts serving a significant price discovery function, and that certain self-regulatory responsibilities be assigned to ECMs offering such contracts. Specifically, the Commission advocated that (1) An ECM contract that is determined to perform a significant price discovery function be subject to large trader reporting requirements comparable to those applicable to all DCM contracts; (2) an ECM should be required to adopt position limits or accountability levels, as appropriate, for a listed contract that serves a significant price discovery function similar to the limits on DCMs; (3) an ECM should be required to monitor trading of a listed contract that serves a significant price discovery function to detect and prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process; and (4) the Commission and the ECM should be provided with emergency authority to alter or supplement contract rules, liquidate open positions, and suspend or curtail trading in any listed contract that serves a significant price discovery function. These authorities would be essential tools for the Commission and the ECM to prevent manipulation and disruptions of the delivery or cash-settlement process.

The Commission further recommended that the determination whether an ECM contract serves a significant price discovery function should focus on the following factors: (1) *Material Liquidity*—trading volume in the ECM contract must be significant enough to affect regulated markets or to become a pricing benchmark; and (2) *Linkage/Material Price Reference*—the relevant ECM contract must either influence other markets and transactions through this linkage or be materially referenced by others in interstate commerce on a frequent and recurring basis.

D. The Reauthorization Legislation and the Statutory Scheme

The CFTC Reauthorization Act of 2008 [29] adds a new section 2(h)(7) to the CEA to govern the treatment of ''significant price discovery contracts'' (''SPDCs'') on ECMs.[30] The legislation, based largely on the Commission's recommendations for improving oversight of ECMs, provides for greater regulation of contracts traded on ECMs that fulfill a significant price discovery function and establishes criteria for the Commission to consider in determining whether an ECM contract qualifies as a SPDC. The Reauthorization Act directs the CFTC to extend its regulatory oversight to the trading of SPDCs; requires ECMs to adopt position and accountability limits for SPDCs; authorizes the Commission to require large traders to report their positions in SPDCs; and establishes core principles for ECMs with contracts that are determined to perform a significant price discovery function. Finally, the legislation directs the Commission to issue rules implementing the provisions of new section 2(h)(7) of the CEA and to include in such rules the conditions under which an ECM will have the responsibility to notify the Commission that an agreement, contract or transaction conducted in reliance on the exemption provided in section 2(h)(3) of the CEA may perform a price discovery function.[31]

The Reauthorization Act significantly broadens the CFTC's regulatory authority over ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which SPDCs are traded—and treating electronic trading facilities in that category as registered entities subject to all provisions of the CEA that are applicable to registered entities.[32] The legislation confers on the CFTC the authority to designate an agreement, contract or transaction as a SPDC if the Commission determines, in its discretion, that the agreement, contract or transaction performs a significant price discovery function under criteria established by section 2(h)(7). When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract or contracts, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C)—including the obligation to establish position limits and/or accountability standards for SPDCs.[33] The Reauthorization Act separately amends section 4i of the CEA to authorize the Commission to require large trader reports for SPDCs listed on ECMs.[34]

Consistent with Congress' directive, the Commission is issuing this proposed notice of rulemaking as an initial step to implementing the amended statutory scheme for ECMs with SPDCs.[35] These regulations are applicable to exempt markets, but also implicate parts 16 through 21 (market, transaction and large trader reporting rules), and 40 (provisions common to contract markets, derivatives transaction execution facilities and derivatives clearing organizations).

[28] *Id.*

[29] Public Law No. 110–246, *supra.* n. 1 (''Pub. L. 110–246''). The Reauthorization Act was incorporated into the Food, Conservation and Energy Act of 2008 as Title XIII of that legislation. Title XIII was not the subject of Congressional hearings and the legislative history is limited to The Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 110–627, 110 Cong., 2d Sess. at 978–86 (2008) (Conference Committee Report).

[30] 7 U.S.C. 2(h)(7).

[31] Pub. L. 110–246 at sec. 12304. *See also* Conference Committee Report, at 985–86; 2008 Farm Bill Commodity Futures Title: Strengthening Oversight of Futures Markets, House Committee on Agriculture (May 9, 2008) *http://agriculture.house.gov/inside/Legislation/110/FB/Conf/Title_XIII_fs.pdf.*

[32] Conference Committee Report, at 985–86.

[33] Congress has made clear that an ECM with a SPDC shall be considered as a registered entity for purposes of the CEA. *Id.* at 985.

[34] Public Law 110–246 at sec. 13202.

[35] *Id.* at sec. 13204. Congress has directed that the Commission issue proposed rules implementing section 2(h)(7) of the CEA not later than 180 days after the date of enactment of the Reauthorization Act and that the Commission issue a final rule no later than 270 days after the date of enactment. The Reauthorization Act initially was enacted as H.R. 2419 on May 22, 2008 but was repealed due to clerical error—and concurrently enacted—by H.R. 2164, Public Law 110–264 on June 18, 2008.

II. The Proposed Rules

A. Part 36—Exempt Markets

Part 36 of the Commission's regulations contains the provisions that apply to exempt boards of trade and to exempt commercial markets, regardless of whether the markets are a significant source for price discovery. Rule 36.3 imposes a number of requirements and restrictions on ECMs—electronic trading facilities relying on the exemption in section 2(h)(3) of the CEA—including notification of intent to rely on the exemption; initial and ongoing information submission requirements; prohibited representations; price discovery notification; and price dissemination requirements. The Commission proposes to amend rule 36.3 to implement its broadened regulatory authority over ECMs with SPDCs under section 2(h)(7) of the CEA.

1. Required Information

The notification provision in rule 36.3(a) is unchanged. The Commission proposes to amend rule 36.3(b) to separately specify the information submission requirements, both initially and on an ongoing basis, for: (1) All ECMs; (2) for ECMs with respect to agreements, contracts or transactions that have not been determined to perform a significant price discovery function; and (3) for ECMs with SPDCs.[36] The proposed amendment to rule 36.3(b) additionally includes provisions related to subpoenas, special calls and the delegation of authority and provides that an electronic trading facility relying on the exemption in section 2(h)(3) of the Act shall not, with respect to agreements, contracts or transactions that are not SPDCs, represent to any person that it is registered with, designated, recognized, licensed or approved by the Commission. This prohibition has its origin in section 2(h)(5) of the CEA, which sets forth the requirements and obligations for ECMs. Although the Reauthorization Act did not amend the prohibition on representation in section 2(h)(5)(7) of the Act, the legislation did amend the statutory definition of ''registered entity'' to include, ''with respect to a contract that the Commission determines is a significant price discovery contract, any electronic trading facility on which the contract is executed or traded.'' [37] Accordingly, the Commission believes that when it has determined that a contract, agreement or transaction executed or traded on the trading facility is a SPDC, the trading facility may represent that it is a registered entity, provided that the representation clearly and prominently states that the ECM is a registered entity only with respect to its SPDCs.

In general, the proposed information submission requirements for ECMs without SPDCs are drafted to be substantively similar to the information that all ECMs currently are required to provide.[38] A significant change to the submission requirements for ECMs is the proposed requirement to file, initially and on a quarterly basis, information about the terms and conditions as well as related information for all contracts traded on the facility. Although the proposed rules set forth the terms, standards and conditions under which an ECM will be responsible to notify the Commission that it may have a SPDC, the Commission is mindful that it must independently be aware of ECM contracts that may develop into SPDCs. The Commission believes that requiring ECMs to identify all agreements, contracts and transactions and to provide basic trading information will enable it to fulfill that obligation. To that end, the Commission proposes to retain for non-SPDCs the requirement that ECMs submit to the Commission weekly reports (or alternatively provide electronic access that would allow the Commission to capture the same information) for contracts that average five trades per day or more.[39] In addition, the Commission is proposing to add a quarterly reporting requirement for all non-SPDCs, to include their terms and conditions, average daily trading volume, and open interest. This quarterly reporting requirement also is being proposed to provide the Commission with information that will assist it in making prompt assessments whether ECM contracts may be SPDCs. ECMs should note that this provision will require them to fulfill the quarterly reporting requirement beginning with the end of the calendar quarter following the adoption of these final rules. Under proposed rule 36.3(b)(3), ECMs with SPDCs will be required to comply with the daily reporting and publication requirements of regulation 16.01.[40]

2. Identifying Significant Price Discovery Contracts

The Reauthorization Act directs the Commission to consider, as appropriate, four specific criteria when identifying whether an agreement, contract or transaction is a SPDC: Price linkage, arbitrage, material price reference, and material liquidity.[41] The legislation further directs that in its rulemaking to implement the provisions of section 2(h)(7) of the CEA, the Commission shall include the standards, as well as conditions under which an ECM will have the responsibility to notify the Commission that a contract traded on the facility may perform a significant price discovery function. Accordingly, proposed rule 36.3(c) addresses: (i) The criteria on which the Commission will rely in making a determination that an agreement, contract or transaction is a SPDC; (ii) the factors that will trigger the ECM's obligation to notify the Commission that it may have a SPDC; (iii) the procedures the Commission will follow in reaching its determination whether a contract is a SPDC (and in determining that a contract is no longer a SPDC); and (iv) the procedures and standards by which an ECM with a SPDC must demonstrate compliance with the core principles.

(i) *Criteria for SPDC Determination.* In enacting new section 2(h)(7) of the CEA, Congress specified four criteria that the Commission must consider in making a determination that an agreement, contract or transaction performs a significant price discovery function. Proposed rule 36.3(c)(1) enumerates the factors—price linkage, arbitrage, material price reference, and material liquidity. Because the legislation does not assign priority to any of the factors, and neither the statutory language nor the Conference Committee Report specifies the degree to which any of the factors must be present, section 2(h)(7)(B) gives the Commission flexibility in applying the criteria to a particular contract and market. The Commission is also mindful that:

> [n]ot all the listed factors must be present to make a determination that a contract

[36] Enhanced obligations for ECMs with SPDCs apply only to the SPDCs and need not be applied to ECM contracts, agreements or transactions that are not SPDCs.

[37] Public Law 110–246 at sec. 13203(b)(3).

[38] ECMs that have already filed a Notification of Operation under section 2(h)(3) of the Act should note that proposed rule 36.3(b) will not require them to provide any additional information to the Commission explaining how the facility meets the definition of trading facility or with information demonstrating that the facility requires all participants to be ECEs as long as the operations of the facility and the participants trading on the facility have not materially changed since the filing of the notification or the most recent ECM Annual Certification form.

[39] *See* 17 CFR 36.3(b).

[40] Once in compliance with the core principles and daily reporting and publication requirements applicable to ECMs with SPDCs, ECMs will not be required to comply with proposed rule 36.3(b)(2) except in regard to non-SPDC contracts that are traded or executed on the facility.

[41] Section 2(h)(7)(B)(v) also authorizes the Commission to specify by rule other material factors relevant to a determination whether a contract is a SPDC.

performs a significant price discovery function. However, the Managers intend that the Commission should not make a determination that an agreement, contract or transaction performs a significant price discovery function on the basis of the price linkage factor unless the agreement, contract or transaction has sufficient volume to impact other regulated contracts or to become an independent price reference or benchmark that is regularly utilized by the public.[42]

Because the criteria mandated by Congress do not lend themselves to bright-line rules, the Commission proposes to explain, in Appendix A to the part 36 rules, how it expects to apply the criteria in making its determinations. This proposed guidance explains that the Commission will make SPDC determinations on a case-by-case basis, applying and weighing each factor as appropriate to the specific contract and circumstances under consideration; offers examples to illustrate which factor or combinations of factors the Commission would look to when evaluating whether a contract is performing a significant price discovery function; and describes the circumstances under which the presence of a factor or factors would be sufficient to warrant such a determination.

By way of example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission would determine that the contract is a SPDC if the price of the contract moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that liquidity in the contract has reached a level sufficient for the contract to perform a significant price discovery function. Accordingly, the proposed guidance establishes threshold liquidity and price relationship standards that will inform the Commission's determination. A different approach is required when considering the price discovery potential of a contract that is serving as a material price reference. In these circumstances, the Commission would rely on either of two sources of evidence in making its determination. The Commission believes that a direct indicator that a contract is serving as a material price reference is observation that cash market participants are actively referencing the contract price when they enter into cash market transactions. Routine publication of an ECM's contract price in widely distributed industry publications and newsletters also would indicate that industry participants attach some value to this information.

(ii) *Notification requirement for ECMs with a SPDC.* The Reauthorization Act requires that as part of its rulemaking to implement new section 2(h)(7) of the CEA, the Commission include the standards, terms and conditions under which an ECM will have the responsibility to notify the Commission that an agreement, contract or transaction conducted in reliance on the exemption provided in section 2(h)(3) of the CEA may perform a significant price discovery function.[43] Accordingly, in proposed rule 36.3(c)(2) the Commission has specified conditions, derived from the statutory criteria, which signal the ECM's obligation to notify the Commission of a possible SPDC. An ECM will be obligated to notify the Commission of a potential SPDC when an agreement, contract or transaction is traded an average of 5 trades per day or more over the most recent calendar quarter and also meets one of the other two reporting factors. The Commission is aware that this requirement may result in over-reporting by ECMs, and wishes to emphasize that the presence of one factor alone will not necessarily result in a determination that a contract is a SPDC. This notice requirement, however, will serve to alert the Commission to the contracts that are most likely to be SPDCs. The Commission believes that the benefit of having the maximum available information with which to make its determinations outweighs the costs associated with possible over-reporting by ECMs.

3. Procedures

When the Commission learns of a potential SPDC—whether through its own information collection and surveillance activities,[44] notification by an ECM pursuant to proposed rule 36.3(c)(2), or unsolicited information from participants in the cash market underlying a contract—the Reauthorization Act directs the Commission to implement a process for determining whether ECM contracts are SPDCs. In proposed rule 36.3(c)(3) the Commission establishes procedures under which the Commission will make and announce its determination whether a particular contract performs a significant price discovery function and also sets forth the actions that must be taken by an ECM following such a determination. With respect to the former, proposed rule 36.3(c)(3) provides that when the Commission intends to undertake such a determination in response to notice by an ECM pursuant to rule 36.3(c)(2), or upon its own initiative, it will notice its intention in the **Federal Register**. The proposed rule also specifies that the Commission, as part of its consideration, will solicit written data, views and arguments from the ECM that lists the potential SPDC and from any other interested parties. Generally, such written submissions must be received within 30 calendar days of the date of publication in the **Federal Register**. After consideration of all relevant matters the Commission will issue an order explaining its determination. The issuance of an affirmative Commission order signals the effectiveness of the Commission's authorities with respect to ECMs with SPDCs[45] and triggers the obligations, requirements—both procedural and substantive—and timetables prescribed in proposed rule 36.3(c)(4) for the ECM.[46]

Under proposed rule 36.3(c)(4), an ECM with a SPDC must submit to the Commission a written demonstration that it complies with the nine core principles established in section 2(h)(7) of the CEA with respect to the SPDC. Although status as a registered entity attaches to an ECM as soon as the Commission issues its order determining that a particular ECM contract performs a significant price discovery function, the Commission has included in proposed rule 36.3(c)(4) a grace period for achieving compliance with the core principles. As proposed, the rule provides 90 calendar days for ECMs with a first-time determination of a SPDC to demonstrate compliance with

[42] Conference Committee Report at 984–85. In addition to the four criteria established by Congress, section 2(h)(7) permits the Commission to consider such other material factors as it may specify by rule as relevant to a determination whether an agreement, contract or transaction serves a significant price discovery function. 7 U.S.C. 2(h)(7)(B)(v).

[43] Public Law 110–246 at sec. 13204.

[44] The Reauthorization Act amended the CEA to require that the Commission review all ECM contracts at least once a year to determine whether any contract is a SPDC. In addition to these formal reviews, it is expected that Commission staff might also become aware of the price discovery attributes of ECM contracts in the ordinary course of discussion or interaction with ECM personnel and various cash and futures market participants.

[45] Those authorities include the emergency powers conferred by section 8a(9) of the Act, 7 U.S.C. 12a(9), which permits the Commission to intervene when it has reason to believe an emergency exists and to take action necessary to maintain or restore orderly trading or liquidation of any futures contract.

[46] Should the Commission conclude, either formally or informally, that a contract which demonstrates some characteristics consistent with a SPDC nonetheless does not serve a significant price discovery function, the Commission may continue to monitor the contract pursuant to its special call authority under proposed rule 36.3(b)(1)(iv), and will advise the ECM as to what further reporting it may require with respect to the contract.

the core principles.[47] For each subsequent SPDC, the ECM is given 15 calendar days from the date of the Commission's order to achieve compliance. The grace period is designed to ensure that the ECM has sufficient time to implement its new regulatory requirements and operations, while avoiding the market disruption that might occur by the sudden imposition of position limits and other trading rules. The Commission is aware that position limits that become effective at the end of the applicable grace period may negatively impact traders who in good faith acquired positions that are above that limit. Requiring immediate compliance would force such traders to liquidate positions in order to be at or below the limit. Accordingly, for the purpose of applying limits on speculative positions in newly-determined SPDCs, the Commission proposes to permit a grace period following the ECM's implementation of position limits applicable to SPDCs for traders with cleared positions in such contracts to become compliant with applicable position limit rules. Traders who hold cleared positions on a net basis in the electronic trading facility's SPDC must be at or below the specified position limit no later than 90 calendar days from the date on which the electronic trading facility implements a position limit, unless a hedge exemption is granted by the electronic trading facility. This grace period applies to both initial and subsequent SPDCs on an ECM, and the ECM should promptly notify traders when it has set position limits. This provision is outlined in the proposed Guidance to Core Principle IV.

Rule 36.3(c)(4) requires that the ECM's submission include specific information designed to permit the Commission to evaluate whether the ECM is indeed in compliance with the core principles. Although there are obvious differences between them, this procedure was modeled on the procedure required of applicants to become designated contract markets.[48] As with other aspects of this rulemaking, the Commission is striving to make the procedures and requirements for ECMs with SPDCs as close as possible to those for DCMs, and in this regard will review the adequacy of submitted materials with the same rigor it applies to DCM applications. Submissions that are incomplete or do not adequately demonstrate compliance with each of the core principles may trigger Commission proceedings under section 5c(d) of the Act and may, pursuant to section 5e or 6 of the Act, result in the revocation of the ECM's right to operate in reliance on the exemption set forth in section 2(h)(3) of the Act with respect to a SPDC.

The Commission also proposes to establish a process for vacating a SPDC determination when the contract no longer meets the criteria specified in section 2(h)(7)(B). Under proposed regulation 36.3(c)(6), the Commission may, on its own initiative or at the request of an ECM with a SPDC, determine that a contract no longer performs a significant price discovery function and vacate its previous determination. Any subsequent determination that the contract once again is a SPDC will be subject to the procedures proposed in regulation 36.3(c)(2). Proposed rule 36.3(c)(6) further provides for the automatic vacation of a significant price discovery contract determination when the SPDC has no open interest and no trading on the contract has occurred for a period of 12 complete calendar months. The Commission is proposing this provision in order to reduce the administrative burden on staff and the compliance burden on an ECM where lack of activity eliminates any possibility that a contract performs a significant price discovery function for the underlying cash market.

4. Substantive Compliance With the Core Principles: Guidance and Acceptable Practices

Section 2(h)(7) of the CEA, as amended, requires that an electronic trading facility on which significant price discovery contracts are traded comply with nine core regulatory principles. Consistent with Congress's intent that status as a registered entity attach to an ECM following the Commission's determination that a particular ECM contract serves a significant price discovery function,[49] these core principles have their origins in their DCM counterparts in section 5 of the CEA and have been construed similarly.[50] The Commission proposes to adopt Appendix B to the part 36 rules to provide general guidance and acceptable practices with respect to compliance with the ECM core principles; the acceptable practices for compliance with the ECM core principles will, where appropriate, mirror those for DCMs. The Commission intends in the acceptable practices to provide non-exclusive safe harbors for compliance with the core principles by ECMs with SPDCs. As is the case with the core principles established for other registered entities, the guidance offered for ECMs is neither mandatory nor the only means of compliance with the core principles. Consistent with its practice of evaluating a DCM's compliance with the core principles during rule enforcement reviews, the Commission will conduct regular rule enforcement reviews of ECMs with SPDCs to evaluate compliance with the nine core regulatory principles.

The Guidance to *Core Principle I* of section 2(h)(7)(C) of the Act requires the ECM to certify the terms and conditions of the SPDC within 90 calendar days of an ECM's initial SPDC, or 15 calendar days if the ECM has previously traded a SPDC. The acceptable practice for this core principle provides that Guideline No. 1 in Appendix A to the Commission's part 40 rules may be used as guidance to satisfy this provision. To ensure continued compliance with all elements of the Commission's statutory and regulatory regimes for ECMs with SPDCs, the ECM is expected to monitor the SPDC and its trading activity on a continuous basis.

Core Principle II requires ECMs to monitor trading in SPDCs to prevent market manipulation and participation abuses. Its guidance and acceptable practices were derived from DCM Core Principle 4 (Monitoring of Trading) and DCM Designation Criterion 2 (Prevention of Market Manipulation).[51] The proposed guidance and acceptable practices in Appendix B to part 36 make clear that ECMs with SPDCs must demonstrate the capacity to prevent market manipulation and have rules deterring trading and participation abuses. Under the proposed guidance, ECMs with SPDCs can demonstrate this capacity through either a dedicated regulatory department or by delegation of that function to an appropriate third party.[52] In either case, the regulatory

[47] Conference Committee Report at 986.

[48] DCM applicants make submissions prior to designation as a registered entity and prior to the listing of any contract, whereas the Commission must review the same information for ECMs after they are deemed registered entities and after the subject contract has established trading volume and open interest.

[49] Conference Committee Report at 986.

[50] 7 U.S.C. 7(d); Conference Committee Report at 985.

[51] 17 CFR 38, Appendices A and B to Part 38.

