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FEDERAL ELECTION COMMISSION

11 CFR Parts 8 and 111

[Notice 2010–10]

Collection of Administrative Debts; Collection of Debts Arising From Enforcement and Administration of Campaign Finance Laws

AGENCY: Federal Election Commission.

ACTION: Final rule.

SUMMARY: The Federal Election Commission ("Commission") is promulgating rules implementing statutory provisions regarding the collection of debts owed to the United States Government. The Commission is also integrating its rules regarding the collection of debts arising solely from the Administrative Fines program into the new rules.

DATES: This rule is effective on May 17, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Amy L. Rothstein, Assistant General Counsel, or Ms. Esther D. Heiden, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission is promulgating new rules to implement the Debt Collection Improvement Act of 1996 ("DCIA"), Public Law 104–134, 110 Stat. 1321–358. The DCIA governs the Federal government's debt collection activities, and mandates that all nontax debts or claims owed to the United States that have been delinquent for a period of 180 days shall be referred to the U.S. Department of the Treasury or a Treasury-designated collection center for appropriate action to collect or terminate collection of the claim or debt. 31 U.S.C. 3711(g)(1). The purposes of the DCIA are: (1) To maximize collections of delinquent debts owed to the Government by ensuring quick action to enforce recovery of debts and the use of all appropriate collection tools; (2) to minimize the costs of debt collection by consolidating related functions and activities and using interagency teams; (3) to reduce losses arising from debt management activity by requiring proper screening of potential borrowers, aggressive monitoring of all accounts, and sharing of information within and among Federal agencies; (4) to ensure that the public is fully informed of the Federal government's debt collection policies and that debtors are aware of their obligations to repay amounts owed to the Federal government; (5) to ensure that debtors have all appropriate due process rights, including the ability to verify, challenge, and compromise claims, and access to administrative appeals procedures that are both reasonable and protect the interests of the United States; (6) to encourage agencies, when appropriate, to sell delinquent debt, particularly debts with underlying collateral; and (7) to rely on the experience and expertise of private sector professionals to provide debt collection services to Federal agencies. Public Law 104–134, sec. 31001(b), 110 Stat. 1321–358, 1321–358.

The Federal Claims Collection Standards ("FCCS"), 31 CFR parts 900–904, were promulgated by the U.S. Department of the Treasury and the U.S. Department of Justice. The FCCS prescribes the standards that Federal agencies must use in the administrative collection, offset, compromise, and suspension or termination of collection activity for civil claims of money, funds, or property as defined by 31 U.S.C. 3701(b). The FCCS applies unless more specific Federal statutes or agency regulations apply, and in certain cases involving bankruptcy. The FCCS clarifies and simplifies Federal debt collection procedures, and prescribes the steps that an agency must take before initiating debt collection to ensure that individuals' rights are protected. These steps include notifying the debtor of the debt and the consequences of failing to resolve the debt. *See* 31 CFR 901.2. The FCCS provides agencies with limited discretion to adopt agency-specific regulations, tailored to the legal and policy requirements applicable to various types of Federal debt.

The new regulations incorporate the provisions of the DCIA and the FCCS, in some instances directly, and in other instances by cross-reference.

The Commission published a Notice of Proposed Rulemaking in the **Federal Register** on February 24, 2010. *See* Notice of Proposed Rulemaking on Collection of Administrative Debts; Collection of Debts Arising From Enforcement and Administration of Campaign Finance Laws, 75 FR 8274 (February 24, 2010) (the "NPRM"). The comment period closed on March 26, 2010. The Commission received one comment in response to the proposed rules.[1]

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate, and publish them in the **Federal Register** at least thirty calendar days before they take effect. The final rules that follow were transmitted to Congress on April 12, 2010.

Explanation and Justification

I. 11 CFR Part 8—Collection of Administrative Debts

The Commission is adding new part 8 and new subpart C to part 111 of its regulations to provide for debt collection. The two provisions taken together are designed to cover all types of debt that the Commission must collect. The approach of separating the two general categories of debt in the regulations at 11 CFR part 8 and 11 CFR part 111 subpart C is for the convenience of the reader. Placing provisions concerning the collection of debts arising from the Commission's enforcement of the campaign finance laws in 11 CFR part 111 is consistent with the current placement of the regulations for collecting Administrative Fines debts with the enforcement provisions of part 111; placing the other debt collection provisions in 11 CFR part 8 also enables general administrative provisions to be located together.

[1] This comment was from the Internal Revenue Service, stating that the Internal Revenue Service did not find any conflict between the Internal Revenue Code and Treasury regulations and the Commission's proposed rules.

A. 11 CFR 8.1—Purpose and Scope

Section 8.1 of 11 CFR provides that the purpose of the regulations is to apply the collection standards set out in the DCIA and the FCCS.

B. 11 CFR 8.2—Debts That Are Covered

Section 8.2 of 11 CFR states that the new Commission regulations in part 8 cover only those debts that are either owed by current and former Commission employees, or arise from the provision of goods or services by contractors or vendors doing business with the Commission. The regulations in part 8 do not cover debts arising from compliance matters, administrative fines, alternative dispute resolution, repayments of public funds, and court judgments arising from the Commission's enforcement of the campaign finance laws, which are covered in new 11 CFR part 111 subpart C. Section 8.2 mirrors 11 CFR 111.51. The Commission's regulations also do not cover other types of debt that are specifically excluded from the FCCS, such as debts involving criminal actions of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other person having an interest in the claim, and debts under the Internal Revenue Code of 1986.

C. 11 CFR 8.3—Administrative Collection of Claims

Section 8.3 of 11 CFR states that the Commission will collect the claims or debts covered by 11 CFR part 8 in accordance with the FCCS, and adopts by cross-reference the relevant provisions of the DCIA, and U.S. Department of the Treasury and Department of Justice debt collection regulations. *See* 31 U.S.C. 3701 *et seq.;* 31 CFR 285.2, 285.4, 285.7, 285.11, and parts 900–904. Proposed section 8.3 stated that the Commission will refer debts to the U.S. Department of the Treasury for collection no later than 180 days after the debts become delinquent. The final rule states that the Commission will refer all debts that are more than 180 days delinquent to the U.S. Department of the Treasury, and may, at its discretion, transfer delinquent debts prior to the end of the 180 day period. This clarifies that the Commission need not complete the referral process to Treasury within the 180 day period. Instead, the Commission is required to transfer debts that are more than 180 days delinquent, and has the discretion to transfer debts before they are 180 days delinquent. The rule includes examples of collection actions that the U.S. Department of the Treasury might take: referral to another debt collection center, referral to a private collection contractor, or referral to the Department of Justice for litigation. These examples are taken from the U.S. Department of the Treasury regulation governing the transfer of debts to the U.S. Department of the Treasury, and are not a comprehensive list of the actions that the U.S. Department of the Treasury may take in collecting such debt. *See* 31 CFR 285.12(c)(2). During the 180 days before the mandatory transfer of a debt to the U.S. Department of the Treasury, the Commission may take any action under these rules to attempt to collect the debt.

D. 11 CFR 8.4—Bankruptcy Claims

Section 8.4 of 11 CFR recognizes that in cases where a debtor has sought protection under the Bankruptcy Code, the Code, particularly 11 U.S.C. 553, may require the Commission to take different action from that prescribed under the debt collection regulations set forth in part 8 and the FCCS. In these situations, bankruptcy law will govern the debt collection process.

E. 11 CFR 8.5—Interest, Penalties, and Administrative Costs

Section 8.5 of 11 CFR states that the Commission shall assess interest, penalties, and administrative costs on debts owed to the United States, in accordance with Federal law. The Commission shall waive collection of interest and administrative costs on debts or portions of debts that are paid within thirty days after the date on which interest begins to accrue.

The regulation also provides that the Commission may, at its discretion, waive collection of interest, penalties, or administrative costs on any debt, even debts that are not paid within thirty days after the date on which interest begins to accrue. The regulation states that the Commission may waive collection of interest, penalties, or administrative costs if it determines that: (1) Collection is against equity and good conscience or is not in the best interest of the United States, including when an administrative offset or installment agreement is in effect; or, (2) waiver is appropriate under the criteria for compromise of debts set forth at 31 CFR 902.2(a).

II. Removal of 11 CFR 111.45

The Commission has removed the provision previously located at 11 CFR 111.45. This provision governed debt collection with respect to the Administrative Fines program. Under the new regulations, these debts are covered by 11 CFR part 111 subpart C—Collection of Debts Arising from Enforcement and Administration of Campaign Finance Laws.

III. 11 CFR Part 111 Subpart C—Collection of Debts Arising From Enforcement and Administration of Campaign Finance Laws

The regulations in 11 CFR part 111 subpart C govern the Commission's collection of debts arising from compliance matters, administrative fines, alternative dispute resolution, repayments of public funds, and court judgments arising from the Commission's enforcement of the campaign finance laws. The regulations cover the collection of debts only, and will be invoked only after the completion of existing Commission processes during which respondents or other parties have had a full and fair opportunity to demonstrate that no civil penalty or repayment should be imposed. *See* 11 CFR parts 111 and 9038, and 9008.11–9008.15.

A. 11 CFR 111.50—Purpose and Scope

Section 111.50 of 11 CFR provides that the purpose of the regulations is to apply the collection standards set out in the DCIA and the FCCS. This provision treats debts under 11 CFR part 111 in a similar manner to those owed by employees and vendors under 11 CFR 8.1, discussed above.

B. 11 CFR 111.51—Debts That Are Covered

Section 111.51 of 11 CFR states that the new Commission regulations in 11 CFR part 111 subpart C cover only those debts arising from compliance matters, administrative fines, alternative dispute resolution, repayments of public funds, and court judgments arising from the Commission's enforcement and administration of the campaign finance laws. The regulations in 11 CFR part 111 subpart C do not cover debts either owed by current and former Commission employees, or arising from the provision of goods or services by contractors or vendors doing business with the Commission, which are covered by new 11 CFR part 8. This new provision treats debts under 11 CFR part 111 in a similar manner to those owed by employees and vendors under new 11 CFR 8.2, and the two provisions taken together are designed to cover all types of debt that the Commission must collect. The Commission's regulations also do not cover other types of debt that are specifically excluded from the FCCS, such as debts involving criminal actions of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other person

having an interest in the claim, and debts under the Internal Revenue Code of 1986.

C. 11 CFR 111.52—Administrative Collection of Claims

Section 111.52 of 11 CFR states that the Commission will collect all claims or debts in accordance with the FCCS, and adopts by cross-reference the relevant DCIA, U.S. Department of the Treasury, and U.S. Department of Justice debt collection provisions. *See* 31 U.S.C. 3701 *et seq.;* 31 CFR 285.2, 285.4, 285.7, 285.11, and parts 900–904. This provision treats the debts covered by new 11 CFR part 111 subpart C in a similar manner to those owed by employees and vendors under new 11 CFR 8.3, discussed above. The proposed provision stated that the Commission will refer debts to the U.S. Department of the Treasury for collection no later than 180 days after the debt becomes delinquent. The final rule states that the Commission will refer all debts that are more than 180 days delinquent to the U.S. Department of the Treasury, and may, at its discretion, transfer delinquent debts prior to the end of the 180 day period. This clarifies that the Commission need not complete the referral process to Treasury within the 180 day period. Instead, the Commission is required to transfer debts that are more than 180 days delinquent, and has the discretion to transfer debts before they are 180 days delinquent. The rule includes examples of collection actions that the U.S. Department of the Treasury might take: referral to another debt collection center, or referral to a private collection contractor. These examples are taken from the U.S. Department of the Treasury regulation governing the transfer of debts to the U.S. Department of the Treasury, and are not a comprehensive list of the actions that the U.S. Department of the Treasury may take in collecting such debt. *See* 31 CFR 285.12(c)(2). During the 180 days before the mandatory transfer of a debt to the U.S. Department of the Treasury, the Commission may take any action under these rules, or may go to court under the Commission's litigating authority in 31 U.S.C. 437g to attempt to collect the debt.

D. 11 CFR 111.53—Litigation by the Commission

Section 111.53 of 11 CFR states that nothing in the debt collection procedures precludes the Commission from filing suit under 2 U.S.C. 437g to enforce compliance with a conciliation agreement, seek a civil money penalty, petition the court for a contempt order, or otherwise exercise its authority to enforce or administer the campaign finance laws and regulations.

E. 11 CFR 111.54—Bankruptcy Claims

Section 111.54 of 11 CFR recognizes that in cases where a debtor has sought protection under the Bankruptcy Code, the Code, particularly 11 U.S.C. 362, may require the Commission to take different action from that prescribed under the debt collection regulations set forth in part 111 and the FCCS. In this event, bankruptcy law will govern the debt collection process. *See* 31 CFR 901.3(a)(5).

F. 11 CFR 111.55—Interest, Penalties, and Administrative Costs

Section 111.55 of 11 CFR states that the Commission shall assess interest, penalties, and administrative costs on debts owed to the United States, as required by Federal law. *See* 31 U.S.C. 3717. The Commission shall waive collection of interest and administrative costs on debts or portions of debts that are paid within thirty days after the date on which interest begins to accrue.

The regulation also provides that the Commission may, at its discretion, waive collection of interest, penalties, or administrative costs on any debt, even debts that are not paid within thirty days after the date on which interest begins to accrue. The regulation states that the Commission may waive collection of interest, penalties, or administrative costs if it determines that: (1) Collection is against equity and good conscience or is not in the best interest of the United States, including when an administrative offset or installment agreement is in effect; or, (2) waiver is appropriate under the criteria for compromise of debts set forth at 31 CFR 902.2(a). This provision treats the debts covered by new 11 CFR part 111 subpart C in a similar manner to those owed by employees and vendors under new 11 CFR 8.5, discussed above.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The attached final rules do not have a significant economic impact on a substantial number of small entities. There are two bases for this certification. First, the attached final rules implement statutorily required processes for collecting unpaid debts, and any economic impact of these rules is caused by the statutory mandate, rather than agency decisions contained in these rules. Second, the provisions in the new rules relate to agency management and procedure and do not impose new substantive or compliance requirements directly on members of the public. If the provision regarding the imposition of interest, penalties, and administrative costs could be viewed as imposing a new requirement on the public, the regulation merely implements the statutory requirement that the Commission assess these additional costs and provides that the Commission can exercise its discretion to waive the assessment of such costs in appropriate circumstances. Thus, any incremental economic impact of this rule on small entities is not significant. Therefore, the Commission certifies that the attached final rules will not have a significant economic impact on a substantial number of small entities.

List of Subjects

11 CFR Part 8

Administrative practice and procedure, Debt collection procedures, Government contracts, Law enforcement, Penalties.

11 CFR Part 111

Administrative practice and procedure, Debt collection procedures, Elections, Law enforcement, Penalties.

■ For the reasons set out in the preamble, the Federal Election Commission is amending Chapter 1 of Title 11 of the *Code of Federal Regulations* as follows:

■ 1. Part 8 is added to read as follows:

PART 8—Collection of Administrative Debts

Sec.

8.1 Purpose and scope.
8.2 Debts that are covered.
8.3 Administrative collection of claims.
8.4 Bankruptcy claims.
8.5 Interest, penalties, and administrative costs.

Authority: 31 U.S.C. 3701, 3711, and 3716–3720A, as amended; 2 U.S.C 431 *et seq.,* as amended; 31 CFR parts 285, and 900–904.

§ 8.1 Purpose and scope.