[52] As is the case for DCMs and DTEFs, ECMs with SPDCs may comply with any core principle through delegation of any relevant function to any registered futures association or another registered entity, but the ECM remains responsible for carrying out the function. Section 5c(b) of the CEA, 7 U.S.C. 7a–2(b). A detailed discussion of registered entities' responsibilities and obligations with respect to delegated functions, as well as a discussion of the distinctions between delegation of functions and outsourcing, or contracting out specified core principle duties is found in the Commission's final rulemaking implementing provisions of the CFMA

department or third party should have an acceptable trade monitoring program, the authority to collect information and documents, and the ability to assess participants' market activity and power.

Core Principle III addresses the ability of an ECM with a SPDC to obtain information necessary to perform any of the functions enumerated in section 2(h)(7)(C) of the CEA (the core principles), to provide that information to the Commission, and to have the capacity to carry out any required information sharing agreements. Core Principle III's guidance and acceptable practices have as their source the guidance and acceptable practices of DCM Designation Criterion 8—Ability to Obtain Information.[53] Proposed Appendix B to part 36 makes clear that ECMs with SPDCs must have the authority to collect information and documents on both a routine and non-routine basis; maintain and properly store audit trail data; maintain records in a form and manner acceptable to the Commission; and have the capacity to carry out appropriate information-sharing agreements. In providing guidance on compliance with this requirement, the Commission also proposes to incorporate the guidance and acceptable practices provided for DCM Core Principles 10 (Trade Information) and 17 (Recordkeeping).[54] The Commission believes that the acceptable practices outlined in Core Principle 10 should be made applicable to ECMs with SPDCs because the ability to record full data entry and trade details, as well as the safe storage of audit trail data, is a necessary component in assessing potential manipulation and conducting effective market surveillance. DCM Core Principle 17 requires that DCMs maintain required records in a form and manner acceptable to the Commission and establishes as guidance for acceptable recordkeeping the standards prescribed in Commission regulation 1.31.[55] To ensure that all information required by the Commission is maintained in a uniform manner, the Commission proposes in the acceptable practices for Core Principle III to adopt the acceptable practices for recordkeeping found in DCM Core Principle 17.

Core Principle IV requires electronic trading facilities with significant price discovery contracts to establish position limit or accountability rules for traders in such significant price discovery contracts. Speculative position limits are necessary to reduce the potential for market manipulation. The acceptable practices for Core Principle IV were derived largely from Core Principle 5 for designated contract markets.[56]

DCMs can list for trading futures contracts on a wide range of commodities, including enumerated agricultural products, excluded commodities (e.g., financial products such as currencies), and exempt commodities (e.g., metals, crude oil, natural gas and electricity). Some of these commodities have limited deliverable supplies while others have deep and liquid cash markets. Depending on the variety of possible contracts listed for trading, a DCM may have a mix of position limit and accountability rules. Specifically, futures contracts based on commodities with limited deliverable supplies should have spot-month speculative position limits. In contrast, financial products having deep and liquid cash markets may be eligible for position accountability levels in lieu of position limits since the potential for market manipulation is minimal.

Unlike DCMs, ECMs relying on the exemption in section 2(h)(3) of the CEA are permitted to offer for trading only contracts on exempt commodities. Because the deliverable supplies of exempt commodities typically are limited, the Commission believes that it will be necessary for SPDCs to have spot-month position limits.

The acceptable practices for Core Principle IV make recommendations with respect to how ECMs should establish spot-month speculative position limits. For a unique SPDC,[57] the spot-month speculative position limit should be set in the same manner outlined for contracts listed for trading on DCMs. In this regard, for a physically-delivered SPDC, the level of the spot-month limit should be based upon an analysis of the deliverable supply and the history of spot-month liquidations. The spot-month limit for a physical-delivery market is appropriately set at no more than 25 percent of the estimated deliverable supply.[58] Where a SPDC has a cash settlement provision, the spot-month speculative position limit should be set at a level that minimizes the potential for price manipulation or distortion in the SPDC itself; in related futures and option contracts traded on a DCM or DTEF; in other SPDCs; in other fungible agreements, contracts and transactions; and in the underlying commodity.

The Commission notes that some SPDCs may not be unique. In other words, a SPDC may be economically equivalent to another SPDC or to a contract traded on a DCM or DTEF. Economic equivalence can arise due to substantial similarity among contracts' terms and conditions (*e.g.*, two physically-delivered contracts or two cash-settled contracts having the same specifications). A SPDC also can be economically equivalent to another SPDC or to a contract listed for trading on a DCM or DTEF if it is cash settled based on a daily settlement price or the final settlement price of the referenced contract. For economically-equivalent SPDCs, the electronic trading facility should establish the same spot-month speculative position limits as specified for the equivalent contract.[59]

ECMs should establish non-spot individual month position accountability levels and all-months-combined position accountability levels for its SPDCs. Once a trader exceeds an established position accountability level, the ECM should initiate an investigation to determine whether the individual's trading activity is justified and is not intended to manipulate the market. As part of its investigation, the ECM should inquire about the trader's rationale for holding a net position in excess of the accountability levels. The ECM also can request that the trader not further increase contract positions. If a trader fails to comply with a request for information, provides information that does not sufficiently justify the position, or continues to increase contract positions after a request not to do so is issued by the ECM, then the accountability provisions should enable the ECM to order the trader to reduce the positions.

If a SPDC is economically equivalent to another SPDC or to a contract traded

relating to trading facilities (''A New Regulatory Framework''), 66 FR 42256, 42266 (August 10, 2001).

[53] 17 CFR 38, Appendix B to Part 38.

[54] 17 CFR 38, Appendix B to Part 38.

[55] 17 CFR 1.31.

[56] 17 CFR 38, Appendix B to Part 38.

[57] A unique SPDC is one that is not economically equivalent to another SPDC or to a contract traded on a DCM or DTEF.

[58] The Commission notes that deliverable supply typically is less than total supply. In this regard, it is common for some portion of the supply to be unavailable for delivery for a variety of reasons. Deliverable supply is the amount of the underlying commodity that reasonably can be expected to be available to short traders and salable by long traders at its market value in normal cash market channels.

[59] Many DCMs have non-spot individual month and all-months-combined position accountability rules for their futures contracts. Moreover, some DCMs establish non-spot individual month and all-months-combined position limits in lieu of the position accountability levels. The Commission believes that the implementation of such accountability provisions or position limits is a good practice. Accordingly, the Commission proposes to adopt it as an acceptable practice for ECMs.

on a DCM or DTEF, then the ECM should set the non-spot individual month position accountability level and all-months-combined position accountability level at the same level as those specified for the economically-equivalent contract. For a unique SPDC, the ECM should adopt non-spot individual month and all-months-combined position accountability levels that are no greater than 10 percent of the average combined futures and delta-adjusted option month-end open interest for the most recent calendar year.

Position accountability levels are not necessary for SPDCs that specify non-spot individual month position limits and all-months-combined position limits. If a SPDC is economically equivalent to another contract, then the non-spot individual month position limit and all-months-combined position limit should be set at the same levels specified for the equivalent or referenced contract. For unique SPDCs, the non-spot individual month and all-months-combined position limits should be set in the same manner as for position accountability levels, *i.e.*, levels that capture a material amount of large positions that could threaten the market.

An ECM with a SPDC may require that all transactions in that contract be cleared only through a DCO. Alternatively, an ECM's SPDC may not be subject to any clearing requirement, in which case the contract would trade on an uncleared basis. Lastly, an ECM may permit a given SPDC to trade on either a cleared or uncleared basis depending on the status of the counterparties involved. The amendments to the CEA give electronic trading facilities reasonable discretion to take into account the differences between cleared and uncleared transactions when complying with Core Principle IV.[60] For the purpose of applying speculative limits to positions in SPDCs, the ECM should apply speculative position limits to cleared positions only.

Uncleared transactions in SPDCs potentially play an important role in risk management strategies and price formation. As a result, the Commission believes that an ECM should monitor not only trading in cleared transactions but also trading with respect to uncleared transactions. However, the Commission is cognizant of the fact that uncleared trades conducted on the ECM may be offset by trades done off the facility. Such offsetting transactions consummated outside of an ECM typically are not reported to the facility. Thus, the ECM likely would find it difficult to net uncleared transactions and maintain records of traders' uncleared positions in a given SPDC. In order to account for this situation, the Commission proposes for ECMs with SPDCs a new measure of trading activity called the volume accountability level. For this measure, the ECM should keep track of each trader's uncleared transactions in a SPDC on a net basis that are conducted on the facility. (For the purpose of netting uncleared transactions, long and short uncleared transactions are only offset if they are conducted with the same counterparty.) A volume accountability level is similar to a position accountability level in that a trader may exceed the volume accountability level. However, if a trader's net volume of uncleared trades exceeds the volume accountability level, the ECM should initiate an investigation to determine whether the trading activity is justified and is not intended to manipulate the market. As part of its investigation, the ECM should inquire about the trader's rationale for holding a net volume of uncleared trades in excess of the volume accountability level. The ECM also can request that the trader not further increase the volume of uncleared trades. If a trader fails to comply with a request for information about the portfolio of uncleared trades, provides information that does not sufficiently justify the uncleared transactions conducted, or continues to increase the volume of uncleared trades after a request not to do so is issued by the ECM, then the volume accountability provisions should enable the ECM to require the trader to reduce the volume of uncleared trades.

Consistent with the specific directive of Core Principle IV, the Commission expects ECMs to impose position limit and position accountability requirements on SPDCs as well as positions in agreements, contracts and transactions that are fungible and cleared together with any SPDC. This circumstance typically occurs where an ECM lists a particular contract on its multilateral trading platform and the resultant positions are cleared by a DCO. Separately, the ECM also provides a non-multilateral trading platform capability for the trading of the same contract and the resultant positions are cleared at the same clearing organization together with positions established on the multilateral platform. Given the fact that such arrangements allow market participants to put on positions on the multilateral platform and take them off away from the platform—as well as vice versa—the Commission believes that it is appropriate for position limit requirements to be applied to overall positions regardless of where they originated.

With regard to compliance with a particular position limit or position accountability rule, ECMs should aggregate on a net basis cleared transactions, including those that are treated by a DCO (registered or unregistered) as fungible with the SPDC. Aggregate positions then will be compared with the applicable position limit and position accountability rules to determine compliance. Uncleared transactions also should be aggregated by trader on a net basis in order to determine whether such trader's volume of uncleared trades exceeds the spot-month volume accountability level.

An ECM with SPDCs should use an automated means of detecting traders' violations of speculative limit rules and exemptions. An automated system also should be used to determine whether a trader has exceeded applicable non-spot individual month accountability levels, all-months-combined accountability levels, and spot-month volume accountability levels. An electronic trading facility should establish a program for effective enforcement of position limits for SPDCs. Lastly, ECMs should use a large trader reporting system to monitor and enforce daily compliance with position limit rules.

The Commission recognizes that some traders with relatively large positions may be adversely affected by newly imposed position limits when a SPDC initially comes into compliance with the core principles. To address this issue, the Commission proposes, for the purpose of applying limits on speculative positions in newly-determined SPDCs, to permit a grace period following issuance of its order for traders with cleared positions in such contracts to become compliant with applicable position limit rules. Traders who hold cleared positions on a net basis in the ECMs SPDC must be at or below the specified position limit level no later than 90 calendar days from the date of the ECM's implementation of position limit rules, unless a hedge exemption is granted by the ECM.

Core Principle V requires the ECM to adopt rules to provide for the exercise of emergency authority. The proposed guidance contained in Appendix B to part 36 is substantially similar to the guidance for DCM Core Principle 6.[61] However, the Commission added a

[60] Public Law 110–246 at sec. 13201.

[61] 17 CFR 38, Appendix B to Part 38.

reference in the proposed guidance for Core Principle V to acknowledge that calls for additional margin apply only to contracts that are cleared through a clearinghouse, since not all contracts traded on electronic trading facilities are cleared.

Core Principle VI requires that an ECM with a SPDC make public daily information on price, trading volume, and other trading data. The Commission believes this information should include settlement prices, price range, volume, open interest, and other related market information, and has proposed in the acceptable practices that compliance with Commission regulation 16.01,[62] which the Commission proposes to make mandatory for ECMs with SPDCs, would constitute an acceptable practice under Core Principle VI.

Core Principle VII requires the ECM to monitor and enforce compliance with the rules of its market. The proposed guidance and acceptable practices provided in Appendix B to part 36 are roughly parallel to the guidance and acceptable practices prescribed for DCM Core Principle 2.[63] The Commission notes that ECMs on which SPDCs are traded are non-intermediated markets, and for this reason guidance relating to a DCM's authority to examine the books and records of intermediaries has not been included in the proposed guidance for Core Principle VII.

Core Principle VIII requires the electronic trading facility to establish and enforce rules to minimize conflicts of interest in its decision-making processes. The Commission notes that an ECM may face conflicts between its self-regulatory responsibilities and its commercial interests similar to those encountered by a DCM. For this reason the Commission proposes to insert certain general elements of the acceptable practices for DCM Core Principle 15 [64]—specifically, those descriptive elements that provide greater clarity and context to particular conflicts—into paragraph (a)(2) of the guidance section for ECM Core Principle VIII.

The acceptable practices for DCM Core Principle 15 include four specific provisions that must be met to receive the benefit of the safe harbor. These provisions address: (1) Board Composition; (2) Definition of Public Director; (3) Regulatory Oversight Committee; and (4) Disciplinary Panels. Although the Commission did not propose any acceptable practices for Core Principle VIII, the Commission emphasizes that the four provisions in the acceptable practices for DCM Core Principle 15 are a clear articulation of acceptable methods for managing conflicts of interest in decision-making. Accordingly, the Commission encourages ECMs with SPDCs to consult the DCM Core Principle 15 acceptable practices for additional guidance as to the spirit of Core Principle VIII.

The Commission recognizes that an electronic trading facility may become subject to compliance with Core Principle VIII by virtue of a single contract representing a small portion of the facility's operations. Thus, the ECM's conflicts may be contract-specific and not require the all-encompassing safe harbor offered for the benefit of DCMs in Core Principle 15.[65] The Commission also recognizes that it may not be practicable for an ECM to implement the full panoply of the Core Principle 15 acceptable practices. The ECM must nonetheless ensure that appropriate measures are in place to guard against conflicts of interest in decision-making. An electronic trading facility should carefully consider its method of compliance, including whether additional measures may be required as the number or importance of its SPDCs increases. The Commission reserves the right to issue additional guidance or specific acceptable practices for Core Principle VIII as circumstances warrant.

Core Principle IX requires ECMs with SPDCs to avoid adopting rules or taking actions that result in unreasonable restraints of trade or impose a material anticompetitive burden on trading. The Commission is required by section 15(b) of its statute to take into consideration the public interest to be protected by the antitrust laws and to take the least anticompetitive means of achieving the objectives, policies and purposes of the CEA.[66] Consistent with the Commission's approach to antitrust considerations with respect to DCMs,[67] it is the Commission's intent to be guided by section 15(b) of the Act in its consideration of any issues arising under this core principle.

5. Annual Commission Review

In accordance with section 2(h)(7) of the CEA, proposed regulation 36.3(d) provides that the Commission will review at least annually agreements, contracts and transactions traded on ECMs to determine whether they serve a significant price discovery function. The Commission proposes to limit these annual reviews to those contracts that have an average daily volume of five or more trades or that have been brought to the attention of the Commission, through the notification procedures of proposed regulation 36.3(c)(2) or otherwise, as possible SPDCs. The Commission believes this approach is consistent with Congress' intent as reflected in the Conference Committee Report:

> The Managers do not intend that the Commission conduct an exhaustive annual examination of every contract traded on an electronic trading facility pursuant to the section 2(h)(3) exemption, but instead to concentrate on those contracts that are most likely to meet the criteria for performing a significant price discovery function.[68]

B. Market, Transaction and Large Trader Reporting Rules

The Commission's market and large trader reporting rules (''reporting rules'') are contained in parts 15 through 21 of the Commission's regulations.[69] Collectively, the reporting rules effectuate the Commission's market and financial surveillance programs.[70] The market surveillance programs analyze market data to detect and prevent market manipulation and disruptions and to enforce speculative position limits. The financial surveillance programs use market data to measure the financial risks that large contract positions may pose to Commission registrants and clearing organizations.

The Commission's reporting rules can be applied to SPDCs traded on ECMs pursuant to the authority of sections 4a, 4c(b), 4g and 4i of the CEA.[71] The amendments introduced to the CEA by the Reauthorization Act, both by defining ECMs with SPDCs as registered entities with respect to those contracts and by making certain provisions of the

[62] 17 CFR 16.01.

[63] 17 CFR 38, Appendix B to part 38.

[64] *Id.*

[65] The Commission recognizes that, pursuant to the Reauthorization Act, compliance with the core regulatory principles is limited to ECMs with SPDCs. However, the Commission also recognizes that all ECMs, not just ECMs with SPDCs, may face potential conflicts of interest in their decision-making processes. Therefore, all ECMs may want to consider implementing appropriate measures to minimize conflicts of interests.

[66] 7 U.S.C. 19.

[67] 17 CFR 38, Appendix B to part 38, Guidance for Core Principle 18.

[68] Conference Committee Report at 985.

[69] 17 CFR parts 15 to 21.

[70] *See* 69 FR 76392 (Dec. 21, 2004).

[71] The Reauthorization Act amended section 2(h)(4)(B) of the Act to subject SPDCs requiring large trader reporting to the provisions of section 4c(b) of the Act. In addition, section 2(h)(4)(D) of the Act provides that transactions executed on ECMs shall be subject to ''such rules, regulations, and orders as the Commission may issue to ensure timely compliance with any of the provisions of this Act applicable to a significant price discovery contract traded on or executed on any electronic trading facility * * *.'' 7 U.S.C. 2(h)(4)(D).

Act directly applicable to SPDCs, give the Commission the authority to establish a comprehensive transaction and position reporting system for SPDCs. Specifically, section 4a of the CEA permits the Commission to set, approve exchange-set, and enforce speculative position limits.[72] Section 4c(b) of the Act,[73] which gives the Commission plenary authority to establish the rules pursuant to which the terms and conditions on which commodity options transactions may be conducted, provides the basis for the Commission's authority to establish a large trader reporting system for transactions on ECMs that involve commodity options. Section 4g of the Act, as amended, imposes reporting and recordkeeping obligations on registered persons and requires them to file such reports as the Commission may require on proprietary and customer positions executed on any board of trade and in any SPDC traded or executed on an electronic trading facility.[74] Finally, section 4i of the Act requires the filing of such reports as the Commission may require when positions made or obtained on DCMs, DTEFs or ECMs with respect to SPDCs equal or exceed Commission-set levels.[75]

In addition to proposing technical and conforming amendments to parts 15 through 21 of its regulations, the Commission seeks, through the proposed regulations, to extend to SPDCs the reporting rules that currently apply to DCMs and DTEFs by defining clearing member and clearing organization and amending the definition of reporting market in Commission regulation 15.00 to apply to positions in, and the trading and clearing of, SPDCs executed on ECMs. Under the proposed rules, ECMs would provide clearing member reports for SPDCs to the Commission pursuant to Commission regulation 16.00. As with DCMs, proposed rule 16.01 would require ECMs to submit to the Commission and publicly disseminate option deltas and aggregated trading data on a daily basis.[76] ECM clearing members that clear SPDCs, regardless of their registration status with the Commission or their status as domestic or foreign persons, would be required to file position reports with the Commission for large SPDC positions held in accounts carried by such brokers when customer positions exceed the contract reporting levels of Commission regulation 15.03(b). In addition, the proposed regulations would require clearing members to identify the owners of reportable SPDC positions on Form 102 (Identification of Special Accounts).[77]

Under the proposed regulations, SPDC traders likewise would be subject to the special call provisions of part 18 of the Commission's regulations for reportable positions. Moreover, clearing members for SPDCs, SPDC traders, and ECMs listing SPDCs each would be subject to the special call provisions of part 21 of the Commission's regulations, which establish the Commission's ability to request information on persons that exercise trading control over commodity futures and options accounts along with additional account-related information for positions that may or may not be reportable under Commission regulation 15.03(b).[78]

In order to effectively communicate with foreign clearing members and foreign traders and to properly administer the proposed special call provisions of parts 17, 18 and 21 of the Commission's regulations, the Commission is also proposing to amend the designation of agent provisions of Commission regulation 15.05. This rule relates to the appointment of an agent for service of process for foreign persons; it is self-effectuating and is designed to permit the Commission to communicate expeditiously with foreign individuals and entities that trade on domestic commodity exchanges.[79] Similar to requirements that currently apply to DCMs and DTEFs, the proposed amendments to regulation 15.05 would require ECMs that list SPDCs to act as the agent of foreign clearing members and foreign traders for the purpose of accepting service or delivery of any communication, including special calls, issued by the Commission to a foreign clearing member or foreign trader.[80]

The Commission is also proposing new regulation 16.02 to require all reporting markets—a definition that currently includes DCMs and DTEFs (unless the Commission determines otherwise) and, as proposed, will include ECMs listing SPDCs with respect to such contracts—to report on a daily basis trade data and related order information for each transaction that is executed on the market. Such reports would include time and sales data, reference files and such other information as the Commission or its designee may require and, upon request, would be accompanied by data that identifies or facilitates the identification of each trader for each transaction or order included in a submitted report. For some time, DCMs have consistently provided transaction level data to the Commission pursuant to rule 38.5(a), under which they must file trade data upon request by the Commission.[81] Recent acquisitions of technology have enabled the Commission more effectively to integrate trade data and related order information into its trade practice, market and financial surveillance programs. Accordingly, the Commission proposes in new regulation 16.02 to make the submission of trade data and related order information mandatory.

In this regard, and specifically with respect to SPDCs, the Commission notes that the proposed amendments to part 17 of the Commission's regulations do not apply to SPDC transactions that are not cleared for the simple reason that no clearing members are involved in clearing such transactions. For purposes of enforcing SPDC position limits and monitoring large SPDC positions, the Commission would use proposed regulation 16.02 to access transaction information and trader identifications to enforce position limits and monitor large positions for market and financial surveillance purposes.

---

[72] 7 U.S.C. 6a.

[73] 7 U.S.C. 6c(b).

[74] 7 U.S.C. 6g.

[75] 7 U.S.C. 6i.

[76] Currently, the public dissemination requirement of Commission regulation 16.01(e) applies only to DCMs. The proposed rules would uniformly apply the public dissemination requirement of Commission regulation 16.01(e) to actively traded DCM contracts and SPDCs executed on DTEFs and ECMs. 17 CFR 16.01(e).

[77] The Commission's Division of Market Oversight increasingly has been charged with administering the procedural requirements of the reporting rules. Accordingly, the Commission is proposing to shift any delegation of the Commission's authority to determine the format of reports and the manner of reporting under parts 15 through 21 of the Commission's regulations from the Executive Director to the Director of the Division of Market Oversight.

[78] 17 CFR 15.03(b). The proposed rules also seek to amend paragraphs (i)(1) and (i)(2) of Commission regulation 21.01 to ensure that any special call to an intermediary for information that classifies a trader as a commercial or noncommercial trader, and the positions of the trader as speculative, spread positions, or positions held to hedge commercial risks, can be made with respect to both commodity futures and commodity options contracts. 17 CFR 21.02(i).

[79] For background on the adoption of the rule, *see* 45 FR 30426 (May 8, 1980).

[80] In order to ensure that the Commission can expeditiously communicate with all foreign individuals and entities that may effect transactions in ECM SPDCs, the Commission is proposing to define the term foreign clearing member in proposed regulation 15.00(g), and to use that term along with the term foreign trader as defined in regulation 15.00(h), in proposed regulation 15.05(i).

[81] 17 CFR 38.5(a).

C. Other Regulatory Provisions

1. Part 40—Provisions Common to Registered Entities

ECMs with SPDCs are integrated into the definition of ''registered entity'' in section 1a(29) of the CEA, as amended. Part 40 of the Commission's regulations applies to registered entities, and therefore, ECMs with SPDCs. Proposed part 40 is being amended to specify which provisions would be, or would not be, applicable to all registered entities. In particular, rules 40.1, 40.2 and 40.5–40.8 and Appendix D apply to ECMs with SPDCs. Although not all provisions of part 40 will be applicable to ECMs with SPDCs,[82] interested parties are strongly encouraged to review all of part 40 because even those sections that are not being amended in this rulemaking may be *de facto* amended by virtue of the fact that the term ''registered entity'' now includes ECMs with SPDCs.

III. Related Matters

A. Cost Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its actions before issuing new regulations under the Act. Section 15(a) does not require the Commission to quantify the costs and benefits of new regulations or to determine whether the benefits of adopted regulations outweigh their costs. Rather, section 15(a) requires the Commission to consider the cost and benefits of the subject regulations. Section 15(a) further specifies that the costs and benefits of the regulations 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 the market for listed derivatives; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may, in its discretion, determine that, notwithstanding its costs, a particular regulation is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The proposed regulations implement the Reauthorization Act by establishing an enhanced level of oversight of ECMs—including ECMs with SPDCs and ECM market participants—as mandated by Reauthorization Act. As a result, in certain cases, it may be more appropriate to attribute the compliance costs imposed by the proposed regulations to requirements that directly arise from the provisions of the Reauthorization Act.

Under the proposed rules, all DCMs, DTEFs (unless the Commission determines otherwise) and ECMs with SPDCs would be required to provide daily transaction and related data reports to the Commission under proposed rule 16.02. The costs associated with the daily transaction and related data reporting requirements of proposed regulation 16.02, however, may be ameliorated by the fact that DCMs have been voluntarily providing transactional data to the Commission on a daily basis since the mid-1980s. The Commission estimates that DCMs would account for the substantial majority of the markets that would likely be required to file such reports pursuant to proposed rule 16.02.

The proposed regulations would extend the market and position reporting requirements of parts 15 to 21 of the Commission's regulations to ECMs with SPDCs with respect to such contracts. The requirements of the proposed regulations are substantial, would involve the submission of daily reports, and would impose burdens on market participants that clear and trade SPDCs. More specifically, the proposed rules would require ECMs with SPDCs with respect to such contracts to provide clearing member reports for SPDCs to the Commission pursuant to Commission regulation 16.00. Proposed rule 16.01 would require ECMs to submit to the Commission and publicly disseminate option deltas and aggregated trading data on a daily basis. Pursuant to proposed rule 17.00 ECM clearing members that clear SPDCs would be required to file position reports with the Commission for large SPDC positions held in accounts carried by such brokers when customer positions exceed contract reporting levels and would be required to identify the owners of reportable SPDC positions on Form 102 under proposed rule 17.01. SPDC traders likewise would be subject to the special call provisions of part 18 of the Commission's regulations for reportable positions, and clearing members for SPDCs, SPDC traders, and ECMs listing SPDCs each would be subject to the special call provisions of part 21 of the Commission's regulations.

The costs associated with the requirements of the market and position reporting rules, should, however, be reduced in part by the substantial overlap between the persons that are currently subject to the reporting rules, and the persons that would be subject to the reporting rules pursuant to the Commission's proposed regulations. For example, there is substantial overlap between traders of the natural gas contract on ICE OTC and traders of the same contract on NYMEX. With respect to clearing members of ICE OTC, for example, such persons are often clearing members or affiliates of clearing members of NYMEX.

The benefits of extending the market and reporting rules to SPDCs are substantial. As an initial matter, it is important to note that a significant focus of the Reauthorization Act concerned amending the CEA with the specific intent of giving the Commission the authority to extend the market and position reporting rules to SPDC markets and market participants. To the extent that contracts listed on ECMs serve a significant price discovery function, the regulatory value of enhanced oversight, through the application of the market and position reporting rules to such contracts, is elevated. The Commission analyzes the information funneled to it by the requirements of the market and position reporting rules to conduct market and financial surveillance. Without such information, the ability of the Commission to discharge its regulatory responsibilities, including the responsibilities of preventing market manipulations and contract price distortions and ensuring the financial integrity of the listed derivatives marketplace, would be compromised.

The bulk of the costs that would be imposed by the requirements of proposed regulation 36.3 relate to significant and increased submission of information requirements. For example, under proposed regulation 36.3(b)(1), all ECMs would be required to file certain basic information including contract terms and conditions with, and make certain demonstrations related to compliance with the terms of the section 2(h)(3) exemption to, the Commission. Proposed regulation 36.3(b)(2) would require ECMs to submit transactional information on a weekly basis to the Commission for certain traded contracts that are not SPDCs and would not be subject to the terms of proposed rule 16.02. Proposed regulation 36.3(c)(4) would impose a substantial cost on ECMs with SPDCs in terms of providing information to the Commission.

In enacting the Reauthorization Act, Congress directed the Commission to take an active role in determining

[82] Regulation 40.3 will not apply to ECMs with SPDCs because it addresses Commission approval of products. Regulation 40.4 applies solely to agricultural products, which cannot be traded on ECMs.

whether contracts listed by ECMs could qualify as SPDCs. Accordingly, the enhanced informational requirements that would be imposed on ECMs with respect to contracts that have not been identified as SPDCs have been proposed by the Commission in order to acquire the information that it requires to discharge this newly mandated responsibility. In addition, the substantial information submission and demonstration requirements that would be imposed on ECMs with SPDCs have been proposed because ECMs with SPDCs, by statute, acquire certain of the self-regulatory responsibilities of DCMs. The submission requirements associated with proposed regulation 36.3(c)(4) are tailored to enable the Commission to ensure that ECMs with SPDCs, as entities with the elevated status of a registered entity under the Act, are in compliance with the statutory terms of the core principles of section 2(h)(7)(C) of the Act. As with the market and position reporting rules, the primary benefit to the public of proposed regulation 36.3 is that its requirements give the Commission the ability to discharge its statutorily mandated responsibility for monitoring for the presence of SPDCs and extending its oversight to the trading of SPDCs.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires that agencies consider the impact of their regulations on small businesses. The requirements related to the proposed amendments fall mainly on registered entities, exchanges, futures commission merchants, clearing members, foreign brokers, and large traders. The Commission has previously determined that exchanges, futures commission merchants and large traders are not ''small entities'' for the purposes of the RFA.[83] Similarly, clearing members, foreign brokers and traders would be subject to the proposed regulations only if carrying or holding large positions. Accordingly, the Acting Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the actions proposed to be taken herein will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

Certain provisions of proposed Commission regulation 36.3 would result in new collection of information requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[84] The Commission therefore is submitting this proposal to the Office of Management and Budget (OMB) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection of information is ''Regulation 36.3—Exempt Commercial Market Submission Requirements'' (OMB control number 3038–NEW). If adopted, responses to this collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, ''Commission Records and Information.'' In addition, section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' [85]

The requirements of Commission regulation 36.3 are currently covered by OMB control number 3038–0054 which applies to both EBOTs and ECMs. As a result of the Reauthorization Act, EBOTs and ECMs have to comply with additional divergent regulatory requirements. Accordingly, the Commission is seeking a new and separate control number for ECMs operating in compliance with the requirements of regulation 36.3. Upon OMB's approval and assignment of a separate control number specifically for the collection of information requirements of proposed regulation 36.3, the Commission intends to submit the necessary documentation to OMB to enable it to apply OMB control number 3038–0054 exclusively to EBOTs.

In addition, the Commission is proposing amendments to parts 15 to 21 of the Commission's regulations, which amend two existing collections of information titled ''Large Trader Reports'' (OMB control number 3038–0009) and ''Futures Volume, Open Interest, Price, Deliveries, and Exchanges of Futures'' (OMB control number 3038–0012). Responses to this collections of information would be mandatory. Where appropriate, the Commission will protect proprietary information pursuant to the Freedom of Information Act [86] and 17 CFR part 145, ''Commission Records and Information.'' In addition, section 8(a)(1) of the Act prohibits the Commission, unless specifically authorized by the Act, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' [87]

Finally, proposed regulation 16.02 would result in a new collection of information requirement within the meaning of the PRA. The Commission is therefore submitting the proposal for regulation 16.02 to OMB for review. The title for the collection of information requirement is ''Regulation 16.02—Daily Trade and Supporting Data Reports'' (OMB control number 3038–NEW). If adopted, this collection would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, ''Commission Records and Information.'' In addition, section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' [88]

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 control number. OMB has not yet assigned control numbers to the new collections for proposed regulations 36.3 and 16.02. The approved collection of information requirements associated with parts 15 to 21, which would be revised by the proposed rules and rule amendments, display control numbers 3038–0009 and 3038–0012.

1. Proposed Regulation 36.3

A. Regulation 36.3(a)

Regulation 36.3(a) requires that ECMs notify the Commission of the intent to operate as an ECM in reliance of section 2(h)(3) of the Act and further provide the information and certifications required by section 2(h)(5)(A) of the Act. Section 2(h)(5)(A) of the Act requires an ECM to provide the name and address of the person who is authorized on behalf of the ECM to receive communications from the Commission, the commodity categories that the ECM intends to offer, and certifications that certain owners and principals of the ECM are not bad actors, that the facility will comply with the requirements of the ECM exemption, and that the facility will update its filings under section 2(h)(5)(A) to account for material changes in the information submitted to the Commission.

[83] 47 FR 18618 (April 30, 1982).

[84] 44 U.S.C. 3501–3520.

[85] 7 U.S.C. 12(a)(1).

[86] 5 U.S.C. 552 *et seq.*

[87] *Id.*

[88] *Id.*

The substantive requirements of regulation 36.3(a) repeat the requirements that are imposed by the Act as a condition of operating pursuant to the ECM exemption. The reporting or recordkeeping burden associated with Commission regulation 36.3(a) involves the compilation and submission of the required information to the Commission. Commission staff estimates that each ECM would expend approximately 4 hours of professional time annually to maintain, verify, and update the notification and required certifications. Commission staff estimates that 20 ECMs will be subject to the requirement resulting in an aggregate burden of 80 hours annually.

B. Regulation 36.3(b)(1)

Under proposed regulation 36.3(b)(1), each ECM would be required to provide contract descriptions and terms and conditions, the market's trading conventions, and the market's trading protocols to the Commission. Each ECM would be required to describe how it meets the statutory definition of a trading facility and demonstrate that it requires each participant to comply with all applicable laws; complies with the initial statutory requirements for the ECM exemption under section 2(h)(3) of the Act; and directs a program to monitor market participants for compliance with the transactional requirements of the ECM exemption. Proposed regulation 36.3(b)(1) would further require that each ECM provide, upon the Commission's request, information that the Commission would deem helpful to its determination as to whether a particular contract is a SPDC. Lastly, each ECM would be required to annually indicate on Form 205 whether it continues to operate under the ECM exemption and certify the accuracy of the information contained in its Notification of Operation submitted pursuant to section 2(h)(5)(A) of the Act and regulation 36.3(a).

Based on the number of contract submissions made by DCMs, the Commission estimates that ECMs collectively would list for trading 250 commodity futures and options contracts annually. Commission staff estimates that compliance with the above requirements and the transmission of descriptions and terms and conditions for such products would take approximately 2 hours of professional time to prepare per contract resulting in a collective burden of 500 hours annually for all ECMs.

C. Regulation 36.3(b)(2)

Proposed regulation 36.3(b)(2) would require that ECMs, with respect to contracts that are not SPDCs, identify contracts which average 5 or more trades per day over a calendar quarter, and for such contracts, compile daily transaction-based reports that include the date of execution, the time of execution, the price of execution, the quantity executed, the total daily trading volume, the total open interest, option type, option strike prices for each qualifying contract, and such other information as may be requested by the Commission. Proposed regulation 36.3(b)(2) would require the submission of the reports on a weekly basis. Such data is generated by ECMs in the normal course of operation. The Commission staff estimates that ECMs would submit weekly reports for a total of 40 contracts annually (2,080 reports). Commission staff estimates that ECMs would expend approximately 20 minutes of professional time to compile and transmit each weekly report to the Commission resulting in an annual burden of approximately 693 hours.

Proposed regulation 36.3(b)(2) would give an ECM the flexibility to choose to submit weekly transaction-based reports or, in the alternative, give the Commission electronic access to its trading facility to enable the Commission to create the weekly reports. Should an ECM select this option, Commission staff believes that such access would not result in any estimable burden on an ECM.

Proposed regulation 36.3(b)(2) also would require that ECMs, with respect to contracts that are not SPDCs, to identify contracts which average 1 or more trades per day over a calendar quarter, and for such contracts, to provide to the Commission on a quarterly basis, the terms and conditions of such contracts, the average daily trading volume, and the most recent level of open interest. As with weekly reports, such data is generated by ECMs in the normal course of operation. The Commission staff estimates that ECMs would submit quarterly reports for a total of 90 contracts annually (360 total reports). Commission staff estimates that ECMs would expend approximately 20 minutes of professional time to compile and transmit each quarterly report resulting in an annual burden of 120 hours.

Furthermore, proposed regulation 36.3(b)(2) would require ECMs to maintain an inventory of all fraud or manipulation based complaints and submit a copy of such complaints to the Commission within 3 or 30 days, depending on the specific facts of the complaints. ECMs should record and retain an inventory of complaints in the normal course of operation. Commission staff is unable to estimate the hourly burden associated with the routine transmittal of such reports to the Commission. However, Commission staff would presume that such transmittal requirements should not result in any materially measurable burden on ECMs.

Lastly, proposed regulation 36.3(b)(2) addresses the Commission's authority to require the submission of data upon special call under section 2(h)(5)(B)(iii) of the Act. Pursuant to that section of the Act, the Commission has the authority to issue special calls in order to enforce certain provisions of the Act including the anti-fraud and anti-manipulation provisions. In addition, the Commission is authorized to issue special calls to ECMs to facilitate its determination as to whether certain contracts are SPDCs, to evaluate a systemic market event, or to obtain information requested by another Federal financial regulator. Commission staff estimates that a total of 15 special calls would be issued to ECMs annually under section 2(h)(5)(B)(iii) of the Act. Each ECM that has been issued a special call would expend approximately 5 hours of professional time to respond to the call resulting in a burden of 75 hours annually.

D. Proposed Regulation 36.3(c)(2)

Proposed regulation 36.3(c)(2) establishes for ECMs certain requirements for notifying the Commission of possible SPDCs that may be listed by the ECM. Specifically, an ECM's obligation to notify the Commission would apply to contracts that average 5 trades or more per day over the most recent calendar quarter, and may be triggered by either the ECM's sale of contract price data or by a contract's daily settlement price being within 2.5 percent of the contemporaneously determined closing, settlement or daily price of another contract 95 percent or more of the days in the most recent quarter. Such notifications would be accompanied by supporting details. Commission staff estimates that cost of monitoring for the triggering conditions is nominal. Commission staff estimates that collectively 10 contracts would be the subject of the notification requirement annually. Each ECM with a qualifying contract would expend approximately 1 hour of professional time to compile and transmit such data to the Commission at an aggregate annual burden of 10 hours.

E. Proposed Regulation 36.6(c)(4)

An ECM with a SPDC, with respect to such a contract, has substantial regulatory responsibilities including the obligation to comply with the core principles of section 2(h)(7)(C) of the Act and to certify the compliance of SPDC contract terms and conditions and exchange rules with the core principles, other applicable provisions of the Act, and Commission regulations thereunder. To enable the Commission to evaluate an ECM's compliance with the statutory and regulatory provisions applicable to SPDCs and ECMs listing SPDCs, Commission regulation 36.3(c)(4) would require ECMs with SPDCs to submit a substantial amount of information and documentation to the Commission including the market's rules, a description of financial standards for members or participants, a description of the market's trading algorithm, legal status documents, and a description of the governance structure of the market. As proposed, such information collectively would be filed only once upon the market's listing of a SPDC. However, subsequent exchange rule changes, as with initial SPDC contract terms and conditions and amendments thereto, would be required to be certified on an ongoing basis.

Commission staff estimates that up to three new ECMs could list at least one SPDC during the next five years. Commission staff estimates that each new ECM listing its initial SPDC would expend approximately 200 hours of professional time providing the information and documentation required under regulation 36.3(c)(4) for an aggregate burden of 600 hours. Assuming that such trading facilities will operate for ten years, the aggregated annualized cost, in terms of burden hours, would be 60 hours. Additionally, Commission staff estimates that the Commission would receive approximately 50 certified filings per SPDC. For each SPDC related certified filing, an ECM would expend, in accordance with the procedural and submission requirements of Commission regulation 40.6, approximately 30 minutes resulting in an aggregate annual burden of 75 hours.

F. Proposed Regulation 36.3(c)(6)

Proposed regulation 36.3(c)(6) requires an ECM listing a SPDC, upon the Commission's request, to file a written demonstration that the ECM is in compliance with the core principles of section 2(h)(7)(C) of the Act. Commission staff estimates that such demonstrations of compliance could require up to 20 hours of response time. Commission staff anticipates issuing 2 requests annually resulting in an aggregate burden of 40 hours.

2. Proposed Regulation 16.02

Under proposed regulation 16.02, reporting markets, a term which as proposed would include ECMs with SPDCs with respect to SPDCs, in addition to DCMs and DTEFs (unless determined otherwise by the Commission), would be required to provide trade and supporting data reports to the Commission on a daily basis. Such reports would include transaction-level trade data and related order information for each transaction executed on the reporting market and would be accompanied by data that identifies traders for each transaction when reporting markets maintain such data.

Since the mid-1980s, all DCMs have voluntarily provided the Commission with transaction level data on a daily basis. Proposed regulation 16.02 seeks to formalize and codify the submission process. Commission staff estimates that each reporting market would expend 18 hours for onsite visits to the Commission, discussions with staff to introduce the order flow process, and meetings with staff for follow-up discussions. The proposed rules would require that reporting markets expend approximately 2325 hours in additional start-up costs to establish the required information technology infrastructure. Commission staff estimates that it would receive daily trade and supporting data reports from up to15 reporting markets annually. Accordingly the start-up burden in terms of hours would in the aggregate be 35,145 hours. Annualized over a useful life of ten years, the aggregated annual burden hours would be 3,514.

It is also estimated that start-up and continuing costs may involve product and service purchases. Commission staff estimates that reporting markets could expend up to $5,000 annually per market on product and service purchases to comply with proposed regulation 16.02. This would result in an aggregated cost of $75,000 per annum (15 reporting markets $\times$ $5,000). This estimate, however, is speculative because reporting markets must possess the ability to audit and track transactions in the ordinary course of operations independently of proposed regulation 16.02.

In addition to the start-up burden, proposed regulation 16.02, if adopted, would impose certain ongoing costs. Commission staff estimates that each reporting market would expend 30 minutes for each daily trade and supporting data report transmitted to the Commission resulting in an aggregate burden of 1,875 hours annually (assuming that such reports are provided for each of 250 trading days).

3. Market and Large Trader Reporting Rules

In order to implement the CEA as amended by the Reauthorization Act, the Commission through this rulemaking proposes to extend the market and large trader reporting requirements that currently apply to DCMs and DTEFs to ECMs with SPDCs with respect to such contracts.

A. Futures Volume, Open Interest, Price, Deliveries, and Exchanges of Futures (OMB control number 3038–0012)

Twelve exchanges currently submit aggregated market data to the Commission and are required to publicly disseminate for each of approximately 250 trading days per year under Commission regulation 16.01. The information includes aggregate figures on a per contract basis on total gross open contracts, open futures contracts against which delivery notices have been stopped, volume generated from the exchange of futures, delta factors as well as certain pricing data. Should the proposed amendments be adopted, it is estimated that up to 15 reporting markets, including ECMs with SPDCs with respect to such contracts, could be required to submit this data to the Commission on a continuing basis. Commission staff estimates that such markets would expend approximately 30 minutes per day to generate the required data files, transmit that file to Commission offices, and publish the required information. This would results in an annual burden of approximately 1,875 hours.

B. Large Trader Reports (OMB Control Number 3038–0009)

1. Clearing Member Reports

Twelve designated contract markets provide clearing member reports pursuant to Commission regulation 16.00 once on each of an estimated 250 trading days per year. Should the proposed rules be adopted, it is estimated that up to 15 reporting markets, including ECMs with SPDCs with respect to such contracts, would be providing this data to the Commission on a continuing basis. The exchanges and ECMs would be required to submit confidential information to the Commission on the aggregate positions and trading activity of each clearing member.