This part prescribes standards and procedures under which the Commission will collect and dispose of certain debts owed to the United States, as described in 11 CFR 8.2. The regulations in this part implement the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701, 3711, and 3716–3720A, as amended; and the Federal Claims Collection Standards, 31 CFR parts 900–904. The activities covered include: the collection of claims of any amount; compromising claims; suspending or terminating the collection of claims; referring debts to the U.S. Department of the Treasury for collection action; and referring debts

under this part 8 of more than $100,000 (exclusive of any interest and charges) to the Department of Justice for litigation.

§ 8.2 Debts that are covered.

(a) The procedures covered by this part apply to debts that are either owed by current and former Commission employees, or arise from the provision of goods or services by contractors or vendors doing business with the Commission.

(b) The procedures covered by this part do not apply to any of the following debts:

(1) Debts that are covered by 11 CFR 111.51, regarding debts arising from compliance matters, administrative fines, alternative dispute resolution, repayments, and court judgments arising under the statutes specified in 11 CFR 111.51(a).

(2) Debts involving criminal actions of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other person having an interest in the claim.

(3) Debts based in whole or in part on conduct in violation of the antitrust laws.

(4) Debts under the Internal Revenue Code of 1986.

(5) Debts between the Commission and another Federal agency. The Commission will attempt to resolve interagency claims by negotiation in accordance with Executive Order 12146, 3 CFR pp. 409–12 (1980 Comp.).

(6) Debts that have become subject to salary offset under 5 U.S.C. 5514.

§ 8.3 Administrative collection of claims.

(a) The Commission shall act to collect all claims or debts. These collection activities will be undertaken promptly and follow up action will be taken as appropriate in accordance with 31 CFR 901.1.

(b) The Commission may take any and all appropriate collection actions authorized and required by the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701 *et seq.* The U.S. Department of the Treasury regulations at 31 CFR 285.2, 285.4, 285.7 and 285.11, and the Federal Claims Collection Standards issued jointly by the Department of Justice and the U.S. Department of the Treasury at 31 CFR parts 900–904 also apply. The Commission has adopted these regulations by cross-reference.

(c) The Commission will refer to the Dept. of Treasury all debt that has been delinquent for more than 180 days, and may refer to the Dept. of Treasury any debt that has been delinquent for 180 days or less. On behalf of the Commission, the U.S. Department of the Treasury will attempt to collect the debt, in accordance with the statutory and regulatory requirements and authorities applicable to the debt and action. This may include referral to another debt collection center, a private collection contractor, or the Department of Justice for litigation. *See* 31 CFR 285.12 (Transfer of debts to Treasury for collection). This requirement does not apply to any debt that:

(1) Is in litigation or foreclosure;

(2) Will be disposed of under an approved asset sale program;

(3) Has been referred to a private collection contractor for a period of time acceptable to the U.S. Department of the Treasury; or

(4) Will be collected under internal offset procedures within three years after the debt first became delinquent.

(d) The U.S. Department of the Treasury is authorized to charge a fee for services rendered regarding referred or transferred debts. The Commission will add the fee to the debt as an administrative cost, in accordance with 11 CFR 8.5.

§ 8.4 Bankruptcy claims.

When the Commission learns that a bankruptcy petition has been filed by a debtor, before proceeding with further collection action, the Commission will take any necessary action in accordance with the provision of 31 CFR 901.2(h).

§ 8.5 Interest, penalties, and administrative costs.

(a) The Commission shall assess interest, penalties, and administrative costs on debts owed to the United States Government in accordance with 31 U.S.C. 3717 and 31 CFR 901.9.

(b) The Commission shall waive collection of interest and administrative costs on a debt or any portion of the debt that is paid in full within thirty days after the date on which the interest begins to accrue.

(c) The Commission may waive collection of interest, penalties, and administrative costs if it:

(1) Determines that collection is against equity and good conscience or not in the best interest of the United States, including when an administrative offset or installment agreement is in effect; or

(2) Determines that waiver is appropriate under the criteria for compromise of debts set forth at 31 CFR 902.2(a).

(d) The Commission is authorized to impose interest and related charges on debts not subject to 31 U.S.C. 3717, in accordance with common law.

PART 111—COMPLIANCE PROCEDURES

■ 2. The authority citation for part 111 is revised to read as follows:

Authority: 2 U.S.C. 432(i), 437g, 437d(a), 438(a)(8); 28 U.S.C. 2461 nt; 31 U.S.C. 3701, 3711, 3716–3719, and 3720A, as amended; 31 CFR parts 285 and 900–904.

Subpart B—Administrative Fines

§ 111.45 [Removed and Reserved]

■ 3. Remove and reserve § 111.45.

■ 4. Subpart C is added to read as follows:

Subpart C—Collection of Debts Arising From Enforcement and Administration of Campaign Finance Laws

Sec.

111.50 Purpose and scope.
111.51 Debts that are covered.
111.52 Administrative collection of claims.
111.53 Litigation by the Commission.
111.54 Bankruptcy claims.
111.55 Interest, penalties, and administrative costs.

§ 111.50 Purpose and scope.

Subpart C prescribes standards and procedures under which the Commission will collect and dispose of certain debts owed to the United States, as described in 11 CFR 111.51. The regulations in this subpart implement the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701, 3711, and 3716–3720A, as amended; and the Federal Claims Collection Standards, 31 CFR parts 900–904. The activities covered include: The collection of claims of any amount; compromising claims; suspending or terminating the collection of claims; and referring debts to the U.S. Department of the Treasury for collection action.

§ 111.51 Debts that are covered.

(a) The procedures of this subpart C of part 111 apply to claims for payment or debt arising from, or ancillary to, any action undertaken by or on behalf of the Commission in furtherance of efforts to ensure compliance with the Federal Election Campaign Act, 2 U.S.C. 431 *et seq.,* as amended, and to administer the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.,* or the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9031 *et seq.,* and Commission regulations, including:

(1) Negotiated civil penalties in enforcement matters and alternative dispute resolution matters;

(2) Civil money penalties assessed under the administrative fines program;

(3) Claims reduced to judgment in the courts and that are no longer in litigation;

(4) Repayments of public funds under the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.;* or

(5) Repayment of public funds under the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9031 *et seq.*

(c) The procedures covered by this subpart do not apply to any of the following debts:

(1) Debts that result from administrative activities of the Commission that are governed by 11 CFR part 8.

(2) Debts involving criminal actions of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other person having an interest in the claim.

(3) Debts based in whole or in part on conduct in violation of the antitrust laws.

(4) Debts under the Internal Revenue Code of 1986.

(5) Debts between the Commission and another Federal agency. The Commission will attempt to resolve interagency claims by negotiation in accordance with Executive Order 12146, 3 CFR pp. 409–12 (1980 Comp.).

(6) Debts that have become subject to salary offset under 5 U.S.C. 5514.

§ 111.52 Administrative collection of claims.

(a) The Commission shall act to collect all claims or debts. These collection activities will be undertaken promptly and follow up action will be taken as appropriate in accordance with 31 CFR 901.1.

(b) The Commission may take any and all appropriate collection actions authorized and required by the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701 *et seq.* The U.S. Department of the Treasury regulations at 31 CFR 285.2, 285.4, 285.7, and 285.11, and the Federal Claims Collection Standards issued jointly by the Department of Justice and the U.S. Department of the Treasury at 31 CFR parts 900–904, also apply. The Commission has adopted these regulations by cross-reference.

(c) The Commission will refer to the Dept. of Treasury all debt that has been delinquent for more than 180 days, and may refer to the Dept. of Treasury any debt that has been delinquent for 180 days or less. On behalf of the Commission, the U.S. Department of the Treasury will attempt to collect the debt, in accordance with the statutory and regulatory requirements and authorities applicable to the debt and action. This may include referral to another debt collection center, or a private collection contractor. *See* 31 CFR 285.12 (Transfer of debts to Treasury for collection). This requirement does not apply to any debt that:

(1) Is in litigation or foreclosure;

(2) Will be disposed of under an approved asset sale program;

(3) Has been referred to a private collection contractor for a period of time acceptable to the U.S. Department of the Treasury; or

(4) Will be collected under internal offset procedures within three years after the debt first became delinquent.

(d) The U.S. Department of the Treasury is authorized to charge a fee for services rendered regarding referred or transferred debts. The Commission will add the fee to the debt as an administrative cost, in accordance with 11 CFR 111.55.

§ 111.53 Litigation by the Commission.

Nothing in this subpart C precludes the Commission from filing suit in the appropriate court to enforce compliance with a conciliation agreement under 2 U.S.C. 437g(a)(5)(D), seek a civil money penalty under 2 U.S.C. 437g(a)(6), petition the court for a contempt order under 2 U.S.C. 437g(a)(11), or otherwise exercise its authority to enforce or administer the statutes specified in 11 CFR 111.51(a).

§ 111.54 Bankruptcy claims.

When the Commission learns that a bankruptcy petition has been filed by a debtor, before proceeding with further collection action, the Commission will take any necessary action in accordance with the provision of 31 CFR 901.2(h).

§ 111.55 Interest, penalties, and administrative costs.

(a) The Commission shall assess interest, penalties, and administrative costs on debts owed to the United States Government, pursuant to 31 U.S.C. 3717. Interest, penalties, and administrative costs will be assessed in accordance with 31 CFR 901.9.

(b) The Commission shall waive collection of interest and administrative costs on a debt or any portion of the debt that is paid within thirty days after the date on which the interest begins to accrue.

(c) The Commission may waive collection of interest, penalties, and administrative costs if it:

(1) Determines that collection is against equity and good conscience or not in the best interest of the United States, including when an administrative offset or installment agreement is in effect; or

(2) Determines that waiver is appropriate under the criteria for compromise of debts set forth at 31 CFR 902.2(a).

(d) The Commission is authorized to impose interest and related charges on debts not subject to 31 U.S.C. 3717, in accordance with common law.

Dated: April 12, 2010.

On behalf of the Commission.

Matthew S. Petersen,

Chairman, Federal Election Commission.

[FR Doc. 2010–8736 Filed 4–15–10; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 61, 63, and 65

[Docket No. FAA–2009–0923; Special Federal Aviation Regulation No. 100–2]

RIN 2120–AJ54

Relief for U.S. Military and Civilian Personnel Who Are Assigned Outside the United States in Support of U.S. Armed Forces Operations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Confirmation of effective date.

SUMMARY: This action confirms the direct final rule issued March 4, 2010, which becomes effective June 20, 2010. The rule changes SFAR 100–1 with an expiration date from June 20, 2010, to SFAR 100–2 with an expiration of until further notice.

DATES: The effective date for the direct final rule that published in the **Federal Register** on March 4, 2010 (75 FR 9763) is confirmed as June 20, 2010.

FOR FURTHER INFORMATION CONTACT: R. Lance Nuckolls, AFS–810, General Aviation and Commercial Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–8212.

For legal questions about this SFAR, contact: Michael Chase, AGC–240, Office of Chief Counsel, Regulations Division, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3110; e-mail to *michael.chase@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA is replacing Special Federal Aviation Regulation 100–1 (SFAR 100–1), with SFAR 100–2 that continues to allow Flight Standards District Offices (FSDOs) to accept expired flight

instructor certificates and inspection authorizations for renewals from U.S. military and civilian personnel (U.S. personnel) who are assigned outside the United States in support of U.S. Armed Forces operations. SFAR 100–2 also continues to allow FSDOs to accept expired airman written test reports for certain practical tests from U.S. personnel who are assigned outside the United States in support of U.S. Armed Forces operations. This action is necessary to avoid penalizing U.S. personnel who are unable to meet the regulatory time limits of their flight instructor certificate, inspection authorization, or airman written test report because they are serving outside the United States in support of U.S. Armed Forces operations. The effect of this action is to give U.S. personnel who are assigned outside the United States in support of U.S. Armed Forces operations extra time to meet certain eligibility requirements in the current rules.

The FAA received no comments on Relief for U.S. Military and Civilian Personnel Who Are Assigned Outside the United States in Support of U.S. Armed Forces Operations direct final rule.

Availability of Docket

The complete docket for the direct final rule entitled Relief for U.S. Military and Civilian Personnel Who Are Assigned Outside the United States in Support of U.S. Armed Forces Operations, Docket No. FAA–2009–0923 may be examined at *http://www.regulations.gov* at any time or go to Docket Operations in Room W12–140 of the West Building, Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Conclusion

In consideration that no comments were submitted in response to the direct final rule, the FAA has determined that no further rulemaking action is necessary. SFAR 100–2 remains in effect as adopted.

Issued in Washington, DC, on April 12, 2010.

Pamela Hamilton-Powell,

Director of Rulemaking, ARM–1.

[FR Doc. 2010–8696 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 279

[Docket ID DOD–2009–OS–0141; RIN 0790–AI59]

Retroactive Stop Loss Special Pay Compensation

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Final rule.

SUMMARY: This rule provides for Retroactive Stop Loss Special Pay as authorized and appropriated in The Supplemental Appropriations Act, 2009. This program is of short duration, from October 21, 2009, to October 21, 2010. The last day for submission of claims to the Secretaries of the Military Departments for Retroactive Stop Loss Special Pay is October 21, 2010. The Secretaries concerned are not authorized to make payments on claims submitted after October 21, 2010.

DATES: This rule is effective October 21, 2009, to comply with section 310 of Public Law 111–32 that calls for the Secretary of Defense to issue a rule not later than 120 days from the date of enactment of the Act. The change of eligibility for Retroactive Stop Loss Special Pay is effective on December 19, 2009, the enactment date of the 2010 Department of Defense Appropriations Act.

FOR FURTHER INFORMATION CONTACT: LTC Brigitte Williams, (703) 614–3973.

SUPPLEMENTARY INFORMATION: This action provides for Retroactive Stop Loss Special Pay as authorized and appropriated in The Supplemental Appropriations Act, 2009 (Section 310 of Pub. L. 111–32) and as described in this rule.

An interim final rule was published October 23, 2009, with an effective date of October 21, 2009 (74 FR 54751 through 54754). No comments were received on the interim final rule.

However, the Department of Defense Appropriations Act, 2010, Section 8108, contains statutory provisions that modify eligibility for Retroactive Stop Loss Pay and extend payments for Stop Loss Special Pay to active duty Service members serving under the Stop Loss authority through FY2010.

Under these provisions, Service members who voluntarily reenlisted or extended their service or suspended their retirement and received a bonus for such reenlistment or extension of service are not eligible to receive the Retroactive Stop Loss Special Pay. The change of eligibility for Retroactive Stop Loss Special Pay is effective on December 19, 2009. The Secretaries of the Military Departments and Director, DFAS, shall stop all payments on applications from the newly ineligible applicants regardless of when received or approved. These applications will be returned to the claimant with an explanation of the change in law that made them ineligible. There will be no recoupment of payments made, prior to December 19, 2009. Additionally, DoD has determined that good cause exists for exemption from public comment of these changes and their effective date as they are in direct compliance with the statute.

The amount of special pay remains $500 per month. If an eligible member dies before the payment is made, the Secretary of the Military Department concerned shall make the payment in accordance with Section 2771 of title 10, United States Code.

A new paragraph (b) has been added to § 279.2 of the final rule to reflect the change in eligibility. A new paragraph (c) has added to § 279.3 of the final rule to reflect the payment rules when an eligible member dies before payment can be made.

Executive Order 12866, "Regulatory Planning and Review"

It has been certified that 32 CFR part 279 does:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities. The Supplemental Appropriations Act, 2009 appropriated $534,400,000 to the Department of Defense, to remain available for obligation until expended: Provided, that such funds shall be available to the Secretaries of the military departments only to make payment of claims specified by this law.

It has been certified that 32 CFR part 279 does not:

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Congressional Review Act, 5 U.S.C. 801, et seq.

It has been certified that this rule is a major rule under the Congressional Review Act. This rule will have an annual effect on the economy of $100 million or more. Because of the congressionally mandated deadline to begin the program, 5 U.S.C. 801(a)(3) does not apply.

Section 202, Public Law 104–4, "Unfunded Mandates Reform Act"

It has been certified that 32 CFR part 279 does not contain a Federal mandate resulting in expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

Public Law 96–354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been certified 32 CFR part 279 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96–511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These requirements have been approved by the Office of Management and Budget under OMB Control Number 0704–0464.

Executive Order 13132, "Federalism"

It has been certified that 32 CFR part 279 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 279

Armed forces, Pay.

■ Accordingly, 32 CFR part 279 is added to read as follows:

PART 279—RETROACTIVE STOP LOSS SPECIAL PAY COMPENSATION

Sec.

279.1 Purpose.
279.2 Eligibility.
279.3 Payment.
279.4 Claims process.
279.5 Recordkeeping.
279.6 Reporting.

Authority: Sec. 310, Pub. L. 111–32, as amended.

§ 279.1 Purpose.

This part provides for Retroactive Stop Loss Special Pay as authorized and appropriated in section 310 of Public Law 111–32 and as described in this part.

§ 279.2 Eligibility.

(a) The Secretaries concerned shall employ the Retroactive Stop Loss Special Pay authority and appropriated funding to compensate Service members, including members of the Reserve components, former and retired members under the jurisdiction of the Secretary who, at any time during the period beginning on September 11, 2001, and ending on September 30, 2009, served on active duty while the Service members' enlistment or period of obligated service was extended, or whose eligibility for retirement was suspended pursuant to any provision of law authorizing the President to extend any period of obligated service, or suspend eligibility for retirement, of a Service member in time of war or of national emergency declared by Congress or the President (commonly referred to as a "stop loss authority").

(b) Service members described in paragraph (a) of this section, who voluntarily reenlisted or extended their service or suspended their retirement and received a bonus for such reenlistment or extension of service are not eligible to receive the Retroactive Stop Loss Special Pay.

(c) Service members who were discharged or released from the Armed Forces under other than honorable conditions are not permitted to receive Retroactive Stop Loss Special Pay under section 310 of Public Law 111–32.

§ 279.3 Payment.

(a) The amount of compensation shall be $500 per month for each month or any portion of a month during the period specified above that the member was retained on active duty as a result of application of the Stop Loss Authority. The Military Departments are to determine and certify who is eligible to receive the Retroactive Stop Loss Special Pay and provide this information to the Defense Finance and Accounting Service (DFAS) for payment. Except as noted in this section, retroactive Stop Loss Special Pay is payable to a member under this section in addition to any other amounts payable or paid to the member by law or policy.

(b) Payment rules are:

(1) Service members will not receive a payment under "The Supplemental Appropriations Act, 2009", section 310 of Public Law 111–32 and "Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009", section 8116 of Public Law 110–329, for the same month or portion of a month during which the member was retained on active duty under Stop Loss Authority as outlined in the Secretary of Defense Memorandum dated March 19, 2009, Subject: Stop Loss Special Pay.

(2) By law, Reserve Component members retained under Stop Loss Authority will receive Retroactive Stop Loss Special Pay only for service on active duty. As such, Reserve Component members may have periods before mobilization and after demobilization while under Stop Loss Authority where no Retroactive Stop Loss Special Pay can be paid.

(3) If an eligible member dies before the payment is made, the Secretary of the Military Department concerned shall make the payment in accordance with section 2771 of title 10, United States Code.

(4) Retroactive Stop Loss Special Pay is subject to all applicable taxes.

§ 279.4 Claims process.

(a) The last day for submission of claims to the Secretaries of the Military Departments for Retroactive Stop Loss Special Pay is October 21, 2010. The Secretaries concerned are not authorized to make payments on claims that are submitted after October 21, 2010.

(b) The additional period between the date of Under Secretary of Defense for Personnel and Readiness Memorandum, Subject: Retroactive Stop Loss Special Pay Compensation signed on September 23, 2009 and October 21, 2009 is provided for the Military Departments to:

(1) Identify and formally notify members or former members that official records indicate their potential eligibility for Retroactive Stop Loss Special Pay. This notification should reflect the estimated number of eligible months and the projected special pay amount along with guidance about how to submit a claim. Special care should be taken to work with family members of eligible Service members who are deceased. These family members may not be knowledgeable of the process and will require additional assistance after filing their claim.

(2) Make a public announcement of the Retroactive Stop Loss Special Pay Authority highlighting the scope of the program, who qualifies for the benefits, and how to submit a claim to a Service point of contact. The Service contact information will be provided in all public releases by the Office of Secretary of Defense (OSD) Public

Affairs Office, as well as by each of the Services Public Affairs Offices.

(3) Establish and publish evidentiary requirements beyond those listed in this paragraph to support an unrecorded extension under Stop Loss Authority. Official documents may include but are not limited to:

(i) DD 214 Form, Certificate of Release or Discharge from Active Duty and/or DD 215, Correction to DD 214.

(ii) Personnel record or enlistment or reenlistment document recording original expiration of service date.

(iii) Approved retirement memorandum or orders establishing retirement prior to actual date of retirement as stipulated in DD Form 214 or DD Form 215.

(iv) Approved resignation memorandum or transition orders establishing a separation date prior to actual date of separation as stipulated in DD Form 214 or DD Form 215.

(v) Signed documentation or affidavit from knowledgeable officials from the individual's chain of command.

(4) Establish claim and appellate procedures, websites, points of contact for assistance or other outreach mechanisms to inform and expedite claims. Publish information on use of Board for Correction of Military/Naval Records.

(5) Claim is submitted and adjudicated by the Service, then sent forward to the Defense Finance and Accounting Service (DFAS) for payment. Upon arrival DFAS will route claim to Debt Claims Management who will process the claim. Payments are then routed through Dispersing and then to Standards and Compliance. Then Dispersing will make payment to the former Service member or estate. Standards and Compliance will build and route reports for OSD and personnel centers.

§ 279.5 Recordkeeping.

The Military Departments will maintain a by-name accounting of claims that will allow aggregate summaries to depict:

(a) The number of claims filed.

(b) The number of claims approved.

(c) The number of claims denied and the reasons why (especially with regard to subparagraph (h) of section 310 of Pub. L. 111–32).

(d) The number of appeals.

(e) The number of claims pending and the reasons why.

(f) The amount of funding that has been obligated, to include mean and median payments provided per claimant, the number of claims and payments made in accordance with section 2771 of title 10, United States Code for deceased claimants.

(g) The mean and median processing times from receipt of claim to payment.

§ 279.6 Reporting.

The Department of Defense shall provide a consolidated report to the congressional defense committees on the implementation of section 310 of Public Law 111–32. As such, the Under Secretary of Defense for Personnel and Readiness, in coordination with the Under Secretary of Defense (Comptroller), will establish data formats and narrative requirements for a cumulative quarterly report beginning January 21, 2010, to monitor the program and the remaining balance of funding appropriated for this purpose.

Dated: April 12, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–8739 Filed 4–15–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 147

[Docket No. USCG–2009–0571]

RIN 1625–AA00

Safety Zone; BW PIONEER at Walker Ridge 249, Outer Continental Shelf FPSO, Gulf of Mexico

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a safety zone around the BW PIONEER, a Floating Production, Storage and Offloading (FPSO) system, at Walker Ridge 249 in the Outer Continental Shelf. The purpose of the safety zone is to protect the FPSO from vessels operating outside the normal shipping channels and fairways. Placing a safety zone around the FPSO significantly reduces the threat of allisions, oil spills, and releases of natural gas, and thereby protects the safety of life, property, and the environment.

DATES: This rule is effective May 17, 2010.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2009–0571 and are available online by going to *http://www.regulations.gov,* inserting USCG–2009–0571 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Dr. Madeleine McNamara, U.S. Coast Guard, District Eight Waterways Management Coordinator; telephone 504–671–2103, *madeleine.w.mcnamara@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On August 24, 2009, we published a notice of proposed rulemaking (NPRM) entitled Safety Zone; BW PIONEER at Walker Ridge 249, Outer Continental Shelf FPSO, Gulf of Mexico in the **Federal Register** (74 FR 42612). We received no comments on the proposed rule. No public meeting was requested and none was held.

Basis and Purpose

The Coast Guard is establishing a safety zone of 500 meters around the stern of the FPSO when it is moored to the turret buoy. If the FPSO detaches from the turret buoy, the safety zone of 500 meters is measured from the center point at 26°41′46.25″ N and 090°30′30.16″ W. This action is based on a thorough and comprehensive examination of the criteria established by the Eighth District, IMO guidelines, and existing regulations. The FPSO can swing in a 360 degree arc around the center point. The safety zone will reduce significantly the threat of allisions, oil spills, and releases of natural gas and increase the safety of life, property, and the environment in the Gulf of Mexico by prohibiting entry into the zone unless specifically authorized by the Commander, Eighth Coast Guard District.

The safety zone established by this regulation is in the deepwater area of the Gulf of Mexico in Walker Ridge 249 with a center point at 26°41′46.25″ N and 090°30′30.16″ W. For the purpose of this regulation, the deepwater area is considered to be waters of 304.8 meters (1,000 feet) or greater depth extending to the limits of the Exclusive Economic Zone (EEZ) contiguous to the territorial sea of the United States and extending to a distance up to 200 nautical miles

from the baseline from which the breadth of the sea is measured. Navigation in the vicinity of the safety zone consists of large commercial shipping vessels, fishing vessels, cruise ships, tugs with tows and the occasional recreational vessel. The deepwater area also includes an extensive system of fairways.

Background

Petrobras America Inc. requested the Coast Guard establish a safety zone around the FPSO BW PIONEER which is an offshore production facility that is typically ship-shaped and stores crude oil in tanks located in the hull of the vessel. It will attach to a moored turret buoy and move in a 360 degree arc around the position 26°41′46.25″ N and 090°30′30.16″ W. The turret buoy is detachable which allows the FPSO to disconnect while the buoy and turret drop below the water's surface to a predetermined depth. The FPSO has a capacity for storing 500,000 barrels of produced oil which is expected to be offloaded on a weekly basis via a floating hose that connects the FPSO to a shuttle tanker. During offloading operations, a shuttle tanker will connect its bow to the FPSO BW PIONEER and its stern to an attendant tug that will assist with safety spacing and stability of the operations. The facility is manned with a crew of 80 people.

The request for the safety zone was made due to safety concerns for both the personnel aboard the facility and the environment. Petrobras America Inc. indicated that it is highly likely that any allision with the facility would result in a catastrophic event. In evaluating this request, the Coast Guard explored relevant safety factors and considered several criteria, including but not limited to, (1) The level of shipping activity around the facility, (2) safety concerns for personnel aboard the facility, (3) concerns for the environment, (4) the likeliness that an allision would result in a catastrophic event based on proximity to shipping fairways, offloading operations, production levels, and size of the crew, (5) the volume of traffic in the vicinity of the proposed area, (6) the types of vessels navigating in the vicinity of the proposed area, and (7) the structural configuration of the facility.

Discussion of Comments and Changes

No comments were received regarding the published NPRM. Therefore, the final rule text is the same as the text published in the NPRM.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

This rule is not a significant regulatory action due to the location of the FPSO BW PIONEER on the Outer Continental Shelf and its distance from both land and safety fairways. Vessels traversing waters near the proposed safety zone will be able to safely travel around the zone without incurring additional costs.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This proposed rule may affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in Walker Ridge block 249.

This safety zone will not have a significant economic impact or a substantial number of small entities for the following reasons: This rule will enforce a safety zone around a FPSO facility that is in an area of the Gulf of Mexico not frequented by vessel traffic and is not in close proximity to a safety fairway. Further, vessel traffic can pass safely around the safety zone without incurring additional costs. No comments were received regarding this subject.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), in the NPRM we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

This rule will not cause a taking of private property or otherwise have

taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. Implementation of this action will not result in any significant cumulative impacts on the human environment; does not involve a substantial change to existing environmental conditions; and is consistent with Federal, State, and/or local laws or administrative determinations relating to the environment. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 147

Continental shelf, Marine safety, Navigation (water).

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 147 as follows:

PART 147—SAFETY ZONES

■ 1. The authority citation for part 147 continues to read as follows:

Authority: 14 U.S.C. 85; 43 U.S.C. 1333; and Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 147.847 to read as follows:

§ 147.847 Safety Zone; BW PIONEER Floating Production, Storage, and Offloading System Safety Zone.

(a) *Description.* The BW PIONEER, a Floating Production, Storage and Offloading (FPSO) system, is in the deepwater area of the Gulf of Mexico at Walker Ridge 249. The FPSO can swing in a 360 degree arc around the center point of the turret buoy's swing circle at 26°41′46.25″ N and 090°30′30.16″ W. The area within 500 meters (1640.4 feet) around the stern of the FPSO when it is moored to the turret buoy is a safety zone. If the FPSO detaches from the turret buoy, the area within 500 meters around the center point at 26°41′46.25″ N and 090°30′30.16″ W is a safety zone.

(b) *Regulation.* No vessel may enter or remain in this safety zone except the following:

(1) An attending vessel;

(2) A vessel under 100 feet in length overall not engaged in towing; or

(3) A vessel authorized by the Commander, Eighth Coast Guard District.

Dated: April 1, 2010.

Mary E. Landry,

Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 2010–8735 Filed 4–15–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0150]

RIN 1625–AA00

Safety Zone; Benchmark Destination Corporate Party, Fireworks Display, San Francisco, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in the navigable waters in San Francisco Bay CA, in support of the Benchmark Destination Corporate Party Fireworks Display. This safety zone is being established to ensure the safety of participants and spectators from the dangers associated with the pyrotechnics. Unauthorized persons or vessels are prohibited from entering into, transiting through, or remaining in the safety zone without permission of the Captain of the Port or his designated representative.

DATES: This rule is effective from 10:45 a.m. through 9:30 p.m. on July 11, 2010.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–0150 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0150 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590,

between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call Ensign Elizabeth Ellerson at (415) 399–7436, or e-mail *Elizabeth.M.Ellerson@uscg.mil*. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the event would occur before the rulemaking process would be completed. Because of the dangers posed by the pyrotechnics used in these fireworks displays, it would be contrary to the public interest to delay implementation of the safety zone.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register.** Any delay in the effective date of this rule would expose mariners to the dangers posed by the pyrotechnics used in the fireworks display.

Background and Purpose

The City of San Francisco will sponsor the Benchmark Destinations Corporate Party Fireworks Display on July 11, 2010, on the navigable waters of San Francisco Bay, CA. The fireworks display is meant for entertainment purposes. This safety zone establishes a temporary restricted area on the waters surrounding the fireworks launch site during loading of the pyrotechnics, and during the fireworks displays. This restricted area around the launch site is necessary to protect spectators, vessels, and other property from the hazards associated with the pyrotechnics on the fireworks barges. The Coast Guard has granted the event sponsor a marine event permit for the fireworks displays.

Discussion of Rule

During the set up of the fireworks display, at 10:45 a.m., until the start of the fireworks displays, the temporary safety zone applies to the navigable waters around the fireworks sites within a radius of 100 feet around the center of the safety zone, located at: 37°48′56.34″ N, 122°22′36.18″ W. From 8:35 p.m. until 9:10 p.m., the area to which the temporary safety zone applies will increase in size to encompass the navigable waters around the fireworks launch site within a radius of 1,000 feet. At 9:30 p.m., the safety zone shall terminate.