Reporting markets, on a daily basis, are required under regulation 16.00 to

report each clearing member's open long and short positions, purchases and sales, exchanges of futures, and futures delivery notices. The data is reported separately by proprietary and customer accounts by futures month and, for options, by puts and calls by expiration date and strike price. The Commission obtains clearing member reports from the reporting markets or the clearing organizations of each reporting market. Reporting markets and the clearing organizations routinely compile, analyze and provide such data to each clearing member. Since the data is routinely provided to clearing members, the reporting burden for this set of data is estimated at 20 minutes for each reporting market per day. Assuming that a total of 15 entities would provide this data on a daily basis to the Commission, the total aggregate burden hours for reporting would be 1,250 hours (assuming that there are 250 trading days annually).

2. Reporting Firms

Under Commission regulation 17.00, routine reports are filed only for accounts with commodity futures and option positions that exceed levels set by the Commission in regulation 15.03(b). As proposed, regulation 17.00 would extend the routine reporting requirements of regulation 17.00 to clearing members on ECMs with SPDCs with respect to SPDCs. Should proposed regulation 17.00 be adopted, it is estimated that up to an additional 30 respondents would be required to file reports at any one time under regulation 17.00 increasing the total number of respondents to 250. The reporting burden consists of staff of reporting firms initializing their information technology systems for new contracts and new accounts. On average it is expected that about 15 minutes per day is expended by these reporting firm staff. Over 250 trading days annually, the aggregate burden would be 15,625 hours.

3. Forms 102

Each account reported to the Commission by an FCM, clearing member, or foreign broker must also be identified on a Form 102 pursuant to regulation 17.01. By amending the definition of reporting market, clearing member, and clearing organization, the notice of proposed rulemaking would extend the requirements of regulation 17.01 to clearing members of ECMs with SPDCs with respect to such contracts. Forms 102 provide information that allows the Commission to combine different accounts held or controlled by the same trader and to identify commercial firms using the markets for hedging. Should the notice of proposed rulemaking be adopted, the total number of Forms 102 filed with the Commission is estimated to increase by 500 to 4,500 per year. Respondents would expend 12 minutes completing each form for a total aggregate burden of 900 hours annually.

4. Reports From Traders

Traders provide identifying information using Forms 40 under Commission regulation 18.04 and position data upon special call under Commission regulations 18.00 and 18.05. The notice of proposed rulemaking would extend the requirements of those regulations to traders of SPDCs. Should the proposed amendments be adopted, the total estimated number of traders filing the Form 40 under regulation 18.04 would increase by 100 to 2,500 per year with each response requiring approximately 20 minutes, resulting in an aggregate annual burden of 833 hours.

The Commission has maintained the authority to make special calls on traders under part 18 of the Commission's regulations when the information obtained routinely under part 17 of the Commission's regulations is incomplete for its market and financial surveillance purposes. Information obtained on call under Commission regulations 18.00 and 18.05 is provided in the manner stipulated per instruction contained in the special call. Should the proposed regulations be adopted, the Commission estimates that 12 special calls would be issued to each of 45 traders under Commission regulations 18.00 and 18.05 and that each response to a call would require approximately 5 hours, for an estimated aggregate annual burden of 2,700 hours.

5. Part 21 of the Commission Regulations

Under part 21 of the Commission's regulations, the Commission may issue special calls for additional cash and futures data concerning traders from FCMs, introducing broker, clearing members, foreign brokers, and traders. In addition, under part 21 of the Commission's regulations (17 CFR part 21), the Commission may request identifying information regarding persons who exercise trading control over accounts. Position information collected pursuant to special call under part 21 of the Commission's regulations may be used to audit large trader reports and is used to investigate potential market abuses. Although similar to the standardized information routinely collected under part 17 of the Commission's regulations for reportable accounts, such data is submitted in response to customized requests for information and may regard accounts and positions that are not reportable. In contrast to special calls for identifying data made under Commission regulation 18.04, special calls made under any provision of part 21 of the Commission's regulations generally occur only when a particular market shows a potential for disruption or when there is an investigation of possible violations of the Act or the regulations thereunder. The notice of proposed rulemaking would apply the terms of part 21 to ECMs with SPDCs with respect to such contracts, clearing members clearing SPDCs, and SPDC traders. Should the proposed regulations be adopted, the Commission estimates that the Commission will continue to make less than 10 special calls under all of the provisions of part 21 of the Commission's regulations and that each response to a call will require approximately 1 hour, resulting in an aggregate reporting burden of 10 hours annually.

4. Information Collection Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

You may submit your comments directly to the Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by e-mail at *OIRA-submissions@omb.eop.gov.* Please provide the Commission with a copy of your comments so that we can summarize all written comments and address them in the final rule preamble. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission. You may obtain a copy of the supporting statements for the

collections of information discussed above by visiting RegInfo.gov. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this Release. Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking.

List of Subjects

17 CFR Part 15

Brokers, Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 16

Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 17

Brokers, Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 18

Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 19

Commodity futures, Cottons, Grains, Reporting and recordkeeping requirements.

17 CFR Part 21

Brokers, Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 36

Commodity futures, Commodity Futures Trading Commission.

17 CFR Part 40

Commodity futures, Contract markets, Designation application, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR parts 15, 16, 17, 18, 19, 21, 36 and 40 as follows:

PART 15—REPORTS—GENERAL PROVISIONS

1. The authority citation for part 15 is revised to read as follows:

Authority: 7 U.S.C. 2, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 9, 12a, 19, and 21, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1624 (June 18, 2008).

2. Revise § 15.00 to read as follows:

§ 15.00 Definitions of terms used in parts 15 to 21 of this chapter.

As used in parts 15 to 21 of this chapter:

(a) *Cash or Spot,* when used in connection with any commodity, means the actual commodity as distinguished from a futures or option contract in such commodity.

(b) *Clearing member* means any person who is a member of, or enjoys the privilege of clearing trades in his own name through, the clearing organization of a designated contract market, registered derivatives transaction execution facility, or registered entity under section 1a(29) of the Act.

(c) *Clearing organization* means the person or organization which acts as a medium for clearing transactions in commodities for future delivery or commodity option transactions, or for effecting settlements of contracts for future delivery or commodity option transactions, for and between members of any designated contract market, registered derivatives transaction execution facility or registered entity under section 1a(29) of the Act.

(d) *Compatible data processing media* means data processing media approved by the Commission or its designee.

(e) *Customer* means ''customer'' (as defined in § 1.3(k) of this chapter) and ''option customer'' (as defined in § 1.3(jj) of this chapter).

(f) *Customer trading program* means any system of trading offered, sponsored, promoted, managed or in any other way supported by, or affiliated with, a futures commission merchant, an introducing broker, a commodity trading advisor, a commodity pool operator, or other trader, or any of its officers, partners or employees, and which by agreement, recommendations, advice or otherwise, directly or indirectly controls trading done and positions held by any other person. The term includes, but is not limited to, arrangements where a program participant enters into an expressed or implied agreement not obtained from other customers and makes a minimum deposit in excess of that required of other customers for the purpose of receiving specific advice or recommendations which are not made available to other customers. The term includes any program which is of the character of, or is commonly known to the trade as, a managed account, guided account, discretionary account, commodity pool or partnership account.

(g) *Discretionary account* means a commodity futures or commodity option trading account for which buying or selling orders can be placed or originated, or for which transactions can be effected, under a general authorization and without the specific consent of the customer, whether the general authorization for such orders or transactions is pursuant to a written agreement, power of attorney, or otherwise.

(h) *Exclusively self-cleared contract* means a cleared contract for which no persons, other than a reporting market and its clearing organization, are permitted to accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trade.

(i) *Foreign clearing member* means a ''clearing member'' (as defined by paragraph (b) of this section) who resides or is domiciled outside of the United States, its territories or possessions.

(j) *Foreign trader* means any trader (as defined in paragraph (o) of this section) who resides or is domiciled outside of the United States, its territories or possessions.

(k) *Guided account program* means any customer trading program which limits trading to the purchase or sale of a particular contract for future delivery of a commodity or a particular commodity option that is advised or recommended to the participant in the program.

(l) *Managed account program* means a customer trading program which includes two or more discretionary accounts traded pursuant to a common plan, advice or recommendations.

(m) *Open contracts means* ''open contracts'' (as defined in § 1.3(t) of this chapter) and commodity option positions held by any person on or subject to the rules of a board of trade which have not expired, been exercised, or offset.

(n) *Reportable position* means:

(1) For reports specified in parts 17, 18 and § 19.00(a)(2) and (a)(3) of this chapter any open contract position that at the close of the market on any business day equals or exceeds the quantity specified in § 15.03 of this part in either:

(i) Any one future of any commodity on any one reporting market, excluding future contracts against which notices of delivery have been stopped by a trader or issued by the clearing organization of a reporting market; or

(ii) Long or short put or call options that exercise into the same future of any commodity, or long or short put or call options for options on physicals that have identical expirations and exercise into the same physical, on any one reporting market.

(2) For the purposes of reports specified in § 19.00(a)(1) of this chapter, any combined futures and futures-equivalent option open contract position as defined in part 150 of this chapter in any one month or in all months combined, either net long or net short in any commodity on any one reporting market, excluding futures positions against which notices of delivery have been stopped by a trader or issued by the clearing organization of a reporting market, which at the close of the market on the last business day of the week exceeds the net quantity limit in spot, single or in all-months fixed in § 150.2 of this chapter for the particular commodity and reporting market.

(o) *Reporting market* means a designated contract market, registered entity under section 1a(29)(E) of the Act, and unless determined otherwise by the Commission with respect to the facility or a specific contract listed by the facility, a registered derivatives transaction execution facility.

(p) *Special account* means any commodity futures or option account in which there is a reportable position.

(q) *Trader* means a person who, for his own account or for an account which he controls, makes transactions in commodity futures or options, or has such transactions made.

3. In § 15.01, revise paragraph (a) to read as follows:

§ 15.01 Persons required to report.

* * * * *

(a) Reporting markets—as specified in parts 16, 17, and 21 of this chapter.

* * * * *

4. In § 15.05, revise the heading and paragraph (a); and add paragraph (i) to read as follows:

§ 15.05 Designation of agent for foreign persons.

(a) For purposes of this section, the term ''futures contract'' means any contract for the purchase or sale of any commodity for future delivery, or a contract identified under § 36.3(b)(i) of this chapter as traded in reliance on the exemption in section 2(h)(3) of the Act, traded or executed on or subject to the rules of any designated contract market or registered derivatives transaction execution facility, or for the purposes of paragraph (i) of this section, a reporting market; the term ''option contract'' means any contract for the purchase or sale of a commodity option, or as applicable, any other instrument subject to the Act pursuant to section 5a(g) of the Act, traded or executed on or subject to the rules of any designated contract market or registered derivatives transaction execution facility, or for the purposes of paragraph (i) of this section, a reporting market; the term ''customer'' means any person for whose benefit a foreign broker makes or causes to be made any futures contract or option contract; and the term ''communication'' means any summons, complaint, order, subpoena, special call, request for information, or notice, as well as any other written document or correspondence.

* * * * *

(i) Any reporting market that is a registered entity under section 1a(29)(E) of the Act that permits a foreign clearing member or foreign trader to clear or effect contracts, agreements or transactions on the trading facility or its clearing organization, shall be deemed to be the agent of the foreign clearing member or foreign trader with respect to any such contracts, agreements or transactions cleared or executed by the foreign clearing member or the foreign trader. Service or delivery of any communication issued by or on behalf of the Commission to the reporting market shall constitute valid and effective service upon the foreign clearing member or foreign trader. The reporting market which has been served with, or to which there has been delivered, a communication issued by or on behalf of the Commission to a foreign clearing member or foreign trader shall transmit the communication promptly and in a manner which is reasonable under the circumstances, or in a manner specified by the Commission in the communication, to the foreign clearing member or foreign trader.

(1) It shall be unlawful for any such reporting market to permit a foreign clearing member or a foreign trader to clear or effect contracts, agreements or transactions on the facility or its clearing organization unless the reporting market prior thereto informs the foreign clearing member or foreign trader of the requirements of this section.

(2) The requirements of paragraphs (i) introductory text and (i)(1) of this section shall not apply to any contracts, transactions or agreements if the foreign clearing member or foreign trader has duly executed and maintains in effect a written agency agreement in compliance with this paragraph with a person domiciled in the United States and has provided a copy of the agreement to the reporting market prior to effecting or clearing any contract, agreement or transaction on the trading facility or its clearing organization. This agreement must authorize the person domiciled in the United States to serve as the agent of the foreign clearing member or foreign trader for the purposes of accepting delivery and service of all communications issued by or on behalf of the Commission to the foreign clearing member or the foreign trader and must provide an address in the United States where the agent will accept delivery and service of communications from the Commission. This agreement must be filed with the Commission by the reporting market prior to permitting the foreign clearing member or the foreign trader to clear or effect any transactions in futures or option contracts. Unless otherwise specified by the Commission, the agreements required to be filed with the Commission shall be filed with the Secretary of the Commission at Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(3) A foreign clearing member or a foreign trader shall notify the Commission immediately if the written agency agreement is terminated, revoked, or is otherwise no longer in effect. If the reporting market knows or should know that the agreement has expired, been terminated, or is no longer in effect, the reporting market shall notify the Secretary of the Commission immediately. If the written agency agreement expires, terminates, or is not in effect, the reporting market, the foreign clearing member and the foreign trader shall be subject to the provisions of paragraphs (i) introductory text and (i)(1) of this section.

5. Add § 15.06 to read as follows:

§ 15.06 Delegations.

(a) The Commission hereby delegates, until the Commission orders otherwise, the authority to approve data processing media, as referenced in § 15.00(d), for data submissions to the Director of the Division of Market Oversight, to be exercised by such Director or by such other employee or employees of such Director as designated from time to time by the Director. The Director may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(b) [Reserved]

PART 16—REPORTS BY REPORTING MARKETS

6. The authority citation for part 16 is revised to read as follows:

Authority: 7 U.S.C. 2, 6a, 6c, 6g, 6i, 7, 7a and 12a, as amended by Title XIII of the Food, Conservation and Energy Act of 2008,

Pub. L. No. 110–246, 122 Stat. 1624 (June 18, 2008), unless otherwise noted.

7. In § 16.01, revise paragraphs (e)(1) and (e)(2) to read as follows:

§ 16.01 Trading volume, open contracts, prices, and critical dates.

* * * * *

(e) *Publication of recorded information.* (1) Reporting markets shall make the information in paragraph (a) of this section readily available to the news media and the general public without charge, in a format that readily enables the consideration of such data, no later than the business day following the day to which the information pertains. The information in paragraphs (a)(4) through (a)(6) of this section shall be made readily available in a format that presents the information together.

(2) Reporting markets shall make the information in paragraphs (b)(1) and (b)(2) of this section readily available to the news media and the general public, and the information in paragraph (b)(3) of this section readily available to the general public, in a format that readily enables the consideration of such data, no later than the business day following the day to which the information pertains.

* * * * *

8. Section 16.02 is added to read as follows:

§ 16.02 Daily trade and supporting data reports.

Reporting markets shall provide trade and supporting data reports to the Commission on a daily basis. Such reports shall include transaction-level trade data and related order information for each transaction that is executed on the reporting market. Reports shall also include time and sales data, reference files and other information as the Commission or its designee may require. All reports must be submitted at the time, and in the manner and format, and with the specific content specified by the Commission or its designee. Upon request, such information shall be accompanied by data that identifies or facilitates the identification of each trader for each transaction or order included in a submitted trade and supporting data report if the reporting market maintains such data.

9. In § 16.07, revise the heading and introductory text; and add paragraph (c) to read as follows:

§ 16.07 Delegation of authority to the Director of the Division of Market Oversight.

The Commission hereby delegates, until the Commission orders otherwise, the authority set forth in paragraphs (a), (b) and (c) of this section to the Director of the Division of Market Oversight, to be exercised by such Director or by such other employee or employees of such Director as may be designated from time to time by the Director. The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

* * * * *

(c) Pursuant to § 16.02, the authority to determine the specific content of any daily trade and supporting data report, request that such reports be accompanied by data that identifies or facilitates the identification of each trader for each transaction or order included in a submitted trade and supporting data report, and the time for the submission of and the manner and format of such reports.

PART 17—REPORTS BY REPORTING MARKETS, FUTURES COMMISSION MERCHANTS, CLEARING MEMBERS, AND FOREIGN BROKERS

10. The authority citation for part 17 is revised to read as follows:

Authority: 7 U.S.C. 2, 6a, 6c, 6d, 6f, 6g, 6i, 7, 7a and 12a, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1624 (June 18, 2008), unless otherwise noted.

11. Revise the heading of part 17 as set forth above.

12. In § 17.00, revise paragraph (a) introductory text and paragraphs (a)(1), (b)(1), and (f); and add and reserve paragraph (c) to read as follows:

§ 17.00 Information to be furnished by futures commission merchants, clearing members and foreign brokers.

(a) *Special accounts—reportable futures and options positions, delivery notices, and exchanges of futures.* (1) Each futures commission merchant, clearing member and foreign broker shall submit a report to the Commission for each business day with respect to all special accounts carried by the futures commission merchant, clearing member or foreign broker, except for accounts carried on the books of another futures commission merchant or clearing member on a fully-disclosed basis. Except as otherwise authorized by the Commission or its designee, such report shall be made in accordance with the format and coding provisions set forth in paragraph (g) of this section. The report shall show each futures position traded in reliance on the exemption in section 2(h)(3) of the Act, separately for each reporting market and for each future position traded in reliance on the exemption in section 2(h)(3) of the Act, and each put and call options position separately for each reporting market, expiration and strike price in each special account as of the close of market on the day covered by the report and, in addition, the quantity of exchanges of futures for commodities or for derivatives positions and the number of delivery notices issued for each such account by the clearing organization of a reporting market and the number stopped by the account. The report shall also show all positions in all contract months and option expirations of that same commodity on the same reporting market for which the special account is reportable.

* * * * *

(b) * * *

(1) *Accounts of eligible entities*—Accounts of eligible entities as defined in § 150.1 of this chapter that are traded by an independent account controller shall, together with other accounts traded by the independent account controller or in which the independent controller has a financial interest, be considered a single account.

* * * * *

(c) [Reserved]

* * * * *

(f) *Omnibus accounts.* If the total open long positions or the total open short positions for any future of a commodity carried in an omnibus account is a reportable position, the omnibus account is in Special Account status and shall be reported by the futures commission merchant or foreign broker carrying the account in accordance with paragraph (a) of this section.

* * * * *

13. In § 17.03, revise the heading, the introductory text, and paragraphs (a) and (b) to read as follows:

§ 17.03 Delegation of authority to the Director of the Division of Market Oversight.

The Commission hereby delegates, until the Commission orders otherwise, the authority set forth in the paragraphs below to the Director of the Division of Market Oversight to be exercised by such Director or by such other employee or employees of such Director as designated from time to time by the Director. The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(a) Pursuant to § 17.00(a) and (h), the authority to determine whether futures commission merchants, clearing members and foreign brokers can report the information required under paragraphs (a) and (h) of § 17.00 on series '01 forms or using some other format upon a determination that such person is unable to report the information using the format, coding structure or electronic data transmission procedures otherwise required.

(b) Pursuant to § 17.02, the authority to instruct or approve the time at which the information required under §§ 17.00 and 17.01 must be submitted by futures commission merchants, clearing members and foreign brokers provided that such persons are unable to meet the requirements set forth in §§ 17.01(g) and 17.02.

* * * * *

14. In § 17.04, revise the heading, paragraph (a), and paragraph (b)(1)(ii) to read as follows:

§ 17.04 Reporting omnibus accounts to reporting firms.

(a) Any futures commission merchant, clearing member or foreign broker who establishes an omnibus account with another futures commission merchant, clearing member or foreign broker shall report to that futures commission merchant, clearing member or foreign broker the total open long positions and the total open short positions in each future of a commodity and, for commodity options transactions, the total open long put options, the total open short put options, the total open long call options, and the total open short call options for each commodity options expiration date and each strike price in such account at the close of trading each day. The information required by this section shall be reported in sufficient time to enable the futures commission merchant, clearing member or foreign broker with whom the omnibus account is established to comply with the regulations of this part and the reporting requirements established by the reporting markets.

(b) * * *

(1) * * *

(ii) The account is an omnibus account of another futures commission merchant, clearing member or foreign broker; or

* * * * *

PART 18—REPORTS BY TRADERS

15. The authority citation for part 18 continues to read as follows:

Authority: 7 U.S.C. 2, 4, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 12a and 19, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1624 (June 18, 2008); 5 U.S.C. 552 and 552(b), unless otherwise noted.

16. Revise § 18.01 to read as follows:

§ 18.01 Interest in or control of several accounts.

If any trader holds, has a financial interest in or controls positions in more than one account, whether carried with the same or with different futures commission merchants or foreign brokers, all such positions and accounts shall be considered as a single account for the purpose of determining whether such trader has a reportable position and, unless instructed otherwise in the special call to report under § 18.00 for the purpose of reporting.

17. In § 18.04, revise paragraphs (a)(7) and (b)(3)(i) to read as follows:

§ 18.04 Statement of reporting trader.

* * * * *

(a) * * *

(7) The names and locations of all futures commission merchants, clearing members, introducing brokers, and foreign brokers through whom accounts owned or controlled by the reporting trader are carried or introduced at the time of filing a Form 40, if such accounts are carried through more than one futures commission merchant, clearing member or foreign broker or carried through more than one office of the same futures commission merchant, clearing member or foreign broker, or introduced by more than one introducing broker clearing accounts through the same futures commission merchant, and the name of the reporting trader's account executive at each firm or office of the firm.

(b) * * *

(3) * * *

(i) Commercial activity associated with use of the option or futures market (such as and including production, merchandising or processing of a cash commodity, asset or liability risk management by depository institutions, or security portfolio risk management).