The effect of the temporary safety zones will be to restrict navigation in the vicinity of the fireworks sites while the fireworks are set up, and until the conclusion of the scheduled displays. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the restricted area. These regulations are needed to keep spectators and vessels a safe distance away from the fireworks barges to ensure the safety of participants, spectators, and transiting vessels.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Although this rule restricts access to the waters encompassed by the safety zones, the effect of this rule will not be significant. The entities most likely to be affected are pleasure craft engaged in recreational activities. Vessel traffic will be able to transit around the safety zone. In addition, the rule will only restrict access for a limited time. Finally, the Public Broadcast Notice to Mariners will notify the users of local waterway to ensure that the safety zone will result in minimum impact.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

Although this rule may affect owners and operators of pleasure craft engaged in recreational activities and sightseeing, it will not have a significant economic impact on a substantial number of small entities for several reasons: (i) This rule will encompass only a small portion of the waterway for a limited period of time; (ii) vessel traffic can pass safely around the area; (iii) vessels engaged in recreational activities and sightseeing have ample space outside of the affected areas of San Francisco, CA to engage in these activities; and (iv) the maritime public will be advised in advance of this safety zone via Broadcast Notice to Mariners.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have

determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–1 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves establishing a safety zone.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 3306, 3701 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T11–303 to read as follows:

§ 165.T11–303 Safety Zone; Benchmark Destinations Corporate Party, Fireworks Display, San Francisco, CA.

(a) *Location.* (1) This temporary safety zone is established for the waters of San Francisco Bay in San Francisco, CA. The fireworks launch sites will be located in position: 37°48′56.34″ N, 122°22′36.18″ W (NAD 83).

(2) During the loading of the fireworks, on 10:45 a.m. July 11, 2010, and until the start of the fireworks displays at 8:35 p.m., the area of the safety zone consists of the navigable waters around the fireworks sites within a radius of 100 feet.

(3) From 8:35 p.m. until 9:30 p.m. on July 11, 2010, the area to which the temporary safety zone applies will increase in size to encompass the navigable waters around the fireworks site within a radius of 1,000 feet.

(4) At 9:30 p.m. on July 11, 2010, this safety zone shall terminate.

(b) *Definitions.* As used in this section, "designated representative" means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port San Francisco (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general regulations in § 165.23, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the COTP or the COTP's designated representative.

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the COTP or a designated representative.

(3) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or a designated representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP or the designated representative. Persons and vessels may request permission to enter the safety zones on VHF–16 or through the 24-hour Command Center at telephone 415–399–3547.

(d) *Effective period.* This section is effective from 10:45 a.m. through 9:30 p.m. on July 11, 2010.

Dated: April 7, 2010.

P.M. Gugg,

Captain, U.S. Coast Guard, Captain of the Port San Francisco.

[FR Doc. 2010–8734 Filed 4–15–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 334

Restricted Areas and Danger Zone at Naval Station Mayport, FL

AGENCY: United States Army Corps of Engineers, Department of Defense.

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is revising its regulations by expanding the existing restricted area as well as establishing two new restricted areas and a new danger zone in the waters adjacent to and within the boundaries of Naval Station (NAVSTA) Mayport in Florida. The NAVSTA Mayport is the third largest naval facility in the continental United States and is unique in that it is home to a busy seaport as well as an air facility which conducts more than 135,000 flight operations each year. This amendment to the existing regulation is necessary to enhance the safety of the local community by ensuring safe navigation of the adjacent waterways, to preserve military security force protection measures, and to adhere to military munitions regulations.

DATES: *Effective date:* May 17, 2010.

ADDRESSES: U.S. Army Corps of Engineers, Attn: CECW–CO (David B. Olson), 441 G Street, NW., Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson, Headquarters, Operations and Regulatory Community of Practice, Washington, DC at 202–761–4922 or Mr. Jon M. Griffin, U.S. Army Corps of Engineers, Jacksonville District, Regulatory Division, at 904–232–1680.

SUPPLEMENTARY INFORMATION: Pursuant to its authorities in Section 7 of the Rivers and Harbors Act of 1917 (40 Stat 266; 33 U.S.C. 1) and Chapter XIX of the Army Appropriations Act of 1919 (40 Stat 892; 33 U.S.C. 3), the Corps is amending the regulations in 33 CFR part 334 by expanding the existing restricted area as well as establishing two new restricted areas and a new danger zone in Florida within the NAVSTA Mayport facilities and along the facility shoreline. This will allow the Commanding Officer, NAVSTA Mayport to restrict passage of persons, watercraft, and vessels in waters contiguous to his/her Command to meet Department of Defense directive O–2000.12–H Chapter C22.14 and United States Fleet Forces Antiterrorism Operation Order 3300–09 requirements for Waterside Security and Naval Vessel Protection Zones. The amendment also addresses public safety concerns associated with increased vessel traffic in the waterways adjacent to the NAVSTA Mayport facility, especially during munitions movement in and around the munitions wharves.

The proposed rule was published in the January 25, 2010, issue of the **Federal Register** (75 FR 3883), and its regulations.gov docket number is COE–2009–0063. Only one comment was received in response to the proposed rule and it was supportive of the proposal.

Procedural Requirements

a. *Review Under Executive Order 12866.* This regulation is issued with respect to a military function of the Department of Defense and the provisions of Executive Order 12866 do not apply.

b. *Review Under the Regulatory Flexibility Act.* The regulation has been reviewed under the Regulatory Flexibility Act (Pub. L. 96–354) which requires the preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities (*i.e.,* small businesses and small governments). The Corps has determined that this regulation would have practically no economic impact on the public, or result in no anticipated navigational hazard or interference with existing waterway traffic. This regulation will have no significant economic impact on small entities.

c. *Review Under the National Environmental Policy Act.* This regulation will not have a significant impact to the quality of the human environment and, therefore, preparation of an environmental impact statement is not required. An environmental assessment has been prepared. It may be reviewed at the district office listed at the end of **FOR FURTHER INFORMATION CONTACT** above.

d. *Unfunded Mandates Act.* This regulation does not impose an enforceable duty among the private sector and, therefore, is not a Federal private sector mandate and is not subject to the requirements of Section 202 or 205 of the Unfunded Mandates Reform Act (Pub. L. 104–4, 109 Stat. 48, 2 U.S.C. 1501 *et seq.*). We have also found under Section 203 of the Act that small governments will not be significantly or uniquely affected by this rule.

List of Subjects in 33 CFR Part 334

Danger zones, Navigation (water), Restricted areas, Waterways.

■ For the reasons set out in the preamble, the Corps amends 33 CFR part 334 as follows:

PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS

■ 1. The authority citation for part 334 continues to read as follows:

Authority: 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3).

■ 2. Revise § 334.500 to read as follows:

§ 334.500 St. Johns River, Atlantic Ocean, Sherman Creek; restricted areas and danger zone, Naval Station Mayport, Florida.

(a) *The areas.* (1) The St. Johns River restricted area and the Atlantic Ocean restricted area described in paragraphs (a)(2) and (a)(3) of this section, respectively, are contiguous but each area is described separately for clarification.

(2) *St. Johns River restricted area.* This restricted area shall encompass all navigable waters of the United States, as defined at 33 CFR 329, within the area bounded by a line connecting the following coordinates: Commencing from the shoreline at latitude 30°23′52.97″ N, longitude 081°25′36.51″ W; thence to latitude 30°23′56.71″ N, longitude 081°25′36.51″ W; then the line meanders irregularly, follow the shoreline at a distance of 380 feet seaward from the mean high water line to a point at latitude 30°23′54.20″ N, longitude 081°24′14.11″ W, thence proceed directly to latitude 30°23′46.33″ N, longitude 081°24′03.73″ W, then the line meanders irregularly, follow the shoreline at a distance of 380 feet seaward from the mean high water line to a point at latitude 30°23′53.08″ N, longitude 081°23′34.00″ W, thence follow the arc of a circle with a radius of 466 feet, centered at latitude 30°23′48.52″ N, longitude 081°23′33.30″ W, to a point on the jetty at latitude 30°23′50.06″ N, longitude 081°23′28.26″ W.

(3) *Atlantic Ocean restricted area.* From the last point identified in paragraph (a)(2) of this section, latitude 30°23′50.06″ N, longitude 081°23′28.26″ W, proceed to a point at latitude 30°23′49.12″ N, longitude 81°23′28.10″ W, then the line meanders irregularly, follow the shoreline at a distance of 380 feet seaward from the mean high water line to a point at latitude 30°22′54.37″ N, longitude 081°23′44.09″ W, thence

proceed directly to shore to terminate at latitude 30°22′54.46″ N, longitude 081°23′48.44″ W.

(4) *Sherman Creek restricted area.* This restricted area shall encompass all navigable waters of the United States, as defined at 33 CFR part 329, to include Sherman Creek, its tributaries and associated tidal marshes located within the NAVSTA Mayport area boundaries described in this section. The restricted area is completely encircled by roadways and is bordered on the south by Wonderwood Expressway, on the west by SR A1A, on the north by Perimeter Road, and on the east by Mayport Road.

(5) *Danger zone.* The danger zone shall encompass all navigable waters of the United States, as defined at 33 CFR part 329, within the area bounded by a line connecting the following coordinates: Commencing from the shoreline at latitude 30°24′00.31″ N, longitude 081°25′06.02″ W; thence to latitude 30°24′11.16″ N, longitude 081°25′03.90″ W; thence to latitude 30°24′00.62″ N, longitude 081°24′10.13″ W; thence to a point on the shoreline riprap at latitude 30°23′41.26″ N, longitude 081°24′08.82″ W.

(b) *The regulations*—(1) *St. Johns River restricted area.* All persons, vessels, or other craft are prohibited from entering, transiting, drifting, dredging, or anchoring within the area described in paragraph (a)(2) of this section without the permission of the Commanding Officer, NAVSTA Mayport or his/her authorized representative. This restriction will be in place 24 hours a day, seven days a week. Warning signs notifying individuals of the restricted area boundary and prohibiting entry into the area will be posted at 500-foot intervals along the property boundary.

(2) *Atlantic Ocean restricted area.* All persons, vessels, or other craft are prohibited from entering, transiting, drifting, dredging, or anchoring within the area described in paragraph (a)(3) of this section without the permission of the Commanding Officer, NAVSTA Mayport or his/her authorized representative. This restriction will be in place 24 hours a day, seven days a week. Warning signs notifying individuals of the restricted area boundary and prohibiting entry into the area will be posted at 500-foot intervals along the property boundary.

(3) *Sherman Creek restricted area.* All persons, vessels, or other craft are prohibited from entering, transiting, drifting, dredging, or anchoring within the area described in paragraph (a)(4) of this section without the permission of the Commanding Officer, NAVSTA Mayport or his/her authorized representative. This restriction will be in place 24 hours a day, seven days a week. Warning signs notifying individuals of the restricted area boundary and prohibiting entry into the area will be posted at 500-foot intervals along the property boundary where practicable (*e.g.,* not in the wetlands). In addition, a floating Small Craft Intrusion Barrier will be placed across Sherman Creek just east of the A1A bridge and another will be placed across tributaries to Sherman Creek just north of the Wonderwood Expressway.

(4) *Danger zone.* During periods of munitions movement at wharves Bravo and Charlie, no person or vessel shall be allowed to remain within the 1,250-foot Explosive Safety Quantity-Distance arcs generated by the activity. NAVSTA Mayport will not announce or publish notification prior to enforcing this regulation due to the unacceptable security threat posed by advance public notice of military munitions movements.

(c) *Enforcement.* The regulations in this section shall be enforced by the Commanding Officer, NAVSTA Mayport and/or such persons or agencies as he/she may designate. Military vessels will patrol the areas identified in this section 24 hours a day, 7 days a week. Any person or vessel encroaching within the areas identified in this section will be asked to immediately leave the area. Failure to do so will result in the forceful removal of the person or vessel from the area in question.

Dated: April 7, 2010.

Approved.

Michael G. Ensch,

Chief, Operations, Directorate of Civil Works.

[FR Doc. 2010–8786 Filed 4–15–10; 8:45 am]

BILLING CODE 3720–58–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2009–0052; FRL–9136–6]

Approval and Promulgation of Air Quality Implementation Plans; Wyoming; Revisions to the Wyoming Air Quality Standards and Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving two State Implementation Plan revisions submitted by the State of Wyoming on September 11, 2008. Wyoming has revised its Air Quality Standards and Regulations, specifically Chapter 1, Section 5, *Unavoidable equipment malfunction,* and Chapter 1, Section 6, *Credible evidence.* Because these revisions conform to the Clean Air Act and EPA regulations, EPA is approving the revisions with the intention of making them Federally enforceable. EPA is taking this action under section 110 of the Clean Air Act.

DATES: This rule is effective on June 15, 2010 without further notice, unless EPA receives adverse comment by May 17, 2010. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2009–0052, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: dolan.kathy@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- *Mail:* Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2009–0052. 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 instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

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 Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kathy Dolan, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. 303–312–6142, *dolan.kathy@epa.gov.*

SUPPLEMENTARY INFORMATION:

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II. Background of Wyoming's Submissions
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Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *Wyoming* mean the State of Wyoming, unless the context indicates otherwise.

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://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 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:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. 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.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

II. Background of Wyoming's Submissions

On September 11, 2008 the State of Wyoming submitted to EPA two formal revisions to Wyoming's State Implementation Plan (SIP). These revisions amend Wyoming's Air Quality Standards and Regulations. In particular, Wyoming has revised Chapter 1, Common Provisions, Section 5, *Unavoidable equipment malfunction,* and has added a new section—Section 6, *Credible evidence*—to Chapter 1.

A. Chapter 1, Common Provisions, Section 5, Unavoidable Equipment Malfunction

Wyoming has revised its unavoidable equipment malfunction rule in response to a series of EPA actions. On November 16, 2000, the Administrator of the EPA issued an order granting in part a petition to object to Wyoming's issuance of a Title V permit. *In the Matter of: Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants,* Petition No. VIII–00–1 (Nov. 16, 2000). In the order, the Administrator directed EPA's regional office in Denver (EPA Region 8) to review Wyoming's Abnormal Conditions and Equipment Malfunction rule. On November 1, 2002, in another Title V petition order, the Administrator repeated this direction. *In the Matter of: Title V Permit for Buckingham Lumber Company, Buckingham Lumber Mill,* Petition No. VIII–2002–01 (Nov. 1, 2002). After completing its review, EPA Region 8 identified for Wyoming deficiencies in the rule. Letter from Richard R. Long, Director, Air and Radiation Program, EPA Region 8, to Dan Olson, Administrator, Wyoming's Department of Environmental Quality (Jan. 30, 2003). EPA Region 8 noted that the rule did not conform to Clean Air Act requirements to protect National Ambient Air Quality Standards (NAAQS) and Prevention of Significant Deterioration (PSD) increments. Specifically, the rule allowed an exemption from enforcement for excess emissions that occurred during malfunctions and certain other conditions. EPA's interpretation was and continues to be that the Clean Air Act requires that all periods of excess emissions be treated as violations that cannot be exempted from enforcement. EPA therefore requested that the rule be revised.

On November 16, 2005, the Environmental Quality Council of the Wyoming Department of Environmental Quality approved a revision to the Abnormal Conditions and Equipment Malfunction rule. The revision removed

the existing automatic exemption and replaced it with enforcement discretion provisions for excess emissions caused by malfunctions. The revision became State-effective January 30, 2006. On September 11, 2008, the Governor of the State of Wyoming submitted the revision to Region 8.