* * * * *

18. In § 18.05, revise paragraphs (a)(2), (a)(3), and (a)(4) to read as follows:

§ 18.05 Maintenance of books and records.

(a) * * *

(2) Over the counter or pursuant to sections 2(d), 2(g) or 2(h)(1)–(2) of the Act or part 35 of this chapter;

(3) On exempt commercial markets operating pursuant to sections 2(h)(3)–(5) of the Act;

(4) On exempt boards of trade operating pursuant to section 5d of the Act; and

* * * * *

PART 19—REPORTS BY PERSONS HOLDING BONA FIDE HEDGE POSITIONS PURSUANT TO § 1.3(z) OF THIS CHAPTER AND BY MERCHANTS AND DEALERS IN COTTON

19. The authority citation for part 19 continues to read as follows:

Authority: 7 U.S.C. 6g(a), 6i, and 12a(5), as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1624 (June 18, 2008), unless otherwise noted.

20. In § 19.00, revise paragraph (a) to read as follows:

§ 19.00 General provisions.

(a) Who must file series '04 reports. The following persons are required to file series '04 reports:

(1) All persons holding or controlling futures and option positions that are reportable pursuant to § 15.00(n)(2) of this chapter and any part of which constitute bona fide hedging positions as defined in § 1.3(z) of this chapter;

(2) Merchants and dealers of cotton holding or controlling positions for futures delivery in cotton that are reportable pursuant to § 15.00(n)(1)(i) of this chapter, or

(3) All persons holding or controlling positions for future delivery that are reportable pursuant to § 15.00(n)(1) of this chapter who have received a special call for series '04 reports from the Commission or its designee. Filings in response to a special call shall be made within one business day of receipt of the special call unless otherwise specified in the call. For the purposes of this paragraph, the Commission hereby delegates to the Director of the Division of Market Oversight, or to such other person designated by the Director, authority to issue calls for series '04 reports.

* * * * *

21. In § 19.01, revise paragraph (b) introductory text and paragraph (b)(1) to read as follows:

§ 19.01 Reports on stocks and fixed price purchases and sales pertaining to futures positions in wheat, corn, oats, soybeans, soybean oil, soybean meal or cotton.

* * * * *

(b) *Time and place of filing reports*—Except for reports filed in response to special calls made under § 19.00(a)(3), each report shall be made monthly, as of the close of business on the last Friday of the month, and filed at the appropriate Commission office specified in paragraph (b)(1) or (2) of this section not later than the second business day following the date of the report in the case of the 304 report and not later than the third business day following the

date of the report in the case of the 204 report. Reports may be transmitted by facsimile or, alternatively, information on the form may be reported to the appropriate Commission office by telephone and the report mailed to the same office, not later than midnight of its due date.

(1) CFTC Form 204 reports with respect to transactions in wheat, corn, oats, soybeans, soybean meal and soybean oil should be sent to the Commission's office in Chicago, IL, unless otherwise specifically authorized by the Commission or its designee.

* * * * *

PART 21—SPECIAL CALLS

22. The authority citation for part 21 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 2a, 4, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 12a, 19 and 21, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1624 (June 18, 2008); 5 U.S.C. 552 and 552(b), unless otherwise noted.

23. Revise § 21.01 to read as follows:

§ 21.01 Special calls for information on controlled accounts from futures commission merchants, clearing members and introducing brokers.

Upon call by the Commission, each futures commission merchant, clearing member and introducing broker shall file with the Commission the names and addresses of all persons who, by power of attorney or otherwise, exercise trading control over any customer's account in commodity futures or commodity options on any reporting market.

24. In § 21.02, revise the heading, introductory text, and paragraphs (f) and (i) to read as follows:

§ 21.02 Special calls for information on open contracts in accounts carried or introduced by futures commission merchants, clearing members, members of reporting markets, introducing brokers, and foreign brokers.

Upon special call by the Commission for information relating to futures or option positions held or introduced on the dates specified in the call, each futures commission merchant, clearing member, member of a reporting market, introducing broker, or foreign broker, and, in addition, for option information, each reporting market, shall furnish to the Commission the following information concerning accounts of traders owning or controlling such futures or option positions, except for accounts carried on a fully disclosed basis by another futures commission merchant or clearing member, as may be specified in the call:

* * * * *

(f) The number of open futures or option positions introduced or carried in each account, as specified in the call;

* * * * *

(i) As applicable, the following identifying information:

(1) Whether a trader who holds commodity futures or option positions is classified as a commercial or as a noncommercial trader for each commodity futures or option contract;

(2) Whether the open commodity futures or option contracts are classified as speculative, spreading (straddling), or hedging; and

(3) Whether any of the accounts in question are omnibus accounts and, if so, whether the originator of the omnibus account is another futures commission merchant, clearing member or foreign broker.

* * * * *

25. Amend § 21.03 as follows:

A. Revise the heading and paragraphs (a), (b), (c) and (d);

B. Revise paragraph (e) introductory text and paragraphs (e)(1) introductory text , (e)(1)(iv) and (e)(1)(v); and

C. Revise paragraphs (f), (g) and (h) to read as follows:

§ 21.03 Selected special calls-duties of foreign brokers, domestic and foreign traders, futures commission merchants, clearing members, introducing brokers, and reporting markets.

(a) For purposes of this section, the term ''accounts of a futures commission merchant, clearing member or foreign broker'' means all open contracts and transactions in futures and options on the records of the futures commission merchant, clearing member or foreign broker; the term ''beneficial interest'' means having or sharing in any rights, obligations or financial interest in any futures or options account; the term ''customer'' means any futures commission merchant, clearing member, introducing broker, foreign broker, or trader for whom a futures commission merchant, clearing member or reporting market that is a registered entity under section 1a(29)(E) of the Act makes or causes to be made a futures or options contract. Paragraphs (e), (g) and (h) of this section shall not apply to any futures commission merchant, clearing member or customer whose books and records are open at all times to inspection in the United States by any representative of the Commission.

(b) It shall be unlawful for a futures commission merchant to open a futures or options account or to effect transactions in futures or options contracts for an existing account, or for an introducing broker to introduce such an account, for any customer for whom the futures commission merchant or introducing broker is required to provide the explanation provided for in § 15.05(c) of this chapter, or for a reporting market that is a registered entity under section 1a(29)(E) of the Act, to cause to open an account in a contract traded in reliance on the exemption in section 2(h)(3) of the Act or to cause to be effected transactions in a contract traded in reliance on the exemption in section 2(h)(3) of the Act for an existing account for any person that is a foreign clearing member or foreign trader, until the futures commission merchant, introducing broker, clearing member, or reporting market has explained fully to the customer, in any manner that such persons deem appropriate, the provisions of this section.

(c) Upon a determination by the Commission that information concerning accounts may be relevant information in enabling the Commission to determine whether the threat of a market manipulation, corner, squeeze, or other market disorder exists on any reporting market, the Commission may issue a call for information from a futures commission merchant, clearing member, introducing broker or customer pursuant to the provisions of this section.

(d) In the event the call is issued to a foreign broker, foreign clearing member or foreign trader, its agent, designated pursuant to § 15.05 of this chapter, shall, if directed, promptly transmit calls made by the Commission pursuant to this section by electronic mail or a similarly expeditious means of communication.

(e) The futures commission merchant, clearing member, introducing broker, or customer to whom the special call is issued must provide to the Commission the information specified below for the commodity, reporting market and delivery months or option expiration dates named in the call. Such information shall be filed at the place and within the time specified by the Commission.

(1) For each account of a futures commission merchant, clearing member, introducing broker, or foreign broker, including those accounts in the name of the futures commission merchant, clearing member or foreign broker, on the dates specified in the call issued pursuant to this section, such persons shall provide the Commission with the following information:

* * * * *

(iv) Whether the account is carried for and in the name of another futures commission merchant, clearing member, introducing broker, or foreign broker; and

(v) For the accounts which are not carried for and in the name of another futures commission merchant, clearing member, introducing broker, or foreign broker, the name and address of any other person who controls the trading of the account, and the name and address of any person who has a ten percent or more beneficial interest in the account.

* * * * *

(f) If the Commission has reason to believe that any person has not responded as required to a call made pursuant to this section, the Commission in writing may inform the reporting market specified in the call and that reporting market shall prohibit the execution of, and no futures commission merchant, clearing member, introducing broker, or foreign broker shall effect a transaction in connection with trades on the reporting market and in the months or expiration dates specified in the call for or on behalf of the futures commission merchant or customer named in the call, unless such trades offset existing open contracts of such futures commission merchant or customer.

(g) Any person named in a special call that believes he or she is or may be adversely affected or aggrieved by action taken by the Commission under paragraph (f) of this section shall have the opportunity for a prompt hearing after the Commission acts. That person may immediately present in writing to the Commission for its consideration any comments or arguments concerning the Commission's action and may present for Commission consideration any documentary or other evidence that person deems appropriate. Upon request, the Commission may, in its discretion, determine that an oral hearing be conducted to permit the further presentation of information and views concerning any matters by any or all such persons. The oral hearing may be held before the Commission or any person designated by the Commission, which person shall cause all evidence to be reduced to writing and forthwith transmit the same and a recommended decision to the Commission. The Commission's directive under paragraph (f) of this section shall remain in effect unless and until modified or withdrawn by the Commission.

(h) If, during the course of or after the Commission acts pursuant to paragraph (f) of this section, the Commission determines that it is appropriate to undertake a proceeding pursuant to section 6(c) of the Act, the Commission shall issue a complaint in accordance with the requirements of section 6(c), and, upon further determination by the Commission that the conditions described in paragraph (c) of this section still exist, a hearing pursuant to section 6(c) of the Act shall commence no later than five business days after service of the complaint. In the event the person served with the complaint under section 6(c) of the Act has, prior to the commencement of the hearing under section 6(c) of the Act, sought a hearing pursuant to paragraph (g) of this section and the Commission has determined to accord him such a hearing, the two hearings shall be conducted simultaneously. Nothing in this section shall preclude the Commission from taking other appropriate action under the Act or the Commission's regulations thereunder, including action under section 6(c) of the Act, regardless of whether the conditions described in paragraph (c) of this section still exist, and no ruling issued in the course of a hearing pursuant to paragraph (g) or this section shall constitute an estoppel against the Commission in any other action.

26. Revise § 21.04 to read as follows:

§ 21.04 Delegation of authority to the Director of the Division of Market Oversight.

The Commission hereby delegates, until the Commission orders otherwise, the special call authority set forth in §§ 21.01 and 21.02 the Director of the Division of Market Oversight to be exercised by such Director or by such other employee or employees of such Director as designated from time to time by the Director. The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this section shall be deemed to prohibit the Commission, at its election, from exercising the authority delegated in this section to the Director.

PART 36—EXEMPT MARKETS

27. The authority citation for part 36 is revised to read as follows:

Authority: 7 U.S.C. 2, 2(h)(7), 6, 6c and 12a, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1624 (June 18, 2008).

28–30. Section 36.3 is amended by revising paragraphs (b) and (c), and adding paragraph (d), to read as follows:

§ 36.3 Exempt commercial markets.

* * * * *

(b) *Required information.*

(1) *All electronic trading facilities.* A facility operating in reliance on the exemption in section 2(h)(3) of the Act, initially and on an on-going basis, must:

(i) Provide the Commission with the terms and conditions, as defined in part 40.1(i) of this chapter and product descriptions for each agreement, contract or transaction listed by the facility in reliance on the exemption set forth in section 2(h)(3) of the Act, as well as trading conventions, mechanisms and practices;

(ii) Provide the Commission with information explaining how the facility meets the definition of ''trading facility'' contained in section 1a(33) of the Act and provide the Commission with access to the electronic trading facility's trading protocols, in a format specified by the Commission;

(iii) Demonstrate to the Commission that the facility requires, and will require, with respect to all current and future agreements, contracts and transactions, that each participant agrees to comply with all applicable laws; that the authorized participants are ''eligible commercial entities'' as defined in section 1a(11) of the Act; that all agreements, contracts and transactions are and will be entered into solely on a principal-to-principal basis; and that the facility has in place a program to routinely monitor participants' compliance with these requirements;

(iv) At the request of the Commission, provide any other information that the Commission, in its discretion, deems relevant to its determination whether an agreement, contract, or transaction performs a significant price discovery function; and

(v) File with the Commission annually, no later than the end of each calendar year, a completed copy of CFTC Form 205—Exempt Commercial Market Annual Certification. The information submitted in Form 205 shall include:

(A) A statement indicating whether the electronic trading facility continues to operate under the exemption; and

(B) A certification that affirms the accuracy of and/or updates the information contained in the previous Notification of Operation as an Exempt Commercial Market.

(2) *Electronic trading facilities trading or executing agreements, contracts or transactions other than significant price discovery contracts.* In addition to the requirements of paragraph (b)(1) of this section, a facility operating in reliance on the exemption in section 2(h)(3) of the Act, with respect to agreements, contracts or transactions that have not been determined to perform significant

price discovery function, initially and on an on-going basis, must:

(i) Identify to the Commission those agreements, contracts and transactions conducted on the electronic trading facility with respect to which it intends, in good faith, to rely on the exemption in section 2(h)(3) of the Act, and which averaged five trades per day or more over the most recent calendar quarter; and, with respect to such agreements, contracts and transactions, either:

(A) Submit to the Commission, in a form and manner acceptable to the Commission, a report for each business day, showing for each such agreement, contract or transaction executed the following information:

(*1*) The underlying commodity, the delivery or price-basing location specified in the agreement, contract or transaction maturity date, whether it is a financially settled or physically delivered instrument, and the date of execution, time of execution, price, and quantity;

(*2*) Total daily volume and, if cleared, open interest;

(*3*) For an option instrument, in addition to the foregoing information, the type of option (*i.e.*, call or put) and strike prices; and

(*4*) Such other information as the Commission may determine.

Each such report shall be electronically transmitted weekly, within such time period as is acceptable to the Commission after the end of the week to which the data applies; or

(B) (*1*) Provide to the Commission, in a form and manner acceptable to the Commission, electronic access to those transactions conducted on the electronic trading facility in reliance on the exemption in section 2(h)(3) of the Act, and meeting the average five trades per day or more threshold test of this section, which would allow the Commission to compile the information described in paragraph (b)(2)(i)(A) of this section and create a permanent record thereof;

(*2*) Maintain a record of allegations or complaints received by the electronic trading facility concerning instances of suspected fraud or manipulation in trading activity conducted in reliance on the exemption set forth in section 2(h)(3) of the Act. The record shall contain the name of the complainant, if provided, date of the complaint, market instrument, substance of the allegations, and name of the person at the electronic trading facility who received the complaint;

(*3*) Provide to the Commission, in the form and manner prescribed by the Commission, a copy of the record of each complaint received pursuant to paragraph (b)(2)(ii) of this section that alleges, or relates to, facts that would constitute a violation of the Act or Commission regulations. Such copy shall be provided to the Commission no later than 30 calendar days after the complaint is received. Provided, however, that in the case of a complaint alleging, or relating to, facts that would constitute an ongoing fraud or market manipulation under the Act or Commission regulations, such copy shall be provided to the Commission within three business days after the complaint is received; and

(*4*) Provide to the Commission on a quarterly basis, within 15 calendar days of the close of each quarter, a list of each agreement, contract or transaction executed on the electronic trading facility in reliance on the exemption set forth in section 2(h)(3) of the Act and indicate for each such agreement, contract or transaction the contract terms and conditions, the contract's average daily trading volume, and the most recent open interest figures.

(3) *Electronic trading facilities trading or executing significant price discovery contracts.* In addition to the requirements of paragraph (b)(1) of this section, if the Commission determines that a facility operating in reliance on the exemption in section 2(h)(3) of the Act trades or executes an agreement, contract or transaction that performs a significant price discovery function, the facility must, with respect to any significant price discovery contract, publish and provide to the Commission the information required by § 16.01 of this chapter.

(4) *Delegation of authority.* The Commission hereby delegates, until the Commission orders otherwise, the authority to determine the form and manner of submitting the required information under paragraphs (b)(1) through (3) of this section, to the Director of the Division of Market Oversight and such members of the Commission's staff as the Director may designate. The Director may submit to the Commission for its consideration any matter that has been delegated by this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(5) *Special calls.*

(i) All information required upon special call of the Commission under section 2(h)(5)(B)(iii) of the Act shall be transmitted at the time and to the office of the Commission as may be specified in the call.

(ii) The Commission hereby delegates, until the Commission orders otherwise, the authority to make special calls as set forth in section 2(h)(5)(B)(iii) of the Act to the Directors of the Division of Market Oversight, the Division of Clearing and Intermediary Oversight, and the Division of Enforcement to be exercised by each such Director or by such other employee or employees as the Director may designate. The Directors may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(6) *Subpoenas to foreign persons.* A foreign person whose access to an electronic trading facility is limited or denied at the direction of the Commission based on the Commission's belief that the foreign person has failed timely to comply with a subpoena as provided under section 2(h)(5)(C)(ii) of the Act shall have an opportunity for a prompt hearing under the procedures provided in § 21.03(b) and (h) of this chapter.

(7) *Prohibited representation.* An electronic trading facility relying upon the exemption in section 2(h)(3) of the Act, with respect to agreements, contracts or transactions that are not significant price discovery contracts, shall not represent to any person that it is registered with, designated, recognized, licensed or approved by the Commission.

(c) *Significant price discovery contracts.*

(1) *Criteria for significant price discovery determination.* The Commission may determine, in its discretion, that an electronic trading facility operating a market in reliance on the exemption in section 2(h)(3) of the Act performs a significant price discovery function for transactions in the cash market for a commodity underlying any agreement, contract or transaction executed or traded on the facility. In making such a determination, the Commission shall consider, as appropriate:

(i) *Price linkage.* The extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market or a derivatives transaction execution facility to value a position, transfer or convert a position, cash or financially settle a position, or close out a position;

(ii) *Arbitrage.* The extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for

trading on or subject to the rules of a designated contract market or derivatives transaction execution facility, or a significant price discovery contract or contracts trading on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis;

(iii) *Material price reference*. The extent to which, on a frequent and recurring basis, bids, offers, or transactions in a commodity are directly based on, or are determined by referencing, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility;

(iv) *Material liquidity*. The extent to which the volume of agreements, contracts or transactions in the commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a designated contract market, a derivatives transaction execution facility, or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act;

(v) *Other material factors* [Reserved].

(2) *Notification of possible significant price discovery contract conditions*. An electronic trading facility operating in reliance on section 2(h)(3) of the Act shall promptly notify the Commission, and such notification shall be accompanied by supporting information or data concerning any contract that:

(i) Averaged five trades per day or more over the most recent calendar quarter; and

(ii) (A) For which the exchange sells its price information regarding the contract to market participants or industry publications; or

(B) Whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another agreement, contract or transaction.

(3) *Procedure for significant price discovery determination*. Before making a final price discovery determination under this paragraph, the Commission shall publish notice in the **Federal Register** that it intends to undertake a determination with respect to whether a particular agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the electronic trading facility and other interested persons. Any such written data, views and arguments shall be filed with the Secretary of the Commission, in the form and manner specified by the Commission, within 30 calendar days of publication of notice in the **Federal Register** or within such other time specified by the Commission. After consideration of all relevant information, the Commission shall issue an order explaining its determination whether the agreement, contract or transaction executed or traded by the electronic trading facility performs a significant price discovery function under the criteria specified in paragraphs (c)(1)(i) through (v) of this section.

(4) *Compliance with Core Principles*. Following the issuance of an order by the Commission that the electronic trading facility executes or trades an agreement, contract or transaction that performs a significant price discovery function, the electronic trading facility must demonstrate, with respect to that agreement, contract or transaction, compliance with the Core Principles under section 2(h)(7)(C) of the Act and the applicable provisions of this part. If the Commission's order represents the first time it has determined that the electronic trading facility's agreement, contract or transaction performs a significant price discovery function, the facility must submit a written demonstration of compliance with the Core Principles within 90 calendar days of the date of the Commission's order. For subsequent determinations by the Commission that the electronic trading facility has an additional agreement, contract or transaction that performs a significant price discovery function, the facility must submit a written demonstration of compliance with the Core Principles within 15 calendar days of the date of the Commission's order. Attention is directed to Appendix B of this part for guidance on and acceptable practices for complying with the Core Principles. Submissions demonstrating how the electronic trading facility complies with the Core Principles with respect to its significant price discovery contract must be filed with the Secretary of the Commission at its Washington, DC headquarters. Submissions must include the following:

(i) A written certification that the significant price discovery contract(s) complies with the Act and regulations thereunder;

(ii) A copy of the electronic trading facility's rules (as defined in § 40.1 of this chapter) and any technical manuals, other guides or instructions for users of, or participants in, the market, including minimum financial standards for members or market participants. Subsequent rule changes must be certified by the electronic trading facility pursuant to section 5c(c) of the Act and § 40.6 of this chapter. The electronic trading facility also may request Commission approval of any rule changes pursuant to section 5c(c) of the Act and § 40.5 of this chapter;

(iii) A description of the trading system, algorithm, security and access limitation procedures with a timeline for an order from input through settlement, and a copy of any system test procedures, tests conducted, test results and contingency or disaster recovery plans;

(iv) A copy of any documents pertaining to or describing the electronic trading system's legal status and governance structure, including governance fitness information;

(v) An executed or executable copy of any agreements or contracts entered into or to be entered into by the electronic trading facility, including partnership or limited liability company, third-party regulatory service, or member or user agreements, that enable or empower the electronic trading facility to comply with a Core Principle;

(vi) A copy of any manual or other document describing, with specificity, the manner in which the trading facility will conduct trade practice, market and financial surveillance;

(vii) To the extent that any of the items in paragraphs (c)(4)(ii) through (vi) of this section raise issues that are novel, or for which compliance with a core principle is not self-evident, an explanation of how that item satisfies the applicable core principle or principles. The electronic trading facility must identify with particularity information in the submission that will be subject to a request for confidential treatment pursuant to § 145.09 of this chapter. The electronic trading facility must follow the procedures specified in § 40.8 of this chapter with respect to any information in its submission for which confidential treatment is requested.