B. Chapter 1, Common Provisions, Section 6, Credible Evidence

Wyoming has added the credible evidence section to its rules in response to an EPA SIP call. On February 24, 1997, EPA revised its rule governing the use of credible evidence in enforcement actions. 62 FR 8314. In parallel, EPA directed its Regional Offices to conduct a SIP call to States in order to ensure consistency with the revised credible evidence rule. On October 20, 1999, EPA Region 8 issued a SIP call to Wyoming. In a letter from EPA Regional Administrator William P. Yellowtail notifying Wyoming of the SIP call, EPA stated that the Wyoming SIP did not comply with sections 110(a)(2)(A) and (C) of the CAA because the SIP could be interpreted to limit the types of credible evidence or information that could be used for determining compliance and establishing violations.

On October 23, 2000, the Environmental Quality Council of the Wyoming Department of Environmental Quality approved revisions to the Wyoming Air Quality Standards and Regulations, including the addition of a provision (Chapter 1, Common Provisions, Section 6, *Credible evidence*) allowing for the use of credible evidence in enforcement actions. The added provision became State-effective December 8, 2000. On September 11, 2008, the Governor of the State of Wyoming submitted the revision to Region 8.

III. EPA's Review of Wyoming's Submissions

To determine if Wyoming's submissions should be approved by EPA, EPA must evaluate the submissions for consistency with the CAA and EPA regulations.

A. Revision to Chapter 1, Common Provisions, Section 5, Unavoidable Equipment Malfunction

EPA's interpretations of the Act regarding excess emissions caused by equipment malfunctions are contained in several documents. Most relevant to this action are the following documents: A memorandum dated September 28, 1982, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, entitled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions"; a clarification to that memorandum from Kathleen M. Bennett issued on February 15, 1983; and a memorandum entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, dated September 20, 1999.[1]

As explained in these memoranda, excess emissions are those air emission levels that exceed any applicable emission limitation. Because excess emissions might aggravate air quality so as to prevent attainment and maintenance of the NAAQS or jeopardize the PSD increments, EPA views all periods of excess emissions as violations of the applicable emission limitation. Therefore, EPA will disapprove all SIP revisions that automatically exempt from enforcement excess emissions claimed to result from an equipment malfunction. In addition, EPA will disapprove SIP revisions that give discretion to a state director to determine whether an instance of excess emissions is a violation of an emission limitation, because such a determination could bar EPA and citizens from enforcing applicable requirements.

Instead, under EPA's interpretations, if a state chooses to address violations for excess emissions that occur as a result of claimed malfunctions, the state may take two approaches. The first, the "enforcement discretion" approach, allows a state director to refrain from taking enforcement action for a violation if certain criteria are met. The second, the "affirmative defense" approach, allows a source to avoid penalties if it can prove that certain conditions are met.

Wyoming has selected the enforcement discretion approach. Under this approach, the state director, in evaluating whether to exercise discretion to decline enforcement for a violation caused by an unavoidable malfunction, should consider whether the following criteria have been satisfied:

1. To the maximum extent practicable the air pollution control equipment, process equipment, or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;

2. Repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded. Off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

3. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

4. All possible steps were taken to minimize the impact of the excess emissions on ambient air quality; and

5. The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance.

We have evaluated Wyoming's enforcement discretion provisions for excess emissions caused by unavoidable equipment malfunctions. The provisions are consistent with EPA's interpretations of the CAA as described in the memoranda above. Specifically, Chapter 1, Common Provisions, section 5(b) gives the Wyoming Air Quality Division discretion when deciding whether to "pursue enforcement after considering whether excess emissions resulted from an unavoidable equipment malfunction." The Division is to make this decision by evaluating, on a case-by-case basis, information to be submitted by the source after an incident. The information submitted by the source and considered by the Division is defined in section 5(a)(i)(A) and generally parallels the criteria outlined in the Kathleen Bennett memoranda discussed above. The source has the burden to provide sufficient information to demonstrate that the Division should use its discretion.

EPA's memoranda also discuss a point not explicitly addressed in Wyoming's new rule. There is no language in the new rule explicitly stating that, even when the Division exercises its discretion and declines enforcement, that exercise of discretion does not bar EPA or any citizen from taking an enforcement action for the violation. However, there is also no language in the new rule explicitly creating such a bar. EPA therefore interprets the rule, consistent with EPA's interpretations of the CAA, as not barring EPA and citizen enforcement for violation of applicable requirements when the Division declines

[1] The relevant interpretations were not affected by a subsequent memorandum titled "Reissuance of Clarification—State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," dated December 5, 2001, from Eric Schaeffer, Director, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, and John S. Seitz, Director, Office of Air Quality Planning and Standards, Office of Air and Radiation.

enforcement. Under this interpretation, the new rule is consistent with the CAA. EPA is therefore approving the revisions to Chapter 1, Common Provisions, Section 5.

B. Addition to Chapter 1, Common Provisions, Section 6, Credible Evidence

On February 24, 1997, EPA promulgated regulations under sections 113(a) and 113(e)(1) of the CAA clarifying the use of non-reference test data—"credible evidence"—in enforcement actions and compliance certifications. 62 FR 8314. In particular, the regulations prohibit state implementation plans from precluding the use of credible evidence. The regulations state: "For the purpose of submitting compliance certifications or establishing whether or not a person has violated or is in violation of any standard in this part, the plan must not preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed." 40 CFR 51.212(c).

EPA has reviewed Wyoming's new credible evidence rule. The new rule mirrors the language in 40 CFR 51.212(c) quoted above and provides for the use of credible evidence in enforcement actions and compliance certifications. Therefore, it is consistent with the CAA and EPA regulations. As a result, EPA is approving the addition of the new credible evidence rule, Chapter 1, Common Provisions, Section 6, *Credible evidence,* into Wyoming's SIP.

IV. Consideration of Section 110(l) of the CAA

Under section 110(l) of the Clean Air Act, EPA cannot approve a SIP revision if the revision would interfere with any applicable requirements concerning attainment and reasonable further progress toward attainment of the NAAQS or any other applicable requirement of the Act. The Wyoming SIP revisions that EPA approves today do not interfere with attainment of the NAAQS or any other applicable requirement of the Act. The first revision removes a provision from the Wyoming SIP that provided an outright exemption from emission limits during malfunctions. In place of the exemption, the SIP now provides—in accordance with the CAA—that the Wyoming Air Quality Division may exercise its enforcement discretion after considering whether excess emissions resulted from an unavoidable equipment malfunction. In the absence of the previous automatic exemption, sources will now have a greater incentive to comply with their emission limits, which will protect the NAAQS and increments to a greater degree than under the previous rule. The second revision, providing for use of credible evidence, also protects the NAAQS and increments to a greater degree by allowing for enhanced enforcement of emissions limits. Therefore, section 110(l) requirements are satisfied.

V. Final Action

EPA is approving SIP revisions that Wyoming submitted on September 11, 2008. The Environmental Quality Council of the Wyoming Department of Environmental Quality adopted revisions to Chapter 1, Common Provisions, Section 5, *Unavoidable equipment malfunction* on November 16, 2005; these revisions became State-effective on January 30, 2006. The Council added Chapter 1, Common Provisions, Section 6, *Credible evidence,* to the Wyoming Air Quality Standards and Regulations on October 23, 2000; this addition became State-effective on December 8, 2000.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments; we are merely approving changes to Wyoming's air rules that conform to the CAA and EPA regulations. However, in the "Proposed Rules" section of today's **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective June 15, 2010 without further notice unless the Agency receives adverse comments by May 17, 2010. If the EPA receives adverse comments, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

VI. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves State law as meeting Federal requirements and imposes no additional requirements beyond those imposed by State law. Accordingly, the Administrator 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.*). Because this rule approves pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a State rule implementing a Federal standard and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it approves a State rule implementing a Federal standard.

In reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus

standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 15, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: April 1, 2010.

Carol L. Campbell,

Acting Deputy Regional Administrator, Region 8.

■ 40 CFR part 52 is amended to read as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart ZZ—Wyoming

■ 2. Section 52.2620 is amended by revising paragraph (b)(3); and the table in paragraph (c)(1) is amended under Chapter 1 by revising the entry for Section 5 and adding an entry for Section 6 to read as follows:

§ 52.2620 Identification of plan.

* * * * *

(b) * * *

(3) Copies of the materials incorporated by reference may be inspected at the Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129; the Environmental Protection Agency, Air and Radiation Docket and Information Center, Air Docket (6102), 1200 Pennsylvania Ave., NW., Washington, DC 20460; or the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

(c) * * *

(1) * * *

State citation	Title/subject	State adopted and effective date	EPA approval date and citation [1]	Explanation
Chapter 1				
* *	*	* *	*	*
Section 5	Unavoidable Equipment Malfunction.	11/16/05, 1/30/06	4/16/10 [Insert FR page number where document begins].	
Section 6	Credible Evidence	10/23/00, 12/8/00	4/16/10 [Insert FR page number where document begins].	
* *	*	* *	*	*

[1] In order to determine the EPA effective date for a specific provision that is listed in this table, consult the **Federal Register** cited in this column for that particular provision.

* * * * *

[FR Doc. 2010–8405 Filed 4–15–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–8127]

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 Dates:* 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:				
Middlesex County, Unincorporated Areas.	510098	October 18, 1974, Emerg; January 18, 1989, Reg; May 3, 2010, Susp.	5/3/2010	5/3/2010
Urbanna, Town of, Middlesex County.	510292	May 21, 1975, Emerg; November 3, 1989, Reg; May 3, 2010, Susp.	.....do-	-Do-.
West Virginia:				
Friendly, Town of, Tyler County.	540259	December 23, 1975, Emerg; November 4, 1988, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Middlebourne, Town of, Tyler County.	540195	May 13, 1975, Emerg; November 4, 1988, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Sistersville, City of, Tyler County.	540197	June 23, 1975, Emerg; November 4, 1988, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Tyler County, Unincorporated Areas.	540277	August 6, 1975, Emerg; November 4, 1988, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Region IV				
Alabama:				
Beaverton, Town of, Lamar County.	010134	August 22, 1974, Emerg; July 3, 1986, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Detroit, Town of, Lamar County.	010135	August 30, 1974, Emerg; June 1, 1987, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Kennedy, Town of, Lamar County.	010136	September 30, 1974, Emerg; August 5, 1986, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Lamar County, Unincorporated Areas.	010271	March 16, 1976, Emerg; June 4, 1990, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Millport, Town of, Lamar County.	010137	August 30, 1974, Emerg; September 18, 1985, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Sulligent, Town of, Lamar County.	010138	August 14, 1974, Emerg; June 25, 1976, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Vernon, City of, Lamar County.	010139	July 25, 1974, Emerg; December 17, 1987, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Florida:				
Greenville, Town of, Madison County.	120150	August 21, 1975, Emerg; July 1, 1987, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Lee, Town of, Madison County.	120151	September 26, 1975, Emerg; April 30, 1986, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Madison, City of, Madison County.	120152	August 1, 1975, Emerg; May 15, 1986, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Madison County, Unincorporated Areas.	120149	May 28, 1975, Emerg; June 4, 1987, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Georgia:				
Griffin, City of, Spalding County.	130165	November 20, 1974, Emerg; January 1, 1987, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Spalding County, Unincorporated Areas.	130388	N/A, Emerg; December 11, 1992, Reg; May 3, 2010, Susp	.....do-	-Do-.
Region V				
Michigan:				
Brooklyn, Village of, Jackson County.	260335	June 18, 1982, Emerg; June 18, 1982, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Concord, Township of, Jackson County.	260946	July 11, 1995, Emerg; May 3, 2010, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Concord, Village of, Jackson County.	260423	June 29, 1976, Emerg; March 1, 1982, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Jackson, City of, Jackson County.	260273	September 19, 1973, Emerg; December 15, 1977, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Leoni, Township of, Jackson County.	260930	May 11, 1995, Emerg; May 3, 2010, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Norvell, Township of, Jackson County.	260424	July 28, 1982, Emerg; September 30, 1988, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Algonac, City of, St. Clair County.	260191	December 15, 1972, Emerg; January 5, 1978, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Burtchville, Township of, St. Clair County.	260193	September 20, 1973, Emerg; August 1, 1986, Reg; May 3, 2010, Susp.	.....do-	-Do-.
China, Township of, St. Clair County.	260203	August 16, 1974, Emerg; August 1, 1978, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Clay, Township of, St. Clair County.	260194	December 22, 1972, Emerg; June 1, 1978, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Columbus, Township of, St. Clair County.	260507	December 18, 1975, Emerg; September 1, 1986, Reg; May 3, 2010, 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
Cottrellville, Township of, St. Clair County.	260196	April 12, 1974, Emerg; September 17, 1980, Reg; May 3, 2010, Susp.	.....do-	-Do-.
East China, Township of, St. Clair County.	260197	February 9, 1973, Emerg; July 3, 1978, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Fort Gratiot, Township of, St. Clair County.	260198	March 23, 1973, Emerg; December 15, 1978, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Ira, Township of, St. Clair County.	260199	December 8, 1972, Emerg; March 4, 1980, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Kenockee, Township of, St. Clair County.	260915	May 23, 1994, Emerg; May 3, 2010, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Kimball, Township of, St. Clair County.	260594	January 8, 1979, Emerg; August 5, 1985, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Marine City, City of, St. Clair County.	260200	January 26, 1973, Emerg; August 1, 1979, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Marysville, City of, St. Clair County.	260201	June 11, 1973, Emerg; June 8, 1984, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Memphis, City of, St. Clair County.	260202	September 26, 1975, Emerg; May 4, 1988, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Port Huron, Township of, St. Clair County.	260672	February 22, 1988, Emerg; September 4, 1991, Reg; May 3, 2010, Susp.	.....do-	-Do-.
St. Clair, City of, St. Clair County.	260279	June 12, 1973, Emerg; June 15, 1978, Reg; May 3, 2010, Susp.	.....do-	-Do-.
St. Clair, Township of, St. Clair County.	260205	March 9, 1973, Emerg; August 1, 1978, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Wales, Township of, St. Clair County.	260508	October 19, 1981, Emerg; July 18, 1985, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Ohio:				
Blanchester, Village of, Clinton County.	390074	N/A, Emerg; November 6, 1997, Reg; May 3, 2010, Susp	.....do-	-Do-.
Clarksville, Village of, Clinton County.	390820	June 9, 1999, Emerg; May 3, 2010, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Clinton County, Unincorporated Areas.	390764	January 29, 1979, Emerg; September 16, 1988, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Sabina, Village of, Clinton County.	390627	February 27, 1981, Emerg; November 15, 1981, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Wilmington, City of, Clinton County.	390075	October 17, 1974, Emerg; September 29, 1978, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Wisconsin:				
Alma, City of, Buffalo County.	555540	May 21, 1971, Emerg; December 8, 1972, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Buffalo County, Unincorporated Areas.	555547	May 7, 1971, Emerg; January 5, 1973, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Buffalo, City of, Buffalo County.	555546	March 19, 1971, Emerg; March 10, 1972, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Cochrane, Village of, Buffalo County.	555550	March 19, 1971, Emerg; February 25, 1972, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Fountain City, City of, Buffalo County.	555555	March 26, 1971, Emerg; April 20, 1972, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Mondovi, City of, Buffalo County.	550031	May 28, 1974, Emerg; June 1, 1981, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Region VII				
Kansas:				
Jackson County, Unincorporated Areas.	200619	June 14, 1982, Emerg; December 15, 1989, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Missouri:				
Adrian, City of, Bates County.	290749	July 27, 1976, Emerg; August 19, 1985, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Bates County, Unincorporated Areas.	290786	October 10, 1997, Emerg; March 1, 2001, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Butler, City of, Bates County.	290026	January 30, 1975, Emerg; September 4, 1985, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Drexel, City of, Bates County.	290064	June 23, 1975, Emerg; April 8, 1977, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Anderson, City of, McDonald County.	290217	October 1, 1980, Emerg; August 5, 1985, Reg; May 3, 2010, Susp.	.....do-	-Do-.
McDonald County, Unincorporated Areas.	290817	June 30, 1999, Emerg; March 1, 2000, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Noel, City of, McDonald County.	290218	January 19, 1977, Emerg; September 4, 1985, Reg; May 3, 2010, 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
Pineville, City of, McDonald County.	290535	June 28, 2003, Emerg; May 3, 2010, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Southwest City, City of, McDonald County.	290528	September 23, 1975, Emerg; September 4, 1985, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Pulaski County, Unincorporated Areas.	290826	December 21, 1983, Emerg; April 17, 1985, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Richland, City of, Pulaski County.	290656	January 29, 1976, Emerg; September 10, 1984, Reg; May 3, 2010, Susp.	.....do-	-Do-.
St. Robert, City of, Pulaski County.	290662	N/A, Emerg; November 30, 2004, Reg; May 3, 2010, Susp	.....do-	-Do-.
Nebraska:				
Bennington, City of, Douglas County.	310074	July 10, 1975, Emerg; December 4, 1979, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Boys Town, Village of, Doulgas County.	310353	July 7, 1977, Emerg; July 18, 1983, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Douglas County, Unincorporated Areas.	310073	November 15, 1974, Emerg; January 16, 1981, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Omaha, City of, Douglas County.	315274	November 6, 1970, Emerg; May 7, 1971, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Valley, City of, Douglas County.	310078	May 1, 1975, Emerg; March 18, 1980, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Bellevue, City of, Sarpy County.	310191	April 13, 1973, Emerg; January 16, 1980, Reg; May 3, 2010, Susp.	.....do-	-Do-.
La Vista, City of, Sarpy County.	310192	April 23, 1974, Emerg; January 16, 1980, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Papillion, City of, Sarpy County.	315275	July 2, 1971, Emerg; August 18, 1972, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Sarpy County, Unincorporated Areas.	310190	February 23, 1973, Emerg; January 16, 1981, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Region X				
Alaska:				
Nome, City of, Nome Census Area.	020069	September 11, 1975, Emerg; September 1, 1983, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Shishmaref, City of, Nome Census Area.	020084	June 5, 1998, Emerg; August 23, 2001, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Idaho:				
Coeur d'Alene, City of, Kootenai County.	160078	June 25, 1975, Emerg; September 2, 1982, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Fernan Lake, City of, Kootenai County.	160079	May 11, 1976, Emerg; February 17, 1982, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Harrison, City of, Kootenai County.	160080	March 3, 1976, Emerg; August 3, 1984, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Hayden Lake, City of, Kootenai County.	160082	January 12, 1976, Emerg; September 1, 1981, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Kootenai County, Unincorporated Areas.	160076	April 8, 1974, Emerg; March 1, 1982, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Post Falls, City of, Kootenai County.	160083	June 16, 1975, Emerg; February 17, 1982, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Rathdrum, City of, Kootenai County.	160187	April 23, 1975, Emerg; September 28, 1984, Reg; May 3, 2010, Susp.	.....do-	-Do-.
Spirit Lake, City of, Kootenai County.	160084	May 28, 1975, Emerg; May 26, 1978, Reg; May 3, 2010, Susp.	.....do-	-Do-.