(5) *Determination of compliance with core principles*. The Commission shall take into consideration differences between cleared and uncleared significant price discovery contracts when reviewing the implementation of the Core Principles by an electronic trading facility. The electronic facility also has reasonable discretion in accounting for differences between cleared and uncleared significant price discovery contracts when establishing the manner in which it complies with the Core Principles.

(6) *Information relating to compliance with core principles.* Upon request by the Commission, an electronic trading facility trading a significant price discovery contract shall file with the Commission a written demonstration, containing such supporting data, information and documents, in the form and manner and within such time as the Commission may specify, that the electronic trading facility is in compliance with one or more core principles as specified in the request, or that is otherwise requested by the Commission to enable the Commission to satisfy its obligations under the Act.

(7) *Enforceability.* An agreement, contract or transaction entered into on or pursuant to the rules of an electronic trading facility trading or executing a significant price discovery contract shall not be void, voidable, subject to rescission or otherwise invalidated or rendered unenforceable as a result of:

(i) A violation by the electronic trading facility of the provisions of section 2(h) of the Act or this part; or

(ii) Any Commission proceeding to alter or supplement a rule, term or condition under section 8a(7) of the Act, to declare an emergency under section 8a(9) of the Act, or any other proceeding the effect of which is to alter, supplement or require an electronic trading facility to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

(8) *Procedures for vacating a determination of a significant price discovery function.*

(i) *By the electronic trading facility.* An electronic trading facility that executes or trades an agreement, contract or transaction that the Commission has determined performs a significant price discovery function under paragraph (c)(3) of this section may petition the Commission to vacate that determination. The petition shall demonstrate that the agreement, contract or transaction no longer performs a significant price discovery function under the criteria specified in paragraph (c)(1) of this section, and has not done so for at least the prior 12 months. An electronic trading facility shall not petition for a vacation of a significant price discovery determination more frequently than once every 12 months.

(ii) *By the Commission.* The Commission may, on its own initiative, begin vacation proceedings if it believes that an agreement, contract or transaction has not performed a significant price discovery function for at least the prior 12 months.

(iii) *Procedure.* Before making a final determination whether an agreement, contract or transaction has ceased to perform a significant price discovery function, the Commission shall publish notice in the **Federal Register** that it intends to undertake such a determination and to receive written data, views and arguments relevant to its determination from the electronic trading facility and other interested persons. Written submissions shall be filed with the Secretary of the Commission in the form and manner specified by the Commission, within 30 calendar days of publication of notice in the **Federal Register** or within such other time specified by the Commission. After consideration of all relevant information, the Commission shall issue an order explaining its determination whether the agreement, contract or transaction has ceased to perform a significant price discovery function and, if so, vacating its prior order. If such an order issues, and the Commission subsequently determines, on its own initiative or after notification by the electronic trading facility, that the agreement, contract or transaction that was subject to the vacation order again performs a significant price discovery function, the electronic trading facility must comply with the Core Principles within 15 calendar days of the date of the Commission's order.

(iv) *Automatic vacation of significant price discovery determination.* Regardless of whether a proceeding to vacate has been initiated, any significant price discovery contract that has no open interest and in which no trading has occurred for a period of 12 complete and consecutive calendar months shall, without further proceedings, no longer be considered to be a significant price discovery contract.

(d) *Commission review.* The Commission shall, at least annually, evaluate as appropriate agreements, contracts or transactions conducted on an electronic trading facility in reliance on the exemption provided in section 2(h)(3) of the Act to determine whether they serve a significant price discovery function as described in paragraph (c)(1) of this section 31. Part 36 is amended by adding a new Appendix A to read as follows:

Appendix A to Part 36—Guidance on Significant Price Discovery Contracts

1. Section 2(h)(7) of the CEA specifies four factors that the Commission must consider, as appropriate, in making a determination that a contract is performing a significant price discovery function. The four factors prescribed by the statute are: Price Linkage; Arbitrage; Material Price Reference; and Material Liquidity.

2. Not all listed factors must be present to support a determination that a contract performs a significant price discovery function. Moreover, the statutory language neither prioritizes the factors nor specifies the degree to which a significant price discovery contract must conform to the various factors. Congress has indicated that it intends that the Commission should not make a determination that an agreement, contract or transaction performs a significant price discovery function on the basis of the Price Linkage factor unless the agreement, contract or transaction also has sufficient volume to impact other regulated contracts or to become an independent price reference or benchmark that is regularly utilized by the public. The Commission believes that the Arbitrage and Material Price Reference factors can be considered separately from each other. That is, the Commission could make a determination that a contract serves a significant price discovery function based on the presence of one of these factors and the absence of the other. The presence of any of these factors, however, would not necessarily be sufficient to establish the contract as a significant price discovery contract. The fourth factor, Liquidity, would be considered in conjunction with the arbitrage and linkage factors as a significant amount of liquidity presumably would be necessary for a contract to perform a significant price discovery function in conjunction with these factors.

3. These factors do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, this guidance is intended to illustrate which factors, or combinations of factors, the Commission will look to when determining that a contract is performing a significant price discovery function, and under what circumstances the presence of a particular factor or factors would be sufficient to support such a determination.

(A) MATERIAL LIQUIDITY—The extent to which the volume of agreements, contracts or transactions in the commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a designated contract market, a derivatives transaction execution facility, or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act.

(1) Liquidity is a broad concept that captures the ability to transact immediately with little or no price concession. Traditionally, objective measures of trading such as volume or open interest have been used as measures of liquidity. So, for example, a market in which trades occur multiple times per minute at prices that differ by only fractions of a cent normally would be considered highly liquid, since presumably a trader could quickly execute a trade at a price that was approximately the same as the price for other recently executed trades. Other factors also will affect the characterization of liquidity, such as whether a large trade—*e.g.*, 100 contracts versus 1 contract—could be executed without a significant price concession. For example,

having to wait a day to sell 1000 bushels of corn may be considered an illiquid market while waiting a day to sell a home may be considered quite liquid. Thus, quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another.

(2) The Commission believes that material liquidity alternatively can be identified by the impact liquidity exhibits through observed prices. In markets where material liquidity exists, a more or less continuous stream of prices can be observed and the prices should be similar. For example, if the trading of a contract occurs on average five times a day, there will be on average five observed prices for the contract per day. If the market is liquid in terms of traders having to make little in the way of price concessions to execute these trades, the prices of this contract should be similar to those observed for similar or related contracts traded in liquid markets elsewhere. Thus, in making determinations that contracts have material liquidity, the Commission will look to transaction prices, both in terms of how often prices are observed and the extent to which observed prices tend to correlate with other contemporaneous prices.

(3) The Commission anticipates that material liquidity will frequently be a consideration in evaluating whether a contract is a significant price discovery contract; however, there may be circumstances in which other factors so dominate the conclusion that a contract is serving a significant price discovery function that a finding of material liquidity in the contract would not be necessary. Circumstances in which this might arise are discussed with respect to the assessment of other factors below.

(4) Finally, material liquidity itself would not be sufficient to make a determination that a contract is a significant price discovery contract, but combined with other factors it can serve as a guidepost indicating which contracts are functioning as significant price discovery contracts. As further discussed below, material liquidity, as reflected through the prices of linked or arbitraged contracts, will be a primary consideration in determining whether such contracts are significant price discovery contracts.

(B) PRICE LINKAGE—The extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market or a derivatives transaction execution facility to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.

(1) A price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract. The link may involve a one-to-one linkage, in that the value of the linked contract is based on a single contract's price, or it may involve multiple contracts. An example of a multiple contract linkage might be where the settlement price is calculated as an index of prices obtained from a basket of contracts traded on other exchanges.

(2) For a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract(s). The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as or move substantially in conjunction with the prices of the referenced contract(s). Where such price characteristics are observed on an ongoing basis, the Commission would expect to determine that the linked contract is a significant price discovery contract.

(3) As an example, where the Commission has observed price linkage, it will next consider whether transactions were occurring on a daily basis for the linked contract in material volumes. (Conversely, where volume has increased noticeably in a particular contract, the Commission would look for linkage) The ultimate level of volume that would be considered material for purposes of deeming a contract a significant price discovery contract will likely differ from one contract to another depending on the characteristics of the underlying commodity and the overall size of the physical market in which it is traded. At a minimum, however, the Commission will consider a linked contract which has volume equal to 5% of the volume of trading in the contract to which it is linked to have sufficient volume potentially to be deemed a significant price discovery contract. In combination with this volume level, the Commission will also examine the relationship between prices of the linked contract and the contract to which it is linked to determine whether a contract is serving a significant price discovery function. As a threshold, the Commission will consider a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement, or other daily prices over the most recent quarter to be sufficiently close for a linked contract potentially to be deemed a significant price discovery contract. For example, if, over the most recent quarter, it was found that 95 percent of the closing, settlement, or other daily prices of the contract, which have been calculated using transaction prices, were within 2.5 percent of the contemporaneously determined closing, settlement, or other daily prices of a contract to which it was linked, the Commission potentially would consider the contract to perform a significant price discovery function.

(4) If, in the example above, the Commission determines that material volume existed, it will examine the relationship between the prices of the linked contracts and the referenced contracts. If it finds that the transaction prices of the linked contract were consistently within a small percentage of the referenced contract or index of contracts that was being referenced, the Commission will be likely to find the linked contract to be a significant price discovery contract. As a threshold, the Commission will consider a 2.5 percent price range for 95 per cent of closing or settlement prices over the most recent quarter to be sufficiently close for a linked contract to potentially be deemed a significant price discovery contract. For example, if, over the most recent quarter, it was found that on 95 percent or more of the days the closing or settlement price of the contract, which has been calculated using transaction prices, was within 2.5 percent of the closing or settlement price of a contract to which it was linked, the Commission potentially will consider the contract to perform a significant price discovery function.

(C) ARBITRAGE CONTRACTS—The extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated contract market or derivatives transaction execution facility, or a significant price discovery contract or contracts trading on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.

(1) Arbitrage contracts are those contracts that can be combined with other contracts to exploit expected economic relationships in anticipation of a profit. In assessing whether a contract can be incorporated into an arbitrage strategy, the Commission will weigh the terms and conditions of a contract in comparison to contracts that potentially could be used in an arbitrage strategy; will consult with industry or other sources regarding a contract's viability in an arbitrage strategy; and will rely on direct observation confirming the use of a contract in arbitrage strategies.

(2) As with linked contracts, the mere fact that a contract could be employed in an arbitrage strategy will not be sufficient to make a determination that a contract is a significant price discovery contract. In addition, the level of liquidity will be considered. To assess whether designation as a significant price discovery contract is warranted, the Commission will examine the relationship between transaction prices of an arbitrage contract and the prices of the contract(s) to which it is related. The Commission believes that where material liquidity exists, prices for the arbitrage contract would be observed to move substantially in conjunction with the prices of the related contract(s) to which it is economically linked. Where such price characteristics are observed on an ongoing basis, it is likely that the linked contract performs a significant price discovery function.

(3) The Commission will apply the same threshold liquidity and price relationship standards for arbitrage contracts as it does for linked contracts. That is, the Commission will view the average of 5 trades per day or more threshold as the level of activity that would potentially meet the material volume criterion. With respect to prices, the Commission will consider an arbitrage

contract potentially to be a significant price discovery contract if, over the most recent quarter, greater than 95 percent of the closing or settlement prices of the contract, which have been calculated using transaction prices, fall within 2.5 percent of the closing or settlement price of the contract or contracts to which it could be arbitraged.

(D) MATERIAL PRICE REFERENCE—The extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.

(1) The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and, therefore, serving a significant price discovery function. The primary source of direct evidence is that cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the market on a frequent and recurring basis. The Commission expects that normally only contracts with material liquidity will be referenced by the cash market; however, the Commission notes that it may be possible for a contract to have very low liquidity and yet still be used as a price reference. In such cases, the simple fact that participants in the underlying cash market broadly have elected to use the contract price as a price reference would be a strong indicator that the contract is a significant price discovery contract.

(2) In evaluating a contract's price discovery role as a directly referenced price source, the Commission will perform an analysis to determine whether cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. The Commission will also consider whether cash market entities are quoting cash prices based on a section 2(h)(3) contract on a frequent and recurring basis.

(3) The second source of evidence is that the price of the contract is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions. As with contract prices that are directly incorporated into cash market prices, the Commission assumes that industry publications choose to publish prices because of the value they transfer to industry participants for the purpose of formulating prices in the cash market.

(4) In applying this criterion, consideration will be given to whether prices established by a section 2(h)(3) contract are reported in a widely distributed industry publication. In making this determination, the Commission will consider the reputation of the publication within the industry, how frequently it is published, and whether the information contained in the publication is routinely consulted by industry participants in pricing cash market transactions.

(5) Under a Material Price Reference analysis, the Commission expects that material liquidity in the contract likely will be the primary motivation for a publisher to publish particular prices. In other words, the fact that the price of a contract is being used as a reference by industry participants suggests, *prima facie*, that the contract performs a significant price discovery function. But the Commission recognizes that trading levels could nonetheless be low for the contract while still serving a significant price discovery function and that evidence of routine publication and consultation by industry participants may be sufficient to establish the contract as a significant price discovery contract. On the other hand, while cash market participants may regularly refer to published prices of a particular contract when establishing cash market prices, it may be the case that the contract itself is a niche market for a specialized grade of the commodity or for delivery at a minor geographic location. In such cases, the Commission will look to such measures as trading volume, open interest, and the significance of the underlying cash market to make a determination that a contract is functioning as a significant price discovery contract. If an examination of trading in the contract were to reveal that true price discovery was occurring in other more broadly defined contracts and that this contract was itself simply reflective of those broader contracts, it is less likely the Commission will deem the contract a significant price discovery contract.

(6) Because price referencing normally occurs out of the view of the electronic trading facility, the Commission may have difficulty ascertaining the extent to which cash market participants actually reference or consult a contract's price when transacting. The Commission expects, however, that as a contract begins to be relied upon to set a reference price, market participants will be increasingly willing to purchase price information. To the extent, then, that an electronic trading facility begins to sell its price information regarding a contract to market participants or industry publications, the contract will meet a threshold standard to indicate that the contract potentially is a significant price discovery contract.

32. Part 36 is amended by adding a new Appendix B to read as follows:

Appendix B to Part 36—Guidance On, and Acceptable Practices in, Compliance With Core Principles

1. This Appendix provides guidance on complying with the core principles under section 2(h)(7)(C) of the Act and this part, both initially and on an ongoing basis. The guidance is provided in paragraph (a) following each core principle and can be used to demonstrate to the Commission core principle compliance under § 36.3(c)(4). The guidance for each core principle is illustrative only of the types of matters an electronic trading facility may address, as applicable, and is not intended to be used as a mandatory checklist. Addressing the issues and questions set forth in this guidance will help the Commission in its consideration of whether the electronic trading facility is in compliance with the core principles. A submission pursuant to § 36.3(c)(4) should include an explanation or other form of documentation demonstrating that the electronic trading facility complies with the core principles.

2. Acceptable practices meeting selected requirements of the core principles are set forth in paragraph (b) following each core principle. Electronic trading facilities on which significant price discovery contracts are traded or executed that follow the specific practices outlined under paragraph (b) for any core principle in this appendix will meet the selected requirements of the applicable core principle. Paragraph (b) is for illustrative purposes only, and does not state the exclusive means for satisfying a core principle.

CORE PRINCIPLE I OF SECTION 2(h)(7)(C)—CONTRACTS NOT READILY SUSCEPTIBLE TO MANIPULATION. The electronic trading facility shall list only significant price discovery contracts that are not readily susceptible to manipulation.

(a) *Guidance.* Upon determination by the Commission that a contract listed for trading on an electronic trading facility is a significant price discovery contract, the electronic trading facility must self-certify the terms and conditions of the significant price discovery contract under § 36.3(c)(4) within 90 calendar days of the date of the Commission's order, if the contract is the electronic trading facility's first significant price discovery contract; or 15 days from the date of the Commission's order if the contract is not the electronic trading facility's first significant price discovery contract. Once the Commission determines that a contract performs a significant price discovery function, subsequent rule changes must be self-certified to the Commission by the electronic trading facility pursuant to § 40.6 of this chapter.

(b) *Acceptable practices.* Guideline No. 1, 17 CFR part 40, Appendix A may be used as guidance in meeting this core principle for significant price discovery contracts.

CORE PRINCIPLE II OF SECTION 2(h)(7)(C)—MONITORING OF TRADING. The electronic trading facility shall monitor trading in significant price discovery contracts to prevent market manipulation, price distortion, and disruptions of the delivery of cash-settlement process through market surveillance, compliance and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded or executed should, with respect to those contracts, demonstrate a capacity to prevent market manipulation and

have trading and participation rules to detect and deter abuses. The facility should seek to prevent market manipulation and other trading abuses through a dedicated regulatory department or by delegation of that function to an appropriate third party. An electronic trading facility also should have the authority to intervene as necessary to maintain an orderly market.

(b) *Acceptable practices.*

(1) *An acceptable trade monitoring program.* An acceptable trade monitoring program should facilitate, on both a routine and non-routine basis, arrangements and resources to detect and deter abuses through direct surveillance of each significant price discovery contract. Direct surveillance of each significant price discovery contract will generally involve the collection of various market data, including information on participants' market activity. Those data should be evaluated on an ongoing basis in order to make an appropriate regulatory response to potential market disruptions or abusive practices. For contracts with a substantial number of participants, an effective surveillance program should employ a much more comprehensive large trader reporting system.

(2) *Authority to collect information and documents.* The electronic trading facility should have the authority to collect information and documents in order to reconstruct trading for appropriate market analysis. Appropriate market analysis should enable the electronic trading facility to assess whether each significant price discovery contract is responding to the forces of supply and demand. Appropriate data usually include various fundamental data about the underlying commodity, its supply, its demand, and its movement through market channels. Especially important are data related to the size and ownership of deliverable supplies—the existing supply and the future or potential supply—and to the pricing of the deliverable commodity relative to the futures price and relative to similar, but non-deliverable, kinds of the commodity. For cash-settled contracts, it is more appropriate to pay attention to the availability and pricing of the commodity making up the index to which the contract will be settled, as well as monitoring the continued suitability of the methodology for deriving the index.

(3) *Ability to assess participants' market activity and power.* To assess participants' activity and potential power in a market, electronic trading facilities, with respect to significant price discovery contracts, at a minimum should have routine access to the positions and trading of its participants and, if applicable, should provide for such access through its agreements with its third-party provider of clearing services.

CORE PRINCIPLE III OF SECTION 2(h)(7)(C)—ABILITY TO OBTAIN INFORMATION. The electronic trading facility shall establish and enforce rules that allow the electronic trading facility to obtain any necessary information to perform any of the functions described in this subparagraph, provide the information to the Commission upon request, and have the capacity to carry out such international information-sharing agreements as the Commission may require.

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded or executed should, with respect to those contracts, have the ability and authority to collect information and documents on both a routine and non-routine basis, including the examination of books and records kept by participants. This includes having arrangements and resources for recording full data entry and trade details and safely storing audit trail data. An electronic trading facility should have systems sufficient to enable it to use the information for purposes of assisting in the prevention of participant and market abuses through reconstruction of trading and providing evidence of any violations of the electronic trading facility's rules.

(b) *Acceptable practices.*

(1) The goal of an audit trail is to detect and deter market abuse. An effective contract audit trail should capture and retain sufficient trade-related information to permit electronic trading facility staff to detect trading abuses and to reconstruct all transactions within a reasonable period of time. An audit trail should include specialized electronic surveillance programs that identify potentially abusive trades and trade patterns. An acceptable audit trail must be able to track an order from time of entry into the trading system through its fill. The electronic trading facility must create and maintain an electronic transaction history database that contains information with respect to transactions executed on each significant price discovery contract.

(2) An acceptable audit trail should include the following: original source documents, transaction history, electronic analysis capability, and safe storage capability. An acceptable audit trail system would satisfy the following practices.

(i) *Original source documents.* Original source documents include unalterable, sequentially identified records on which trade execution information is originally recorded. For each order (whether filled, unfilled or cancelled, each of which should be retained or electronically captured), such records reflect the terms of the order, an account identifier that relates back to the account(s) owner(s), and the time of order entry.

(ii) *Transaction history.* A transaction history consists of an electronic history of each transaction, including:

(A) All the data that are input into the trade entry or matching system for the transaction to match and clear;

(B) Timing and sequencing data adequate to reconstruct trading; and

(C) The identification of each account to which fills are allocated.

(iii) *Electronic analysis capability.* An electronic analysis capability that permits sorting and presenting data included in the transaction history so as to reconstruct trading and to identify possible trading violations with respect to market abuse.

(iv) *Safe storage capability.* Safe storage capability provides for a method of storing the data included in the transaction history in a manner that protects the data from unauthorized alteration, as well as from accidental erasure or other loss. Data should be retained in the form and manner specified by the Commission or, where no acceptable manner of retention is specified, in accordance with the recordkeeping standards of Commission regulation 1.31.

(3) Arrangements and resources for the disclosure of the obtained information and documents to the Commission upon request. To satisfy section 2(h)(7)(C)(III)(bb), the electronic trading facility should maintain records of all information and documents related to each significant price discovery contract in a form and manner acceptable to the Commission. Where no acceptable manner of maintenance is specified, records should be maintained in accordance with the recordkeeping standards of Commission regulation 1.31.

(4) The capacity to carry out appropriate information-sharing agreements as the Commission may require. Appropriate information-sharing agreements could be established with other markets or the Commission can act in conjunction with the electronic trading facility to carry out such information sharing.

CORE PRINCIPLE IV OF SECTION 2(h)(7)(C)—POSITION LIMITATIONS OR ACCOUNTABILITY. The electronic trading facility shall adopt, where necessary and appropriate, position limitations or position accountability for speculators in significant price discovery contracts, taking into account positions in other agreements, contracts and transactions that are treated by a derivatives clearing organization, whether registered or not registered, as fungible with such significant price discovery contracts to reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month.

(a) *Guidance.* [Reserved]

(b) Acceptable practices.