*-do- = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: April 5, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation.

[FR Doc. 2010–8751 Filed 4–15–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003]

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Base (1% annual-chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated in the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2820, or (email) *kevin.long@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Deputy Federal Insurance and Mitigation Administrator has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community. The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This final rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

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 final rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for part 67 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.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ^ Elevation in meters (MSL) Modified	Communities affected
Mercer County, Illinois, and Incorporated Areas Docket No.: FEMA–B–1035			
Mississippi River	431 miles upstream of the confluence with the Ohio River (approximately 0.1 mile downstream of 50th Street extended).	+546	City of New Boston, Unincorporated Areas of Mercer County.
	437 miles upstream of the confluence with the Ohio River (approximately 0.2 mile downstream of Lock & Dam Road extended).	+550	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected

∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of New Boston

Maps are available for inspection at City Hall, 405 Main Street, New Boston, IL 61272.

Unincorporated Areas of Mercer County

Maps are available for inspection at the Mercer County Courthouse, 100 Southeast 3rd Street, Aledo, IL 61231.

Branch County, Michigan (All Jurisdictions)
Docket No.: FEMA–B–1014

Cold Creek	At the upstream side of Jonesville Road	+963	Township of Girard.
	Approximately 150 feet upstream of Gorbell Road	+964	
Coldwater River	At the upstream side of East Fenn Road	+959	Township of Ovid.
	Approximately 350 feet upstream of East Fenn Road	+960	
County Drain 40	Approximately 0.5 mile downstream of South Wood Road	+989	Township of Ovid.
	At the downstream side of South Wood Road	+990	
County Drain 40	Approximately 0.8 mile north of Dorrance Road and 0.5 mile west of North Fremont Road.	+981	Township of Quincy.
	Approximately 0.5 mile north of Dorrance Road and 0.5 mile west of North Fremont Road.	+981	
Craig Lake Little Swan Creek	Entire shoreline	+927	Township of Girard.
	At the downstream side of Lindley Road	+872	Township of Matteson.
	Approximately 0.4 mile upstream of Butz Road	+892	
	Approximately 1,100 feet downstream of West Colon Road	+892	
	Approximately 350 feet upstream of Langwell Road	+907	
Matteson Lake	Entire shoreline	+927	Township of Matteson.
Morrison Lake Sauk River	Entire shoreline	+927	Township of Girard.
	At the upstream side of Fox Road	+983	Township of Quincy.
	Approximately 50 feet upstream of Fox Road	+983	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Township of Girard

Maps are available for inspection at the Township Hall, 1009 Marshall Road, Coldwater, MI 49036.

Township of Matteson

Maps are available for inspection at the Township Hall, M–86 & Athens Road, Bronson, MI 49028.

Township of Ovid

Maps are available for inspection at the Township Hall, 114 West Front Street, Ovid, MI 49036.

Township of Quincy

Maps are available for inspection at the Quincy Public Library, 11 North Main Street, Quincy, MI 49082.

Claiborne County, Mississippi, and Incorporated Areas
Docket No.: FEMA–B–1037

Bayou Pierre	Approximately 30,000 feet downstream of Anthony Road	+92	Unincorporated Areas of Claiborne County.
	Approximately 8,100 feet downstream of Anthony Road	+96	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Unincorporated Areas of Claiborne County

Maps are available for inspection at 410 Main Street, Port Gibson, MS 39150.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Pike County, Missouri, and Incorporated Areas Docket No.: FEMA–B–1035			
Mississippi River	At the convergence with Thomas Chute	+450	Unincorporated Areas of Pike County, City of Clarksville, City of Louisiana, Village of Annada.
	At the convergence with Gilbert Chute	+469	
Noix Creek	Approximately 0.67 mile upstream of Highway 79	+465	Unincorporated Areas of Pike County.
	At the confluence with Bishop Branch	+477	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Clarksville
Maps are available for inspection at 111 Howard Street, Clarksville, MO 63336.

City of Louisiana
Maps are available for inspection at 202 South 3rd Street, Louisiana, MO 63353.

Unincorporated Areas of Pike County
Maps are available for inspection at 115 West Main Street, Bowling Green, MO 63334.

Village of Annada
Maps are available for inspection at 232 Arlington Avenue, Annada, MO 63330.

Ralls County, Missouri, and Incorporated Areas Docket No.: FEMA–B–1034			
Bear Creek	At Lilly Avenue	+499	Unincorporated Areas of Ralls County.
	At Hydesburg Road	+562	
Mississippi River	At the divergence from Gilberts Chute	+471	Unincorporated Areas of Ralls County.
	At the confluence with Marble Creek	+475	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Unincorporated Areas of Ralls County
Maps are available for inspection at 311 South Main Street, New London, MO 63459.

Eastern Band of Cherokee Indians, North Carolina Docket Nos.: FEMA–B–7767, FEMA–B–7778, FEMA–B–7734, FEMA–B–7818, and FEMA–D–7824			
Adams Creek	Approximately 650 feet upstream of the confluence with the Oconaluftee River.	+1874	Eastern Band of Cherokee Indians.
	Approximately 130 feet upstream of Red Clay Road	+2233	
Bates Creek	At the confluence with Hanging Dog Creek	+1529	Eastern Band of Cherokee Indians, Unincorporated Areas of Cherokee County.
	Approximately 0.8 mile upstream of the confluence with Hanging Dog Creek.	+1633	
Big Witch Creek	At the confluence with Wrights Creek	+2438	Eastern Band of Cherokee Indians.
	Approximately 1.6 mile upstream of the confluence with Wrights Creek.	+3024	
Blackrock Creek	At the confluence with Soco Creek	+2530	Eastern Band of Cherokee Indians, Unincorporated Areas of Jackson County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
	Approximately 1.3 mile upstream of the confluence with Soco Creek.	+3052	
Bunches Creek	Approximately 150 feet upstream of the confluence with Raven Fork.	+2385	Eastern Band of Cherokee Indians.
	Approximately 0.8 mile upstream of Bunches Creek Road	+3158	
Cooloska Branch	At the confluence with Snowbird Creek	+1942	Eastern Band of Cherokee Indians, Unincorporated Areas of Graham County.
	Approximately 900 feet upstream of Massey Branch Road (State Road 1116).	+1965	
Cooloska Branch Tributary 1	At the confluence with Cooloska Branch	+1961	Eastern Band of Cherokee Indians.
	Approximately 30 feet downstream of Jackson Branch Road (State Road 1149).	+2008	
Cooper Creek	At the confluence with the Tuckasegee River	+1792	Eastern Band of Cherokee Indians, Unincorporated Areas of Swain County.
	Approximately 100 feet upstream of Isaac Wiggins Road	+2057	
Crooked Creek	At the confluence with the Tuckasegee River	+1853	Eastern Band of Cherokee Indians, Unincorporated Areas of Jackson County.
	Approximately 1,400 feet upstream with East Dynasty Drive	+1891	
Goose Creek	At the upstream side of Goose Creek Road	+1855	Eastern Band of Cherokee Indians.
	Approximately 1,050 feet upstream of Goose Creek Road	+1904	
Hanging Dog Creek	At the confluence with the Hiwassee River	+1529	Eastern Band of Cherokee Indians, Unincorporated Areas of Cherokee County.
	Approximately 1,300 feet upstream of Running Deer Lane	+1914	
Hornbuckle Creek	At the confluence with Soco Creek	+2776	Eastern Band of Cherokee Indians, Unincorporated Areas of Cherokee County.
	Approximately 0.9 mile upstream of the confluence with Soco Creek.	+3042	
Little Snowbird Creek	At the confluence with Snowbird Creek	+2108	Eastern Band of Cherokee Indians, Unincorporated Areas of Cherokee County.
	Approximately 800 feet upstream of the confluence of Hornet Nest Branch.	+3288	
Mountain Creek	At the confluence with the Cheoah River	+1945	Eastern Band of Cherokee Indians, Unincorporated Areas of Cherokee County.
	Approximately 50 feet downstream of Mountain Creek Road (State Road 1214).	+2397	
Pigeon Creek	Approximately 20 feet upstream of the confluence with Raven Fork.	+2257	Eastern Band of Cherokee Indians.
	Approximately 0.7 mile upstream of the confluence with Raven Fork.	+2717	
Raven Fork	Approximately 1,650 feet upstream of Big Cove Road	+2638	Eastern Band of Cherokee Indians.
	Approximately 0.5 mile upstream of Big Cove Road	+2663	
Snowbird Creek	At the confluence with the Cheoah River	+1942	Eastern Band of Cherokee Indians, Unincorporated Areas of Cherokee County.
	Approximately 0.6 mile downstream of the confluence with Chestnut Flat Branch.	+2207	
Soco Creek	Approximately 1,100 feet downstream of U.S. Route 441	+1936	Eastern Band of Cherokee Indians, Unincorporated Areas of Jackson County.
	Approximately 350 feet upstream of the confluence with Hornbuckle Creek.	+2808	
Straight Fork	Approximately 100 feet upstream of the confluence with Raven Fork.	+2455	Eastern Band of Cherokee Indians.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
	Approximately 1.0 mile upstream of the confluence with Raven Fork.	+2558	
Tuckasegee River	At the confluence with the Little Tennessee River	+1710	Eastern Band of Cherokee Indians, Town of Bryson City, Unincorporated Areas of Swain County.
	At the upstream side of U.S. Route 74/441	+1845	
Wrights Creek	Approximately 500 feet upstream of the confluence with Soco Creek.	+2055	Eastern Band of Cherokee Indians.
	Approximately 0.9 mile upstream of the confluence with Big Witch Creek.	+2708	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Eastern Band of Cherokee Indians
Maps are available for inspection at the Ginger Lynn Welch Complex, 810 Acquoni Road, Cherokee, NC 28719.

Unincorporated Areas of Cherokee County
Maps are available for inspection at the Cherokee County Mapping Department/GIS, County Courthouse, 39 Peachtree Street, Suite 104, Murphy, NC 28906.

Unincorporated Areas of Graham County
Maps are available for inspection at the Graham County Mapping Department, 12 North Main Street, Robbinsville, NC 28771.

Unincorporated Areas of Jackson County
Maps are available for inspection at the Jackson County Inspections Department, 401 Grindstaff Cove Road, Suite 105, Sylva, NC 28779.

Town of Bryson City
Maps are available for inspection at the Town Manager's Office, 45 Everett Street, Bryson City, NC 28713.

Unincorporated Areas of Swain County
Maps are available for inspection at the Swain County Mapping Department, 101 Mitchell Road, Bryson City, NC 28713.

Jackson County, North Carolina, and Incorporated Areas
Docket Nos.: FEMA–B–7778 and FEMA–B–1024

Abbs Creek	At the confluence with Caney Fork	+2419	Unincorporated Areas of Jackson County.
	Approximately 0.4 mile upstream of East Brasstown Road (State Road 1744).	+2688	
Allens Branch	At the confluence with Scott Creek	+2074	Town of Sylva, Unincorporated Areas of Jackson County.
	Approximately 1,500 feet upstream of East Nugget Lane	+2480	
Barkers Creek	At the confluence with the Tuckasegee River	+1899	Unincorporated Areas of Jackson County.
	Approximately 350 feet upstream of West Barkers Creek Road (State Road 1392).	+2022	
Blackrock Creek	At the confluence with Soco Creek	+2530	Unincorporated Areas of Jackson County.
	Approximately 1.3 mile upstream of the confluence with Soco Creek.	+3052	
Blanton Branch	At the confluence with Scott Creek	+2143	Unincorporated Areas of Jackson County.
	Approximately 1,200 feet upstream of East Racking Cove (State Road 1775).	+2371	
Brook Branch	At the confluence with Greens Creek	+2140	Unincorporated Areas of Jackson County.
	Approximately 220 feet upstream of East Alpine Road	+2199	
Brushy Fork	At the confluence with Greens Creek	+2261	Unincorporated Areas of Jackson County.
	Approximately 20 feet upstream of West Brushy Fork Road (State Road 1371).	+2327	
Buff Creek	At the confluence with Scott Creek	+2260	Unincorporated Areas of Jackson County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
	Approximately 1,900 feet upstream of East Bamboo Trail	+2428	
Bumgarner Branch	At the confluence with Mill Creek (into Tuckasegee River)	+2114	Town of Sylva, Unincorporated Areas of Jackson County.
	Approximately 1,200 feet upstream of Big Orange Way	+2136	
Camp Creek	At the confluence with the Tuckasegee River	+1856	Unincorporated Areas of Jackson County.
	Approximately 50 feet upstream of East Firefly Road (State Road 1408).	+2088	
Cane Branch	At the confluence with the Tuckasegee River	+1871	Unincorporated Areas of Jackson County.
	Approximately 1,670 feet upstream of the confluence with the Tuckasegee River.	+1953	
Cane Creek	Approximately 50 feet upstream of East Old Cullowhee Road (State Road 1002).	+2058	Unincorporated Areas of Jackson County.
	Approximately 2,000 feet upstream of East Old Cullowhee Road (State Road 1002).	+2122	
Caney Fork	Approximately 10 feet upstream of the confluence with the Tuckasegee River.	+2123	Unincorporated Areas of Jackson County.
	Approximately 0.9 mile upstream of the confluence with Mull Creek.	+2932	
Cedar Creek	At the confluence with West Fork Tuckasegee River	+3499	Unincorporated Areas of Jackson County.
	Approximately 1.1 mile upstream of East Receptive Drive	+3672	
Chastine Creek	At the confluence with Caney Fork	+2550	Unincorporated Areas of Jackson County.
	Approximately 2,000 feet upstream of East Caney Fork Road (State Road 1737).	+2824	
Chattooga River	At the North Carolina/South Carolina state boundary	+2150	Unincorporated Areas of Jackson County.
	Approximately 0.7 mile upstream of the confluence with Chattooga River Tributary 5.	+3399	
Cope Creek	Approximately 80 feet upstream of the confluence with Scott Creek.	+2046	Town of Sylva, Unincorporated Areas of Jackson County.
	Approximately 50 feet upstream of East Claude Cook Road (State Road 1712).	+2396	
Cox Branch	At the confluence with Cullowhee Creek	+2107	Town of Forest Hills, Unincorporated Areas of Jackson County.
	Approximately 1,450 feet upstream of West Slate Mountain ...	+2204	
Crooked Creek	At the confluence with the Tuckasegee River	+1853	Unincorporated Areas of Jackson County.
	Approximately 1,400 feet upstream of East Dynasty Drive	+1891	
Cullowhee Creek	Approximately 400 feet upstream of West Camp Lab Road ...	+2096	Unincorporated Areas of Jackson County.
	Approximately 300 feet upstream of West Ramp Cove Road	+2367	
Cullowhee Creek Tributary 3	At the confluence with Cullowhee Creek	+2137	Unincorporated Areas of Jackson County.
	Approximately 110 feet upstream of West Parker Farm Road (State Road 1166).	+2170	
Dark Ridge Creek	At the confluence with Scott Creek	+2632	Unincorporated Areas of Jackson County.
	Approximately 0.5 mile upstream of the confluence with Scott Creek.	+2686	
Dicks Creek	At the confluence with the Tuckasegee River	+1933	Unincorporated Areas of Jackson County.
	Approximately 900 feet upstream of East Dicks Creek Road (State Road 1388).	+2216	
Dills Branch	Approximately 90 feet upstream of U.S. Route 23/74	+2021	Town of Sylva, Unincorporated Areas of Jackson County.
	Approximately 320 feet upstream of East Dills Cove Road (State Road 1380).	+2534	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Dills Creek (into Fisher Creek) ...	At the confluence with Fisher Creek	+2396	Unincorporated Areas of Jackson County.
	Approximately 650 feet upstream of West Dills Branch Road	+2821	
East Fork Savannah Creek	At the confluence with Savannah Creek	+2175	Unincorporated Areas of Jackson County.
	Approximately 1,700 feet upstream of West Chickadee Lane	+2342	
Fisher Creek	At the confluence with Scott Creek	+2118	Unincorporated Areas of Jackson County.
	Approximately 150 feet upstream of West Kellogg Lane	+2467	
Flat Creek	At the confluence with the Tuckasegee River	+2566	Unincorporated Areas of Jackson County.
	Approximately 2.3 miles upstream of the confluence with the Tuckasegee River.	+3275	
Fowler Creek	At the confluence with the Chattooga River	+2706	Unincorporated Areas of Jackson County.
	Approximately 1,430 feet upstream of West Chimney Top Trail.	+3415	
Gem Creek	At the confluence with Little Pine Creek	+3534	Unincorporated Areas of Jackson County.
	Approximately 900 feet upstream of West Salt Rock Road (State Road 1160).	+3550	
Gladie Creek	At the confluence with the Tuckasegee River	+2566	Unincorporated Areas of Jackson County.
	Approximately 1.3 mile upstream of the confluence with the Tuckasegee River.	+2644	
Grassy Camp Creek	At the confluence with Norton Creek	+3632	Unincorporated Areas of Jackson County.
	Approximately 800 feet upstream of Norton Road (State Road 1143).	+3678	
Greenland Creek	At the confluence with Panthertown Creek and the Tuckasegee River.	+3654	Unincorporated Areas of Jackson County.
	Approximately 1.2 mile upstream of the confluence with Panthertown Creek and the Tuckasegee River.	+3711	
Greens Creek	At the confluence with Savannah Creek	+2119	Unincorporated Areas of Jackson County.
	Approximately 1,060 feet upstream of West Sugar Fork Road (State Road 1370).	+2417	
Hornbuckle Creek	At the confluence with Soco Creek	+2776	Unincorporated Areas of Jackson County.
	Approximately 0.9 mile upstream of the confluence with Soco Creek.	+3042	
Horsepasture River	At the Jackson/Transylvania county boundary	+2973	Unincorporated Areas of Jackson County.
	Approximately 0.4 mile upstream of U.S. Route 64	+3208	
Horsepasture River Tributary 4 ..	At the confluence with the Horsepasture River	+3141	Unincorporated Areas of Jackson County.
	Approximately 1,400 feet upstream of the confluence with the Horsepasture River.	+3147	
Hurricane Creek	At the confluence with West Fork Tuckasegee River	+3499	Unincorporated Areas of Jackson County.
	Approximately 0.8 mile upstream of North Norton Road (State Road 1145).	+3635	
Jacks Creek	At the confluence with the Tuckasegee River	+1884	Unincorporated Areas of Jackson County.
	Approximately 700 feet upstream of U.S. Route 74	+1935	
Johns Creek	At the confluence with Caney Fork	+2292	Unincorporated Areas of Jackson County.
	Approximately 1,800 feet upstream of East Nicholson Cove Road (State Road 1748).	+2479	
Kitchen Branch	At the confluence with Scott Creek	+2105	Unincorporated Areas of Jackson County.
	Approximately 1,350 feet upstream of East Kitchen Branch Road (State Road 1442).	+2714	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ^ Elevation in meters (MSL) Modified	Communities affected
Knob Creek	At the confluence with Norton Creek	+3578	Unincorporated Areas of Jackson County.
	Approximately 1,350 feet upstream of Flintlock Road	+3985	
Laurel Branch	At the confluence with the Tuckasegee River	+1918	Unincorporated Areas of Jackson County.
	Approximately 1,600 feet upstream of Cowee Tunnel Road	+2119	
Little Pine Creek	At the confluence with Pine Creek	+3532	Unincorporated Areas of Jackson County.
	Approximately 180 feet upstream of West Salt Rock Road (State Road 1160).	+3582	
Little Savannah Creek	At the confluence with Savannah Creek	+2028	Unincorporated Areas of Jackson County.
	Approximately 800 feet upstream of East Little Savannah Road (State Road 1367).	+2190	
Locust Creek	Approximately 500 feet upstream of the confluence with the Tuckasegee River.	+2043	Unincorporated Areas of Jackson County.
	Approximately 0.5 mile upstream of West Match Point	+2314	
Logan Creek	At the confluence with the Horsepasture River	+3158	Unincorporated Areas of Jackson County.
	Approximately 0.6 mile upstream of U.S. Route 64	+3170	
Long Branch	Approximately 950 feet upstream of East Little Savannah Road (State Road 1367).	+2235	Unincorporated Areas of Jackson County.
	Approximately 1,650 feet upstream of East Little Savannah Road (State Road 1367).	+2262	
Long Branch (into Horsepasture River).	At the confluence with the Horsepasture River	+3128	Unincorporated Areas of Jackson County.
	Approximately 980 feet upstream of U.S. Route 64	+3134	
Mill Creek	At the confluence with West Fork Tuckasegee River	+3499	Unincorporated Areas of Jackson County.
	Approximately 940 feet upstream of Sunbird Lane	+3780	
Mill Creek (into Tuckasegee River).	At the confluence with the Tuckasegee River	+2026	Town of Sylva, Town of Webster, Unincorporated Areas of Jackson County.
	Approximately 150 feet upstream of the confluence with Bumgarner Branch.	+2114	
Monteith Branch	At the confluence with Scott Creek	+2114	Unincorporated Areas of Jackson County.
	Approximately 1,010 feet upstream of West Razorback Trail	+3118	
Moses Creek	At the confluence with Caney Fork	+2198	Unincorporated Areas of Jackson County.
	Approximately 30 feet upstream of East Moses Creek Road	+2371	
Mull Creek	At the confluence with Caney Fork	+2709	Unincorporated Areas of Jackson County.
	Approximately 0.5 mile upstream of East Caney Fork Road (State Road 1737).	+2845	
Nations Creek	At the confluence with the Tuckasegee River	+1869	Unincorporated Areas of Jackson County.
	Approximately 0.9 mile upstream of the confluence with the Tuckasegee River.	+2011	
Norton Creek	At the confluence with West Fork Tuckasegee River	+3499	Unincorporated Areas of Jackson County.
	Approximately 600 feet upstream of Jodytown Road (State Road 1150).	+3677	
Norton Mill Creek	At the confluence with the Chattooga River	+2566	Unincorporated Areas of Jackson County.
	Approximately 0.6 mile upstream of West Whiteside Cove Road (State Road 1107).	+2767	
Ochre Hill Creek	At the confluence with Scott Creek	+2227	Unincorporated Areas of Jackson County.
	Approximately 1,520 feet upstream of the confluence with Scott Creek.	+2271	
Panthertown Creek	At the confluence with Greenland Creek and the Tuckasegee River.	+3654	Unincorporated Areas of Jackson County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
	Approximately 0.7 mile upstream of the confluence of Panthertown Creek Tributary 1.	+3702	
Panthertown Creek Tributary 1 ..	At the confluence with Panthertown Creek	+3662	Unincorporated Areas of Jackson County.
	Approximately 1,540 feet upstream of the confluence with Panthertown Creek.	+3674	
Peewee Branch	At the confluence with Greens Creek	+2332	Unincorporated Areas of Jackson County.
	Approximately 685 feet upstream of the confluence with Greens Creek.	+2357	
Pine Creek	At the confluence with West Fork Tuckasegee River	+3499	Unincorporated Areas of Jackson County.
	Approximately 0.6 mile upstream of West Pine Creek Road (State Road 1163).	+3568	
Pressley Creek	At the confluence with Tilley Creek	+2186	Unincorporated Areas of Jackson County.
	Approximately 800 feet upstream of the confluence with Tilley Creek.	+2204	
Savannah Creek	At the confluence with the Tuckasegee River	+2004	Unincorporated Areas of Jackson County.
	Approximately 0.4 mile upstream of the confluence with Shell Branch.	+3081	
Scott Creek	At the confluence with the Tuckasegee River	+1974	Town of Dillsboro, Town of Sylva, Unincorporated Areas of Jackson County.
	Approximately 350 feet upstream of U.S. Route 74/23	+3164	
Scott Creek Tributary 13	At the confluence with Scott Creek	+2127	Unincorporated Areas of Jackson County.
	Approximately 850 feet upstream of East Skyland Drive (State Road 1432).	+2160	
Shoal Creek	At the confluence with Soco Creek	+1943	Unincorporated Areas of Jackson County.
	Approximately 1.4 mile upstream of East Olivet Church Road (State Road 1424).	+2052	
Silver Run Creek	At the confluence with the Whitewater River	+3303	Unincorporated Areas of Jackson County.
	Approximately 0.9 mile upstream of East Moody Road (State Road 1106).	+3465	
Slickens Creek	At the confluence with the Tuckasegee River	+2893	Unincorporated Areas of Jackson County.
	Approximately 1,300 feet upstream of the confluence with the Tuckasegee River.	+3181	
Soapstone Creek	At the confluence with Scott Creek	+2541	Unincorporated Areas of Jackson County.
	Approximately 580 feet upstream of East Cripple Creek (State Road 1708).	+2627	
Soco Creek	Approximately 1,100 feet downstream of U.S. Route 441	+1936	Unincorporated Areas of Jackson County.
	Approximately 350 feet upstream of the confluence with Hornbuckle Creek.	+2808	
Sugar Fork	At the confluence with Greens Creek	+2359	Unincorporated Areas of Jackson County.
	Approximately 800 feet upstream of the confluence with Greens Creek.	+2400	
Sutton Branch	At the confluence with Savannah Creek	+2098	Unincorporated Areas of Jackson County.
	Approximately 0.6 mile upstream of U.S. Route 23/441	+2196	
Tanasee River	At the confluence with the Tuckasegee River	+3078	Unincorporated Areas of Jackson County.
	Approximately 0.4 mile upstream of East Tannassee Creek Road (State Road 1262).	+3157	
Tatham Creek	At the confluence with Savannah Creek	+2241	Unincorporated Areas of Jackson County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
	Approximately 1,400 feet upstream of the confluence with Savannah Creek.	+2289	
Tilley Creek	At the confluence with Cullowhee Creek	+2150	Unincorporated Areas of Jackson County.
	Approximately 0.6 mile upstream of West Tilley Creek Road (State Road 1001).	+2424	
Trout Creek	At the confluence with West Fork Tuckasegee River	+2439	Unincorporated Areas of Jackson County.
	Approximately 0.4 mile upstream of East Trout Creek Road (State Road 1131).	+2771	
Tuckasegee River	Approximately 150 feet downstream of the Jackson/Swain county boundary.	+1835	Town of Dillsboro, Unincorporated Areas of Jackson County.
	At the confluence with Greenland Creek and Panthertown Creek.	+3654	
Tuckasegee River Tributary 13	At the confluence with the Tuckasegee River	+1849	Unincorporated Areas of Jackson County.
	Approximately 500 feet upstream of West Thomas Cove Road (State Road 1413).	+1881	
Tuckasegee River Tributary 42	At the confluence with the Tuckasegee River	+2129	Unincorporated Areas of Jackson County.
	Approximately 930 feet upstream of the confluence with the Tuckasegee River.	+2132	
Wayehutta Creek	Approximately 500 feet upstream of the confluence with the Tuckasegee River.	+2080	Unincorporated Areas of Jackson County.
	Approximately 1,260 feet upstream of East Wayehutta Road (State Road 1731).	+2096	
West Fork Tuckasegee River	At the confluence with the Tuckasegee River	+2149	Unincorporated Areas of Jackson County.
	At the confluence with Hurricane Creek	+3499	
Whitewater River	At the North Carolina/South Carolina state boundary	+1961	Unincorporated Areas of Jackson County.
	Approximately 550 feet upstream of the confluence with Silver Run Creek.	+3308	
Wolf Creek	At the confluence with the Tuckasegee River	+2571	Unincorporated Areas of Jackson County.
	Approximately 2.3 miles upstream of West Canada Road	+3108	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Town of Dillsboro
Maps are available for inspection at the Town Office, 42 Front Street, Dillsboro, NC 28725.

Town of Forest Hills
Maps are available for inspection at the Jackson County Inspections Department, 401 Grindstaff Cove Road, Suite 105, Sylva, NC 28779.