(1) *Introduction.* In order to diminish potential problems arising from excessively large speculative positions, and to facilitate orderly liquidation of expiring contracts, an electronic trading facility relying on the exemption in section 2(h)(3) should adopt rules that set position limits or accountability levels on traders' cleared positions in significant price discovery contracts. These position limit rules specifically may exempt bona fide hedging; permit other exemptions; or set limits differently by market, delivery month or time period. For the purpose of evaluating a significant price discovery contract's speculative-limit program for cleared positions, the Commission will consider the specified position limits or accountability levels, aggregation policies, types of exemptions allowed, methods for monitoring compliance with the specified limits or levels, and procedures for dealing with violations.

(2) *Accounting for cleared and uncleared trades.*

(i) Speculative-limit levels typically should be set in terms of a trader's combined position involving cleared trades in a significant price discovery contract, plus positions in agreements, contracts and transactions that are treated by a derivatives clearing organization, whether registered or not registered, as fungible with such significant price discovery contract. (This

circumstance typically exists where an exempt commercial market lists a particular contract for trading but also allows for positions in that contract to be cleared together with positions established through bilateral or off-exchange transactions, such as block trades, in the same contract. Essentially, both the on-facility and off-facility transactions are considered fungible with each other.) In this connection, the electronic trading facility should make arrangements to ensure that it is able to ascertain accurate position data for the market.

(ii) For significant price discovery contracts that may be traded on either a cleared or an uncleared basis, the electronic trading facility should apply position limits to cleared transactions in the contract. For those transactions in the contract that are not cleared, the electronic trading facility should establish accountability procedures for monitoring traders' overall positions and take that information into account when ascertaining whether an individual trader's overall position poses a threat to the market.

(3) *Limitations on spot-month positions.* Spot-month limits should be adopted for significant price discovery contracts to minimize the susceptibility of the market to manipulation or price distortions, including squeezes and corners or other abusive trading practices.

(i) *Contracts economically equivalent to an existing contract.* An electronic trading facility that lists a significant price discovery contract that is economically-equivalent to another significant price discovery contract or to a contract traded on a designated contract market or derivatives transaction execution facility should set the spot-month limit for its significant price discovery contract at the same level as that specified for the economically-equivalent contract.

(ii) *Contracts that are not economically equivalent to an existing contract.* There may not be an economically-equivalent significant price discovery contract or economically equivalent contract traded on a designated contract market or derivatives transaction execution facility. In this case, the spot-month speculative position limit should be established in the following manner. The spot-month limit for a physical delivery market should be based upon an analysis of deliverable supplies and the history of spot-month liquidations. The spot-month limit for a physical-delivery market is appropriately set at no more than 25 percent of the estimated deliverable supply. In the case where a significant price discovery contract has a cash settlement provision, the spot-month limit should be set at a level that minimizes the potential for price manipulation or distortion in the significant price discovery contract itself; in related futures and options contracts traded on a designated contract market or derivatives transaction execution facility; in other significant price discovery contracts; in other fungible agreements, contracts and transactions; and in the underlying commodity.

(4) *Position accountability for non-spot-month positions.* The electronic trading facility should establish for its significant price discovery contracts non-spot individual month position accountability levels and all-months-combined position accountability levels. An electronic trading facility may establish non-spot individual month position limits and all-months-combined position limits for its significant price discovery contracts in lieu of position accountability levels.

(i) *Definition.* Position accountability provisions provide a means for an exchange to monitor traders' positions that may threaten orderly trading. An acceptable accountability provision sets target accountability threshold levels that may be exceeded, but once a trader breaches such accountability levels, the electronic trading facility should initiate an investigation to determine whether the individual's trading activity is justified and is not intended to manipulate the market. As part of its investigation, the electronic trading facility should inquire about the trader's rationale for holding a position in excess of the accountability levels. An acceptable accountability provision should provide the electronic trading facility with the authority to order the trader not to further increase positions. If a trader fails to comply with a request for information about positions held, provides information that does not sufficiently justify the position, or continues to increase contract positions after a request not to do so is issued by the facility, then the accountability provision should enable the electronic trading facility to require the trader to reduce positions.

(ii) *Contracts economically equivalent to an existing contract.* When an electronic trading facility lists a significant price discovery contract that is economically equivalent to another significant price discovery contract or to a contract traded on a designated contract market or derivatives transaction execution facility, the electronic trading facility should set the non-spot individual month position accountability level and all-months-combined position accountability level for its significant price discovery contract at the same levels, or lower, as those specified for the economically-equivalent contract.

(iii) *Contracts that are not economically equivalent to an existing contract.* For significant price discovery contracts that are not economically equivalent to an existing contract, the trading facility shall adopt non-spot individual month and all-months-combined position accountability levels that are no greater than 10 percent of the average combined futures and delta-adjusted option month-end open interest for the most recent calendar year. For electronic trading facilities that choose to adopt non-spot individual month and all-months-combined position limits in lieu of position accountability levels for their significant price discovery contracts, the limits should be set in the same manner as the accountability levels.

(iv) *Contracts economically equivalent to an existing contract with position limits.* If a significant price discovery contract is economically equivalent to another significant price discovery contract or to a contract traded on a designated contract market or derivatives transaction execution facility that has adopted non-spot or all-months-combined position limits, the electronic trading facility should set non-spot month position limits and all-months-combined position limits for its significant price discovery contract at the same (or lower) levels as those specified for the economically-equivalent contract.

(5) *Provisions for uncleared contracts.* If an electronic trading facility offers a significant price discovery contract that is exclusively uncleared, or one that may be either cleared by a derivatives clearing organization or uncleared at the discretion of the trader, the trading facility should establish for the uncleared trades a spot-month volume accountability level equal to the spot-month speculative position limit. In this regard, the electronic trading facility should keep track of each trader's uncleared transactions in a significant price discovery contract on a net basis. (For the purpose of netting uncleared transactions, long and short uncleared transactions are only offset if they are conducted with the same counterparty.) If a particular trader's net volume of uncleared transactions exceeds the specified spot-month volume accountability level, the electronic trading facility should conduct an investigation to determine whether the trader's trading activity is warranted and is not intended to manipulate the market.

(6) *Account aggregation.* An electronic trading facility should have aggregation rules for significant price discovery contracts that apply to accounts under common control, those with common ownership, *i.e.*, where there is a ten percent or greater financial interest, and those traded according to an express or implied agreement. Such aggregation rules should apply to cleared transactions with respect to applicable speculative position limits, as well as to uncleared transactions with respect to applicable spot-month volume accountability levels. An electronic trading facility will be permitted to set more stringent aggregation policies. An electronic trading facility may grant exemptions to its price discovery contracts' position limits for bona fide hedging (as defined in § 1.3(z) of this chapter) and may grant exemptions for reduced risk positions, such as spreads, straddles and arbitrage positions.

(7) *Implementation deadlines.* An electronic trading facility with a significant price discovery contract is required to comply with Core Principle IV as set forth in section 2(h)(7)C) of the Act within 90 calendar days of the date of the Commission's order determining that the contract performs a significant price discovery function if such contract is the electronic trading facility's first significant price discovery contract, or within 15 days of the date of the Commission's order if such contract is not the electronic trading facility's first significant price discovery contract. For the purpose of applying limits on speculative positions in newly-determined significant price discovery contracts, the Commission will permit a grace period following issuance of its order for traders with cleared positions in such contracts to become compliant with applicable position limit rules. Traders who hold cleared positions on a net basis in the

electronic trading facility's significant price discovery contract must be at or below the specified position limit level no later than 90 calendar days from the date of the electronic trading facility's implementation of position limit rules, unless a hedge exemption is granted by the electronic trading facility. This grace period applies to both initial and subsequent price discovery contracts. Electronic trading facilities should notify traders of this requirement promptly upon implementation of such rules.

(8) *Enforcement provisions.* The electronic trading facility should have appropriate procedures in place to monitor its position limit and accountability provisions and to address violations.

(i) An electronic trading facility with significant price discovery contracts should use an automated means of detecting traders' violations of speculative limits or exemptions, particularly if the significant price discovery contracts have large numbers of traders. An electronic trading facility should monitor the continuing appropriateness of approved exemptions by periodically reviewing each trader's basis for exemption or requiring a reapplication. An automated system also should be used to determine whether a trader has exceeded applicable non-spot individual month position accountability levels, all-months-combined position accountability levels, and spot-month volume accountability levels.

(ii) An electronic trading facility should establish a program for effective enforcement of position limits for significant price discovery contracts. Electronic trading facilities should use a large trader reporting system to monitor and enforce daily compliance with position limit rules. The Commission notes that an electronic trading facility may allow traders to periodically apply to the electronic trading facility for an exemption and, if appropriate, be granted a position level higher than the applicable speculative limit. The electronic trading facility should establish a program to monitor approved exemptions from the limits. The position levels granted under such hedge exemptions generally should be based upon the trader's commercial activity in related markets including, but not limited to, positions held in related futures and options contracts listed for trading on designated contract markets, fungible agreements, contracts and transactions, as determined by either a registered or unregistered derivatives clearing organization. Electronic trading facilities may allow a brief grace period where a qualifying trader may exceed speculative limits or an existing exemption level pending the submission and approval of appropriate justification. An electronic trading facility should consider whether it wants to restrict exemptions during the last several days of trading in a delivery month. Acceptable procedures for obtaining and granting exemptions include a requirement that the electronic trading facility approve a specific maximum higher level.

(iii) An acceptable speculative limit program should have specific policies for taking regulatory action once a violation of a position limit or exemption is detected. The electronic trading facility policies should consider appropriate actions.

(9) *Violation of Commission rules.* A violation of position limits for significant price discovery contracts that have been self-certified by an electronic trading facility also a violation of section 4a(e) of the Act.

CORE PRINCIPLE V OF SECTION 2(h)(7)(C)—EMERGENCY AUTHORITY—The electronic trading facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, where necessary and appropriate, including the authority to liquidate open positions in significant price discovery contracts and to suspend or curtail trading in a significant price discovery contract.

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded should have clear procedures and guidelines for decision-making regarding emergency intervention in the market, including procedures and guidelines to avoid conflicts of interest while carrying out such decision-making. An electronic trading facility on which significant price discovery contracts are executed or traded should also have the authority to intervene as necessary to maintain markets with fair and orderly trading as well as procedures for carrying out the intervention. Procedures and guidelines should include notifying the Commission of the exercise of the electronic trading facility's regulatory emergency authority, explaining how conflicts of interest are minimized, and documenting the electronic trading facility's decision-making process and the reasons for using its emergency action authority. Information on steps taken under such procedures should be included in a submission of a certified rule and any related submissions for rule approval pursuant to part 40 of this chapter, when carried out pursuant to an electronic trading facility's emergency authority. To address perceived market threats, the electronic trading facility on which significant price discovery contracts are executed or traded should, among other things, be able to impose position limits in the delivery month, impose or modify price limits, modify circuit breakers, call for additional margin either from market participants or clearing members (for contracts that are cleared through a clearinghouse), order the liquidation or transfer of open positions, order the fixing of a settlement price, order a reduction in positions, extend or shorten the expiration date or the trading hours, suspend or curtail trading on the electronic trading facility, order the transfer of contracts and the margin for such contracts from one market participant to another, or alter the delivery terms or conditions or, if applicable, should provide for such actions through its agreements with its third-party provider of clearing services.

(b) *Acceptable practices.* [Reserved]

CORE PRINCIPLE VI OF SECTION 2(h)(7)(C)—DAILY PUBLICATION OF TRADING INFORMATION. The electronic trading facility shall make public daily information on price, trading volume, and other trading data to the extent appropriate for significant price discovery contracts.

(a) *Guidance.* An electronic trading facility, with respect to significant price discovery contracts, should provide to the public information regarding settlement prices, price range, volume, open interest, and other related market information for all applicable contracts as determined by the Commission on a fair, equitable and timely basis. Provision of information for any applicable contract can be through such means as provision of the information to a financial information service or by timely placement of the information on the electronic trading facility's public Web site.

(b) *Acceptable practices.* Compliance with § 16.01 of this chapter, which is mandatory, is an acceptable practice and satisfies the requirements of under Core Principle VI.

CORE PRINCIPLE VII OF SECTION 2(h)(7)(C)—COMPLIANCE WITH RULES. The electronic trading facility shall monitor and enforce compliance with the rules of the electronic trading facility, including the terms and conditions of any contracts to be traded and any limitations on access to the electronic trading facility.

(a) *Guidance.*

(1) An electronic trading facility on which significant price discovery contracts are executed or traded should have appropriate arrangements and resources for effective trade practice surveillance programs, with the authority to collect information and documents on both a routine and non-routine basis, including the examination of books and records kept by its market participants. The arrangements and resources should facilitate the direct supervision of the market and the analysis of data collected. Trade practice surveillance programs may be carried out by the electronic trading facility itself or through delegation or contracting-out to a third party. If the electronic trading facility on which significant price discovery contracts are executed or traded delegates or contracts-out the trade practice surveillance responsibility to a third party, such third party should have the capacity and authority to carry out such programs, and the electronic trading facility should retain appropriate supervisory authority over the third party.

(2) An electronic trading facility on which significant price discovery contracts are executed or traded should have arrangements, resources and authority for effective rule enforcement. The Commission believes that this should include the authority and ability to discipline and limit or suspend the activities of a market participant as well as the authority and ability to terminate the activities of a market participant pursuant to clear and fair standards. The electronic trading facility can satisfy this criterion for market participants by expelling or denying such person's future access upon a determination that such a person has violated the electronic trading facility's rules.

(b) *Acceptable practices.* An acceptable trade practice surveillance program generally would include:

(1) Maintenance of data reflecting the details of each transaction executed on the electronic trading facility;

(2) Electronic analysis of this data routinely to detect potential trading violations;

(3) Appropriate and thorough investigative analysis of these and other potential trading violations brought to the electronic trading facility's attention; and

(4) Prompt and effective disciplinary action for any violation that is found to have been committed. The Commission believes that the latter element should include the authority and ability to discipline and limit or suspend the activities of a market participant pursuant to clear and fair standards that are available to market participants. *See, e.g.*, 17 CFR part 8.

CORE PRINCIPLE VIII OF SECTION 2(h)(7)(C)—CONFLICTS OF INTEREST. The electronic trading facility on which significant price discovery contracts are executed or traded shall establish and enforce rules to minimize conflicts of interest in the decision-making process of the electronic trading facility and establish a process for resolving such conflicts of interest.

(a) *Guidance.*

(1) The means to address conflicts of interest in the decision-making of an electronic trading facility on which significant price discovery contracts are executed or traded should include methods to ascertain the presence of conflicts of interest and to make decisions in the event of such a conflict. In addition, the Commission believes that the electronic trading facility on which significant price discovery contracts are executed or traded should provide for appropriate limitations on the use or disclosure of material non-public information gained through the performance of official duties by board members, committee members and electronic trading facility employees or gained through an ownership interest in the electronic trading facility or its parent organization(s).

(2) All electronic trading facilities on which significant price discovery contracts are traded bear special responsibility to regulate effectively, impartially, and with due consideration of the public interest, as provided in section 3 of the Act. Under Core Principle VIII, they are also required to minimize conflicts of interest in their decision-making processes. To comply with this core principle, electronic trading facilities on which significant price discovery contracts are traded should be particularly vigilant for such conflicts between and among any of their self-regulatory responsibilities, their commercial interests, and the several interests of their management, members, owners, market participants, other industry participants and other constituencies.

(b) *Acceptable practices.* [Reserved]

CORE PRINCIPLE IX OF SECTION 2(h)(7)(C)—ANTITRUST CONSIDERATIONS. Unless necessary or appropriate to achieve the purposes of this Act, the electronic trading facility, with respect to any significant price discovery contracts, shall endeavor to avoid adopting any rules or taking any actions that result in any unreasonable restraints of trade or imposing any material anticompetitive burden on trading on the electronic trading facility.

(a) *Guidance.* An electronic trading facility, with respect to a significant price discovery contract, may at any time request that the Commission consider under the provisions of section 15(b) of the Act any of the electronic trading facility's rules, which may be trading protocols or policies, operational rules, or terms or conditions of any significant price discovery contract. The Commission intends to apply section 15(b) of the Act to its consideration of issues under this core principle in a manner consistent with that previously applied to contract markets.

(b) *Acceptable practices.* [Reserved]

PART 40—PROVISIONS COMMON TO REGISTERED ENTITIES

33. The authority citation for part 40 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a, 8 and 12a, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1624 (June 18, 2008).

34. Revise the heading of part 40 as set forth above.

35. Amend § 40.1 as follows:

A. Remove the term ''registered entity'' and add in its place the term ''contract market, derivatives transaction execution facility or derivatives clearing organization'' in paragraphs (b)(2), (b)(3), and (f)(2); and

B. Remove the term ''contract market, derivatives transaction execution facility or derivatives clearing organization'' and add in its place the term ''registered entity'' in paragraph (h).

36. Amend § 40.2 as follows:

A. Remove the term ''registered entity'' and add in its place ''contract market, derivatives transaction execution facility on which significant price discovery contracts are traded or executed'' in paragraph (a);

B. Remove the term ''registered entity'' and add in its place ''contract market, derivatives transaction execution facility or derivatives clearing organization'' in paragraphs (a)(1) and (a)(3)(iv); and

C. Revise paragraph (b) to read as follows:

§ 40.2 Listing and accepting products for trading or clearing by certification.

* * * * *

(b) A registered entity shall provide, if requested by Commission staff, additional evidence, information or data relating to whether any contract meets, initially or on a continuing basis, any of the requirements of the Act or Commission regulations or policies thereunder which may be beneficial to the Commission in conducting a due diligence assessment of the product and the entity's compliance with these requirements.

* * * * *

37. In § 40.3, remove the term ''registered entity'' and add in its place the term ''designated contract market or registered derivatives transaction execution facility'' in paragraphs (a)(1), (c)(1), (c)(2), and (e)(2).

38. In § 40.4, remove the term ''registered entity'' and add in its place the term ''designated contract market'' in paragraph (b)(9)(ii).

39. In § 40.6, revise paragraphs (a)(2), (c)(3)(ii)(G), and (c)(3)(ii)(H) to read as follows:

§ 40.6 Self-certification of rules.

(a) * * *

(2) The registered entity has filed its submission electronically in a format specified by the Secretary of the Commission with the Secretary of the Commission at *submissions@cftc.gov*, the relevant branch chief at the regional office having local jurisdiction over the registered entity, and, for filings submitted by a designated contract market, registered derivatives transaction execution facility, or electronic trading facility on which significant price discovery contracts are traded or executed, the Division of Market Oversight at *DMOSubmissions@cftc.gov,* and the Commission has received the submission at its headquarters by the open of business on the business day preceding implementation of the rule; *provided, however,* rules or rule amendments implemented under procedures of the governing board to respond to an emergency as defined in § 40.1, shall, if practicable, be filed with the Commission prior to the implementation or, if not practicable, be filed with the Commission at the earliest possible time after implementation, but in no event more than twenty-four hours after implementation; and

* * * * *

(c) * * *

(3) * * *

(ii) * * *

(G) *Option contract terms.* For registered entities that are in compliance with the daily reporting requirements of § 16.01 of this chapter, changes to option contract rules relating to the strike price listing procedures, strike price intervals, and the listing of strike prices on a discretionary basis.

(H) *Trading months.* For registered entities that are in compliance with the daily reporting requirements of § 16.01 of this chapter, the initial listing of trading months which are within the currently established cycle of trading months.

40. In § 40.7, remove the term ''designated contract market, registered derivatives transaction execution

facility or registered derivatives clearing organization'' and add in its place the term ''registered entity'' in paragraph (b) introductory text.

41. In § 40.8, revise paragraph (a), redesignate paragraph (b) as paragraph (c), and add new paragraph (b) to read as follows:

§ 40.8 Availability of public information.

(a) The following sections of all applications to become a designated contract market, derivatives execution transaction facility or designated clearing organization will be public: transmittal letter, proposed rules, the applicant's regulatory compliance chart, documents establishing the applicant's legal status, documents setting forth the applicant's governance structure, and any other part of the application not covered by a request for confidential treatment.

(b) The following submissions required by § 36.3(c)(4) by an electronic trading facility on which significant price discovery contracts are traded or executed will be public: rulebook, the facility's regulatory compliance chart, documents establishing the facility's legal status, documents setting forth the facility's governance structure, and any other parts of the submissions not covered by a request for confidential treatment.

* * * * *

42. Revise Appendix D to part 40 to read as follows:

Appendix D to Part 40—Submission Cover Sheet and Instructions

A properly completed submission cover sheet must accompany all rule submissions submitted electronically by a registered entity to the Secretary of the Commodity Futures Trading Commission, at *submissions@cftc.gov* in a format specified by the Secretary of the Commission. Each submission should include the following:

1. *Identifier Code (optional)*—If applicable, the exchange or clearing organization Identifier Code at the top of the cover sheet. Such codes are commonly generated by the exchanges or clearing organizations to provide an identifier that is unique to each filing (e.g., NYMEX Submission 03–116).

2. *Date*—The date of the filing.

3. *Organization*—The name of the organization filing the submission (*e.g.*, CBOT).

4. *Filing as a*—Check the appropriate box for a designated contract market (DCM), derivatives clearing organization (DCO), derivatives transaction execution facility (DTEF), or electronic trading facility with a significant price discovery contract (ECM–SPDC).

5. *Type of Filing*—Indicate whether the filing is a rule amendment or new product and the applicable category under that heading.

6. *Rule Numbers*—For rule filings only, identify rule number(s) being adopted or modified in the case of rule amendment filings.

7. *Description*—For rule or rule amendment filings only, enter a brief description of the new rule or rule amendment. This narrative should describe the substance of the submission with enough specificity to characterize all essential aspects of the filing.

8. *Other Requirements*—Comply with all filing requirements for the underlying proposed rule or rule amendment. The filing of the submission cover sheet does not obviate the responsibility to comply with any applicable filing requirement (e.g., rules submitted for Commission approval under § 40.5 must be accompanied by an explanation of the purpose and effect of the proposed rule along with a description of any substantive opposing views).

A sample of the required submission cover sheet follows.

BILLING CODE 6351–01–P

SUBMISSION COVER SHEET

Exchange Identifier Code (optional) **Date:**

***IMPORTANT*:**

CHECK BOX IF CONFIDENTIAL TREATMENT IS REQUESTED. ☐

ORGANIZATION

FILING AS A: ☐ **DCM** ☐ **DCO** ☐ **DTEF** ☐ **ECM/SPDC**

TYPE OF FILING

- **Rule Amendments**
  - ☐ Self-Certification Under Reg. 40.6(a) or 41.24
  - ☐ Commission Approval Requested Under Reg. 40.5 or 40.4 (a)
  - ☐ Notification of Rule Amendment Under Reg. 40.6(c)
  - ☐ Non-Material Agricultural Rule Change Determination Under Reg. 40.4(b)
- **New Products**
  - ☐ Self-Certification Under Reg. 40.2 or 41.23
  - ☐ Commission Approval Requested Under Reg. 40.3

RULE NUMBERS

DESCRIPTION (Rule Amendments Only)

Issued in Washington, DC, on December 2, 2008, by the Commission.

David Stawick,

Secretary of the Commission.

[FR Doc. E8–28867 Filed 12–11–08; 8:45 am]

BILLING CODE 6351–01–C

Federal Register

Friday,
December 12, 2008

Part IV

The President

Proclamation 8328—Human Rights Day, Bill of Rights Day, And Human Rights Week, 2008

Federal Register
Vol. 73, No. 240
Friday, December 12, 2008

Presidential Documents

Title 3—

The President

Proclamation 8328 of December 8, 2008

Human Rights Day, Bill of Rights Day, And Human Rights Week, 2008

By the President of the United States of America

A Proclamation

The United States was founded on the principle that government must respect people's rights to speak freely, worship as they choose, and pursue their dreams in liberty. As we remember the enduring importance of our Constitution's Bill of Rights, our thoughts turn to those who have yet to secure these precious liberties. During Human Rights Day, Bill of Rights Day, and Human Rights Week, Americans celebrate the rights bestowed upon all by our Creator and reaffirm our deep commitment to helping those whose desire for liberty and justice is still dismissed and denied.

In a free society, every person is treated with dignity and can rise as high as their talents and hard work will take them. Yet in countries like Belarus, Burma, Cuba, Iran, North Korea, Sudan, Syria, and Zimbabwe, fervent pleas for freedom are silenced by tyranny and oppression. So long as there are people who fight for liberty, the United States will stand with them and speak out for those who have no other voice.

Freedom is the eternal birthright of all mankind, and during Human Rights Day, Bill of Rights Day, and Human Rights Week, we renew our commitment to lead the cause of human rights and pray for the day when the light of liberty will shine on all of humanity.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim December 10, 2008, as Human Rights Day; December 15, 2008, as Bill of Rights Day; and the week beginning December 10, 2008, as Human Rights Week. I call upon the people of the United States to mark these observances with appropriate ceremonies and activities.

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

[FR Doc. E8–29704
Filed 12–11–08; 11:15 am]
Billing code 3195–W9–P

Reader Aids

Federal Register

Vol. 73, No. 240

Friday, December 12, 2008

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6064**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**
TTY for the deaf-and-hard-of-hearing	**741–6086**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **http://www.gpoaccess.gov/nara/index.html**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **http://www.archives.gov/federal_register**

E-mail

FEDREGTOC-L (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings);* then follow the instructions.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC-L and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, DECEMBER

72687–73148 1
73149–73544 2
73545–73760 3
73761–73994 4
73995–74342 5
74343–74604 8
74605–74926 9
74927–75304 10
75305–75534 11
75535–75926 12

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
8324 73149
8325 73151
8326 74925
8327 75293
8328 00000

Executive Orders:
12171 (amended by 13480) 73991
13480 73991
13481 75531

Administrative Orders:
Memorandums:
Memorandum of July 10, 2002 (superseded by Memorandum of December 9, 2008) 00000
Memorandum of December 8, 2006 (superseded by EO 13481) 75531
Memorandum of December 9, 2008 75531
Memorandum of December 9, 2008 75535

5 CFR

Proposed Rules:
315 74071
316 74071
532 74374
591 74858
9901 73606

6 CFR

Proposed Rules:
5 ..... 74632, 74633, 74635, 74637, 75372, 75373

7 CFR

250 74605
301 75537
761 74343
762 74343
764 74343
767 74343
920 75537
946 74346
984 ..... 73761, 73995
1430 73764

Proposed Rules:
319 74073
930 74073
1205 72747
1220 74078
1487 73617

8 CFR

103 75540
212 75540
214 75540
245 75540
299 ..... 74605, 75540

9 CFR

317 75564
381 75564

10 CFR

Proposed Rules:
430 74639
1004 74658
1010 72748

11 CFR

111 72687

12 CFR

308 73153
327 73158
701 73392
702 72688
704 72688

Proposed Rules:
226 74989

13 CFR

120 75498

14 CFR

1 73768
25 73997
39 ..... 73165, 73168, 73169, 73545, 73782, 73785, 75305, 75307, 75312, 75314, 75316, 75319
91 73171
97 ..... 74927, 74928
101 73768
121 73171
125 73171
400 73768
401 73768
420 73768

Proposed Rules:
23 73195
39 ..... 73618, 74080, 74661, 74999, 75007, 75009
71 ..... 74376, 74377, 74378, 75011, 75013
234 74586
259 74586
399 74586

15 CFR

6 75321
744 73999
760 74348
770 73547
774 73547
902 74003

17 CFR

Proposed Rules:
15.....75888
16.....75888
17.....75888
18.....75888
19.....75888
21.....75888
36.....75888
40.....75888

18 CFR

284.....72692, 73494

19 CFR

351.....74930
Proposed Rules:
360.....75624

20 CFR

Proposed Rules:
416.....74663

21 CFR

101.....74349
556.....72714
558.....72714, 75323
1300.....73549
1315.....73549
1316.....73549
Proposed Rules:
Ch. I.....75625

22 CFR

Proposed Rules:
62.....75015

24 CFR

576.....75324
582.....75324
583.....75324

25 CFR

293.....74004

26 CFR

1.....75326, 75566
301.....73180
Proposed Rules:
1.....73197, 74380
31.....74082

28 CFR

26.....75327
28.....74932
73.....73181

29 CFR

1910.....75568
1915.....75568
1917.....75246, 75568
1918.....75246, 75568
1926.....75568
4022.....72715
4044.....72716
Proposed Rules:
1926.....73197

30 CFR

780.....75814
784.....75814
816.....75814
817.....75814
924.....74943
938.....72717

31 CFR

103.....74010
380.....75589
560.....73788

32 CFR

199.....74945
706 .....72725, 73556, 73557, 75591
Proposed Rules:
185.....73896

33 CFR

117.....74018, 74966
Proposed Rules:
117.....72752

34 CFR

99.....74806
300.....73006

36 CFR

2.....74966
7.....74606
212.....74612

37 CFR

41.....74972
381.....72726

38 CFR

53.....73558

39 CFR

912.....75339
Proposed Rules:
3001.....72754

40 CFR

Ch. I.....75592
19.....75340
27.....75340
52 .....73562, 74019, 74027, 74029, 75600
63.....72727
80.....74403
112.....74236, 75346
180 .....73580, 73586, 74972, 74978, 75601, 75605
220.....74983
221.....74983
222.....74983
223.....74983
224.....74983
227.....74983
228.....74983
261.....72912
262.....72912
1045.....73789
1054.....73789
1065.....73789
Proposed Rules:
Ch. I.....73620
52 .....74096, 74097, 74098, 75626
60.....72962, 73629
61.....73629
63 .....72756, 73629, 73631
80.....74350
158.....75629
161.....75629
180.....73632
260.....73520
261.....73520
264.....73520
265.....73520
268.....73520
270.....73520
273.....73520

42 CFR

440.....73694
Proposed Rules:
84.....75027, 75045

43 CFR

419.....74031
429.....74326
423.....75347
2300.....74039
3800.....73789

44 CFR

64.....75609
67.....73182
Proposed Rules:
67.....74666, 74673

45 CFR

301.....74898
302.....74898
303.....74898
304.....74898
Proposed Rules:
301.....74408
302.....74408
303.....74408
305.....74408
308.....74408

46 CFR

Proposed Rules:
71.....74426
114.....74426
115.....74426
122.....74426
170.....74426
171.....74426
172.....74426
174.....74426
175.....74426
176.....74426
178.....74426
179.....74426
185.....74426

47 CFR

51.....72732
54.....72732
61.....72732
69.....72732
73.....73192, 74047
Proposed Rules:
Ch. 1.....75629
1.....75376
73 .....73199, 75381, 75630, 75631

48 CFR

533.....74613
552.....74613
Proposed Rules:
536.....73199
1804.....73201
1845.....73202
1852.....73201, 73202

49 CFR

192.....72737
229.....74070
232.....74070
383.....73096
384.....73096
390.....73096
391.....73096
Proposed Rules:
89.....74098
213.....73078
390.....73129
391.....73129
571.....72758
573.....74101
575.....72758
579.....72758, 74101

50 CFR

14.....74615
17 .....73794, 74357, 75356
27.....74966
229 .....73032, 75611, 75613
300.....72737
404.....73592
622.....73192
648.....74373, 74631
660.....72739, 72740
665.....75615, 75622
679.....74987
Proposed Rules:
17 .....73211, 74123, 74427, 74434, 74674, 74675, 75176
21.....74445, 74447
216.....75631
226.....74681
622.....73219
635.....75382
665.....75057
679 .....73222, 75059, 75659
680.....74129, 75661

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT DECEMBER 12, 2008

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Almonds Grown in California:

Relaxation of Incoming Quality Control Requirements; published 11-12-08

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service

Citrus Canker; Movement of Fruit from a Quarantined Area; Bag Markings; published 12-12-08

AGRICULTURE DEPARTMENT

Food Safety and Inspection Service

Uniform Compliance Date for Food Labeling Regulations; published 12-12-08

DEFENSE DEPARTMENT

Federal Acquisition Regulation:

FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements; published 11-12-08

DEFENSE DEPARTMENT

Navy Department

Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea (1972); published 12-12-08

ENVIRONMENTAL PROTECTION AGENCY

Approval and Promulgation of Implementation Plans:

San Joaquin Valley Air Basin, CA; published 11-12-08

Pesticide Tolerance:

Etofenprox; published 12-12-08

Pesticide Tolerances:

Isoxaflutole; published 12-12-08

GENERAL SERVICES ADMINISTRATION

Federal Acquisition Regulation:

FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements; published 11-12-08

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Federal Acquisition Regulation:

FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements; published 11-12-08

TREASURY DEPARTMENT

Fiscal Service

Collateral Acceptability and Valuation; published 12-12-08

TREASURY DEPARTMENT

Internal Revenue Service

Creditor Continuity of Interest; published 12-12-08

RULES GOING INTO EFFECT DECEMBER 13, 2008

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Kiwifruit Grown in California; Decreased Assessment Rate; published 12-12-08

RULES GOING INTO EFFECT DECEMBER 14, 2008

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Taking of Marine Mammals Incidental to Commercial Fishing Operations:

Atlantic Large Whale Take Reduction Plan; published 12-12-08

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Rural Business-Cooperative Service

Rural Development Grants; comments due by 12-15-08; published 10-15-08 [FR E8-23286]

AGRICULTURE DEPARTMENT

Rural Housing Service

Rural Development Grants; comments due by 12-15-08; published 10-15-08 [FR E8-23286]

AGRICULTURE DEPARTMENT

Rural Utilities Service

Amending the Household Water Well System Grant Program Regulations; comments due by 12-18-08; published 11-18-08 [FR E8-26769]

Rural Development Grants; comments due by 12-15-08; published 10-15-08 [FR E8-23286]

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Atlantic Highly Migratory Species:

Atlantic Swordfish Quotas; comments due by 12-18-08; published 11-18-08 [FR E8-27337]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic:

Amendments to the Spiny Lobster Fishery Management Plans for the Caribbean and Gulf of Mexico and South Atlantic; comments due by 12-15-08; published 10-29-08 [FR E8-25823]

Spiny Lobster (Panulirus argus) Resources of the Caribbean, Gulf of Mexico, and South Atlantic; Minimum Conservation Standards for Imported Spiny Lobster; comments due by 12-15-08; published 10-15-08 [FR E8-24484]

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries:

Specifications and Management Measures; comments due by 12-17-08; published 11-17-08 [FR E8-27225]

Fisheries off West Coast States; Pacific Coast Groundfish Fishery:

Pacific Whiting Allocation; comments due by 12-16-08; published 12-1-08 [FR E8-28468]

Magnuson-Stevens Act Provisions; Scientific and Statistical Committees; Peer Review; National Standard Guidelines; comments due by 12-17-08; published 9-18-08 [FR E8-21837]

DEFENSE DEPARTMENT

Defense Acquisition Regulations System

Defense Federal Acquisition Regulation Supplement:

Clarification of Central Contractor Registration and Procurement Instrument Identification Data Requirements; comments due by 12-19-08; published 10-20-08 [FR E8-24486]

EDUCATION DEPARTMENT

Rehabilitation Training; comments due by 12-15-08; published 11-14-08 [FR E8-27136]

ENERGY DEPARTMENT

Energy Conservation Program:

Energy Conservation Standards for Certain Consumer Products and for Certain Commercial and Industrial Equipment; comments due by 12-16-08; published 10-17-08 [FR E8-23405]

ENVIRONMENTAL PROTECTION AGENCY

Approval and Promulgation of Air Quality Implementation Plans:

Virginia; Amendments to Ambient Air Quality Standards for Particulate Matter; comments due by 12-17-08; published 11-17-08 [FR E8-27192]

California State Implementation Plan, Ventura County Air Pollution Control District; Revisions; comments due by 12-19-08; published 11-19-08 [FR E8-27484]

Environmental Statements; Notice of Intent:

Coastal Nonpoint Pollution Control Programs; States and Territories—

Florida and South Carolina; Open for comments until further notice; published 2-11-08 [FR 08-00596]

Federal Antidegradation Policy Applicable to Waters of the United States within the Commonwealth of Pennsylvania; removal; comments due by 12-15-08; published 11-14-08 [FR E8-27209]

Removing the Federal Antidegradation Policy Applicable to Waters of the United States:

Commonwealth of Pennsylvania; comments due by 12-15-08; published 12-30-99 [FR E8-26951]

State Implementation Plans:

CA Revisions; Great Basin Unified Air Pollution Control District et al.; comments due by 12-18-08; published 11-18-08 [FR E8-27301]

FEDERAL COMMUNICATIONS COMMISSION

Radio Broadcasting Services:

Marquez, TX; comments due by 12-15-08; published 11-10-08 [FR E8-26741]

Silverpeak, NV; comments due by 12-15-08; published 11-7-08 [FR E8-26511]

Williston, SC; comments due by 12-15-08; published 11-10-08 [FR E8-26747]

FEDERAL DEPOSIT INSURANCE CORPORATION

Deposit Insurance Regulations:

Temporary Increase in Standard Coverage Amount; Mortgage Servicing Accounts; comments due by 12-16-08; published 10-17-08 [FR E8-24626]

FEDERAL HOUSING FINANCE BOARD

Affordable Housing Program Amendments

Federal Home Loan Bank Mortgage Refinancing Authority; comments due by 12-16-08; published 10-17-08 [FR E8-24320]

FEDERAL HOUSING FINANCING AGENCY

Affordable Housing Program Amendments

Federal Home Loan Bank Mortgage Refinancing Authority; comments due by 12-16-08; published 10-17-08 [FR E8-24320]

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Applications for Food and Drug Administration Approval to Market a New Drug; Postmarketing Reports:

Reporting Information About Authorized Generic Drugs; Companion Document to Direct Final Rule; comments due by 12-15-08; published 9-29-08 [FR E8-22829]

Reporting Information About Authorized Generic Drugs; comments due by 12-15-08; published 9-29-08 [FR E8-22833]

HOMELAND SECURITY DEPARTMENT

Coast Guard

Safety Zones:

Fireworks Displays within the Fifth Coast Guard District; comments due by 12-15-08; published 11-14-08 [FR E8-27007]

Security Zone:

West Basin, Port Canaveral Harbor, Cape Canaveral, FL; comments due by 12-19-08; published 10-20-08 [FR E8-24808]

Security Zones; Escorted Vessels, Mobile, AL, Captain of the Port Zone; comments due by 12-15-08; published 11-13-08 [FR E8-26900]

HOMELAND SECURITY DEPARTMENT

Federal Emergency Management Agency

Agency Information Collection Activities; Proposals, Submissions, and Approvals; comments due by 12-15-08; published 10-15-08 [FR E8-24475]

Proposed Flood Elevation Determinations; comments due by 12-16-08; published 9-17-08 [FR E8-21687]

HOMELAND SECURITY DEPARTMENT

Privacy Act of 1974; Implementation of Exemptions; comments due by 12-15-08; published 11-14-08 [FR E8-27093]

HOUSING AND URBAN DEVELOPMENT DEPARTMENT

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

Inspector Candidate Assessment Questionnaire; comments due by 12-15-08; published 10-15-08 [FR E8-24370]

Civil Money Penalties; Certain Prohibited Conduct; comments due by 12-16-08; published 10-17-08 [FR E8-24574]

Public Housing Operating Fund Program; Increased Terms of Energy Performance Contracts; comments due by 12-15-08; published 10-16-08 [FR E8-24573]

State Community Development Block Grant Program; Administrative Rule Changes; comments due by 12-16-08; published 10-17-08 [FR E8-24572]

INTERIOR DEPARTMENT

Fish and Wildlife Service

Endangered and Threatened Wildlife and Plants:

90-Day Finding on a Petition to List the Least Chub as Threatened or Endangered with Critical Habitat; comments due by 12-15-08; published 10-15-08 [FR E8-24467]

LABOR DEPARTMENT

Occupational Safety and Health Administration

Tree Care Operations; comments due by 12-17-08; published 9-18-08 [FR E8-21851]

SECURITIES AND EXCHANGE COMMISSION

Amendments to Regulation SHO; comments due by 12-16-08; published 10-17-08 [FR E8-24785]

SMALL BUSINESS ADMINISTRATION

Business Loan Program Regulations:

Incorporation of London Interbank Offered Rate Base Rate and Secondary Market Pool Interest Rate Changes; comments due by 12-15-08; published 11-13-08 [FR E8-26999]

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness Directives:

Airbus Model A310 Series Airplanes; comments due by 12-15-08; published 11-13-08 [FR E8-26914]

Airbus Model A318, A319, A320, and A321 Series Airplanes; comments due by 12-17-08; published 11-17-08 [FR E8-27167]

BAE Systems (Operations) Limited (Jetstream) Model 4101 Airplanes; comments due by 12-17-08; published 11-17-08 [FR E8-27161]

Boeing Model 727 Airplanes; comments due by 12-15-08; published 10-29-08 [FR E8-25758]

Boeing Model 737-600, -700, -700C, -800, and -900 Series Airplanes; comments due by 12-15-08; published 10-30-08 [FR E8-25903]

Boeing Model 737-600, 700, 700C, 800, and 900 Series Airplanes; comments due by 12-15-08; published 10-31-08 [FR E8-25990]

Boeing Model 767 Airplanes; comments due by 12-16-08; published 11-21-08 [FR E8-27519]

Bombardier Model CL-600-1A11 (CL-600), CL-600-2A12 (CL-601), and CL-600-2B16 (CL-601-3A, CL-601-3R, and CL-604) Airplanes; comments due by 12-17-08; published 11-17-08 [FR E8-27162]

Bombardier Model CL 600 2B19 (Regional Jet Series 100 & 440) Airplanes; comments due by 12-15-08; published 11-14-08 [FR E8-26911]

Hawker Beechcraft Corporation Model MU 300 10 Airplanes and Model 400 and 400A Series Airplanes; and Raytheon (Mitsubishi) Model MU-300 Airplanes; comments due by 12-15-08; published 10-31-08 [FR E8-26000]

McDonnell Douglas Model 717-200 Airplanes; comments due by 12-15-08; published 10-31-08 [FR E8-25991]

Rolls-Royce plc RB211 Trent 553-61, 553A2-61, 556-61, 556A2-61, 556B-61, 556B2-61, 560-61, and 560A2-61 Turbofan Engines; comments due by 12-15-08; published 11-14-08 [FR E8-26200]

Proposed Establishment of Colored Federal Airway; Alaska; comments due by 12-15-08; published 10-30-08 [FR E8-25940]

Proposed Establishment of Special Air Traffic Rule, in the Vicinity of Luke AFB, AZ; Correction; comments due by 12-15-08; published 10-15-08 [FR E8-24373]

TREASURY DEPARTMENT

Foreign Assets Control Office

Licensing Procedures for Exportation of Agricultural Commodities, Medicine, and Medical Devices to Sudan and Iran; comments due by 12-17-08; published 11-17-08 [FR E8-27242]

TREASURY DEPARTMENT

Alcohol and Tobacco Tax and Trade Bureau

Proposed Expansions of the Russian River Valley and Northern Sonoma Viticultural Areas; Reopening of Comment Period; comments due by 12-19-08; published 10-29-08 [FR E8-25748]

VETERANS AFFAIRS DEPARTMENT

Special Ratings; comments due by 12-16-08; published 10-17-08 [FR E8-23825]

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current

session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 2040/P.L. 110–451
Civil Rights Act of 1964 Commemorative Coin Act (Dec. 2, 2008; 122 Stat. 5021)

S. 602/P.L. 110–452
Child Safe Viewing Act of 2007 (Dec. 2, 2008; 122 Stat. 5025)

S. 1193/P.L. 110–453
To direct the Secretary of the Interior to take into trust 2 parcels of Federal land for the benefit of certain Indian Pueblos in the State of New Mexico, and for other purposes. (Dec. 2, 2008; 122 Stat. 5027)

Last List December 2, 2008

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.