Town of Sylva
Maps are available for inspection at the Town Hall, 83 Allen Street, Sylva, NC 28779.

Town of Webster
Maps are available for inspection at the Jackson County Inspections Department, 401 Grindstaff Cove Road, Suite 105, Sylva, NC 28779.

Unincorporated Areas of Jackson County
Maps are available for inspection at the Jackson County Inspections Department, 401 Grindstaff Cove Road, Suite 105, Sylva, NC 28779.

Swain County, North Carolina, and Incorporated Areas
Docket No.: FEMA–B–7767

Adams Creek	Approximately 650 feet upstream of the confluence with the Oconaluftee River.	+1874	Eastern Band of Cherokee Indians.
	Approximately 130 feet upstream of Red Clay Road	+2233	
Alarka Creek	At the confluence with the Little Tennessee River	+1710	Unincorporated Areas of Swain County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
	Approximately 1,100 feet upstream of Unahala Creek Road (State Road 1138).	+2556	
Bunches Creek	Approximately 150 feet upstream of the confluence with Raven Fork.	+2385	Eastern Band of Cherokee Indians.
	Approximately 0.8 mile upstream of Bunches Creek Road	+3158	
Conley Creek	At the confluence with the Tuckasegee River	+1845	Unincorporated Areas of Swain County.
	Approximately 1,900 feet upstream of Childers Barn Lane	+2113	
Cooper Creek	At the confluence with the Tuckasegee River	+1792	Eastern Band of Cherokee Indians, Unincorporated Areas of Swain County.
	Approximately 100 feet upstream of Isaac Wiggins Road	+2057	
Deep Creek	At the confluence with the Tuckasegee River	+1740	Town of Bryson City, Unincorporated Areas of Swain County.
	Approximately 150 feet upstream of Access Road to Deep Creek Campgrounds.	+1805	
Goose Creek	At the upstream side of Goose Creek Road	+1855	Eastern Band of Cherokee Indians.
	Approximately 1,050 feet upstream of Goose Creek Road	+1904	
Jenkins Branch	At the confluence with the Tuckasegee River	+1727	Town of Bryson City.
	Approximately 200 feet upstream of Eastside Drive	+1815	
Kirkland Creek	At the confluence with the Tuckasegee River	+1751	Town of Bryson City, Unincorporated Areas of Swain County.
	Approximately 100 feet upstream of Kirklands Creek Road (State Road 1164).	+2222	
Little Tennessee River	At the North Carolina/Tennessee state boundary	+1088	Unincorporated Areas of Swain County.
	Approximately 150 feet upstream of the Swain/Macon county boundary.	+1857	
Nantahala River	At the confluence with the Little Tennessee River	+1710	Unincorporated Areas of Swain County.
	At the Swain/Macon county boundary	+1985	
Oconaluftee River	Approximately 1.0 mile upstream of the confluence with Raven Fork.	+2056	Unincorporated Areas of Swain County.
	Approximately 1.8 mile upstream of the confluence with Raven Fork.	+2135	
Pigeon Creek	Approximately 20 feet upstream of the confluence with Raven Fork.	+2257	Eastern Band of Cherokee Indians.
	Approximately 0.7 mile upstream of the confluence with Raven Fork.	+2717	
Raven Fork	Approximately 1,650 feet upstream of Big Cove Road	+2638	Eastern Band of Cherokee Indians.
	Approximately 0.5 mile upstream of Big Cove Road	+2663	
Shepherd Creek	At the confluence with Kirkland Creek	+1844	Unincorporated Areas of Swain County.
	Approximately 1.4 mile upstream of the confluence with Kirkland Creek.	+2232	
Silvermine Creek	At the confluence with the Nantahala River	+1724	Unincorporated Areas of Swain County.
	Approximately 100 feet upstream of Taylor Road (State Road 1104).	+2151	
Straight Fork	Approximately 100 feet upstream of the confluence with Raven Fork.	+2455	Eastern Band of Cherokee Indians.
	Approximately 1.0 mile upstream of the confluence with Raven Fork.	+2558	
Toot Hollow Branch	At the confluence with the Tuckasegee River	+1734	Town of Bryson City, Unincorporated Areas of Swain County.
	Approximately 330 feet upstream of Monteith Road (State Road 1334).	+1806	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Tuckasegee River	At the confluence with the Little Tennessee River	+1710	Eastern Band of Cherokee Indians, Town of Bryson City, Unincorporated Areas of Swain County.
	At the upstream side of U.S. Route 74/441	+1845	
Wesser Creek	At the confluence with Conley Creek	+1984	Unincorporated Areas of Swain County.
	Approximately 200 feet upstream of Estes Drive	+2052	
Wesser Creek (into Nantahala River).	At the confluence with the Nantahala River	+1711	Unincorporated Areas of Swain County.
	Just downstream of the confluence with Right Fork Wesser Creek.	+2201	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Eastern Band of Cherokee Indians
Maps are available for inspection at the Ginger Lynn Welch Complex, 810 Acquoni Road, Cherokee, NC 28719.

Town of Bryson City
Maps are available for inspection at the Town Manager's Office, 45 Everett Street, Bryson City, NC 28713.

Unincorporated Areas of Swain County
Maps are available for inspection at the Swain County Mapping Department, 101 Mitchell Street, Bryson City, NC 28713.

Platte County, Nebraska, and Incorporated Areas
Docket No.: FEMA–B–1031

Loup River	Approximately 1.4 mile upstream of the confluence with the Platte River.	+1432	City of Columbus.
	At U.S. Route 81	+1447	
Platte River	At the Platte/Colfax county boundary	+1411	City of Columbus, Unincorporated Areas of Platte County.
	Approximately 4.1 miles upstream of the Platte/Colfax county boundary.	+1430	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Columbus
Maps are available for inspection at City Hall, 2424 14th Street, Columbus, NE 68602.

Unincorporated Areas of Platte County
Maps are available for inspection at the Courthouse, 2610 14th Street, Columbus, NE 68601.

Merrimack County, New Hampshire, and Incorporated Areas
Docket No.: FEMA–B–1031

Merrimack River	Approximately 1 mile downstream of the confluence with the Contoocook River.	+252	City of Concord.
	Approximately 0.7 mile downstream of the confluence with the Contoocook River.	+252	
Warner River	Approximately 0.98 mile downstream of State Route 127	+362	Town of Webster.
	Approximately 1,100 feet downstream of State Route 127	+364	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected

ADDRESSES

City of Concord
Maps are available for inspection at City Hall, 41 Green Street, Concord, NH 03301.

Town of Webster
Maps are available for inspection at the Town Hall, 945 Battle Street, Webster, NH 03303.

Dodge County, Wisconsin, and Incorporated Areas
Docket No.: FEMA–B–1032

Beaver Dam Lake	Entire shoreline	+874	City of Beaver Dam, City of Fox Lake, Unincorporated Areas of Dodge County.
Beaver Dam River	Approximately 377 feet downstream of U.S. Route 151	+841	City of Beaver Dam, Unincorporated Areas of Dodge County.
	Beaver Dam Lake Dam	+866	
Fox Lake	Entire shoreline	+896	City of Fox Lake, Unincorporated Areas of Dodge County.
Libby Creek	Approximately 0.25 mile downstream of Shamrock Road	+864	Unincorporated Areas of Dodge County.
	Approximately 0.53 mile upstream of County Highway 1	+884	
Old Mill Creek	Approximately 0.51 mile downstream of County Highway P	+883	City of Fox Lake, Unincorporated Areas of Dodge County.
	Approximately 878 feet upstream of State Highway 33	+896	
Park Creek	Approximately 0.25 mile downstream of Shaw Hill Road	+818	Unincorporated Areas of Dodge County.
	Just upstream of North Crystal Lake Road	+895	
Pratt Creek	Approximately 153 feet downstream of Sunset Road	+879	Unincorporated Areas of Dodge County.
	Approximately 0.93 mile upstream of Fairfield Road	+903	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Beaver Dam
Maps are available for inspection at 205 South Lincoln Avenue, Beaver Dam, WI 53916.

City of Fox Lake
Maps are available for inspection at 248 East State Street, Fox Lake, WI 53933.

Unincorporated Areas of Dodge County
Maps are available for inspection at 127 East Oak Street, Juneau, WI 53039.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: April 13, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2010–8819 Filed 4–15–10; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 10–606; MB Docket No. 10–49; RM–11593]

Television Broadcasting Services; Beaumont, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission grants a petition for rulemaking filed by Freedom Broadcasting of Texas, the licensee of KFDM(TV), channel 21, Beaumont, Texas, requesting the substitution of channel 25 for channel 21 at Beaumont.

DATES: This rule is effective April 16, 2010.

FOR FURTHER INFORMATION CONTACT: Adrienne Y. Denysyk, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MB Docket No. 10–49, adopted April 6, 2010, and released April 7, 2010. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC, 20554. This document will also be available via ECFS (*http://fjallfoss.fcc.gov/ecfs/*). This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via the company's Web site, *http://www.bcipweb.com.* 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).

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

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

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

■ 2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Texas, is amended by adding channel 25 and removing channel 21 at Beaumont.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. 2010–8766 Filed 4–15–10; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 75, No. 73
Friday, April 16, 2010

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.

FEDERAL HOUSING FINANCE AGENCY

5 CFR Chapter LXXX

RINs 2590–AA02, 3209–AA15

Supplemental Standards of Ethical Conduct for Employees of the Federal Housing Finance Agency

AGENCY: Federal Housing Finance Agency.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing and seeking comment on a proposed regulation, with the concurrence of the Office of Government Ethics, which would supplement the Standards of Ethical Conduct for Employees of the Executive Branch. To ensure a comprehensive and effective ethics program at FHFA and to address ethical issues unique to FHFA, the proposed regulation would establish prohibitions on the ownership of certain financial interests and restrictions on outside employment and business activities.

DATES: Comments regarding the notice of proposed rulemaking must be received on or before May 17, 2010. For additional information, *see* **SUPPLEMENTARY INFORMATION.**

ADDRESSES: You may submit your comments on the proposed rulemaking, identified by "RIN 2590–AA02," by any of the following methods:

- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel; Attention: Comments/RIN 2590–AA02, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552.
- *Hand Delivery/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel; Attention: Comments/RIN 2590–AA02, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The package should be logged at the Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- *E-mail:* Comments to Alfred M. Pollard, General Counsel, may be sent by e-mail at *RegComments@FHFA.gov*. Please include "RIN 2590–AA02" in the subject line of the message.
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Isabella Sammons, Deputy General Counsel, telephone (202) 414–3790 (not a toll-free number), Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Comments

The Federal Housing Finance Agency (FHFA) invites comment on all aspects of the proposed regulation, and will take all relevant comments into consideration before issuing the final regulation.

Copies of all comments will be posted on the FHFA internet Web site at *http://www.fhfa.gov*. In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m. at the Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 414–3751.

II. Background

The Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289, 122 Stat. 2654, amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*) (Safety and Soundness Act), and the Federal Home Loan Bank Act (12 U.S.C. 1421–1449) to establish FHFA as an independent agency of the Federal Government.[1] FHFA was established to oversee the prudential operations of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (collectively, enterprises), and the Federal Home Loan Banks (Banks) (collectively, regulated entities) and to ensure that they operate in a safe and sound manner including being capitalized adequately; foster liquid, efficient, competitive and resilient national housing finance markets; comply with the Safety and Soundness Act and rules, regulations, guidelines and orders issued by the Director of FHFA, and the respective authorizing statutes of the regulated entities; and carry out their missions through activities authorized and consistent with the Safety and Soundness Act and their authorizing statutes; and, that the activities and operations of the regulated entities are consistent with the public interest.

The Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (FHFB) were abolished one year after enactment of the HERA. However, the regulated entities continue to operate under regulations promulgated by OFHEO and FHFB; and such regulations are enforceable by the Director of FHFA until such regulations are modified, terminated, set aside, or superseded by the Director of FHFA.[2]

Executive Order 12674, as amended by Executive Order 12731, authorized the United States Office of Government Ethics (OGE) to establish a single, comprehensive and clear set of executive-branch standards of conduct. On August 7, 1992, OGE published the Standards of Ethical Conduct for Employees of the Executive Branch (Standards).[3] Codified at 5 CFR part 2635, the Standards took effect on February 3, 1993, and established uniform standards of ethical conduct for all executive branch employees.

With the concurrence of OGE, 5 CFR 2635.105 authorizes executive branch agencies to publish agency-specific supplemental regulations necessary to implement their respective ethics programs. The FHFA, with the concurrence of OGE, has determined that the following supplemental rules contained in the proposed regulation, which would add a new 5 CFR chapter LXXX, consisting of part 9001, are necessary to implement successfully the ethics program of FHFA in light of the

[1] *See* Division A, titled the "Federal Housing Finance Regulatory Reform Act of 2008," Title I, § 1101 of HERA.

[2] *See* sections 1302 and 1312 of HERA.

[3] *See* 57 FR 35006–35067, as corrected at 57 FR 48557 and 57 FR 52583, with additional grace period extensions at 59 FR 4779–4780, 60 FR 6390–6391, 60 FR 66857–66858 and 61 FR 40950–40952.

unique programs and operations of FHFA.

III. Section-by-Section Analysis

The following is a section by section analysis of the proposed regulation.

Section 9001.101 General

Proposed § 9001.101 explains that the proposed regulation would apply to all employees of FHFA and would supplement the Standards found in 5 CFR part 2635. It would also require that employees of FHFA must comply with the Standards, this part, guidance, and procedures established pursuant to this part, and any additional rules of conduct that FHFA is authorized to issue. It also notes that employees should contact the Designated Agency Ethics Official (DAEO) if they have questions about any provision of this regulation or other ethics-related matters.

The proposed section also contains cross-references to other executive branch ethics regulations and a subsequent employment restriction of section 1317D of the Safety and Soundness Act, 12 U.S.C. 4523, applicable to certain highly compensated former FHFA officers and employees, including the FHFA Director, along with an annual employee notification requirement as to that statutory restriction. Section 1317D prohibits such highly compensated former FHFA officers and employees, and the Director, from accepting compensation from an enterprise under section 1317D of the Safety and Soundness Act for two years after leaving FHFA.

Section 9001.102 Definitions

Proposed § 9001.102 defines the key terms used in the proposed regulation.

Affiliate would be defined as any entity that controls, is controlled by, or is under common control with another entity.

Designated Agency Ethics Official, or *DAEO,* as also used in 5 CFR part 2635, and "alternate DAEO" would be defined as the individuals so designated by the Director, FHFA. The DAEO is responsible for designating agency ethics officials and ethics designees, as such terms are used in 5 CFR part 2635. As proposed, the alternate DAEO would act as the DAEO in the DAEO's absence.

Director would be defined as the Director of FHFA or his or her designee.

Employee would be defined as an officer or employee of FHFA, including a special Government employee. For purposes of this part, it also would be defined as an individual on detail from another agency to FHFA for a period of more than 30 days.

Enterprise would be defined as the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.

Federal Home Loan Bank or *Bank* would be defined as a Bank established under the Federal Home Loan Bank Act; the term "Federal Home Loan Banks" means, collectively, all the Federal Home Loan Banks.

Federal Home Loan Bank System would be defined as the Federal Home Loan Banks under the supervision of FHFA.

Regulated entity would be defined as the Federal National Mortgage Association and any affiliate thereof; the Federal Home Loan Mortgage Corporation and any affiliate thereof; or any Federal Home Loan Bank; the term "regulated entities" means, collectively, the Federal National Mortgage Association and any affiliate thereof; the Federal Home Loan Mortgage Corporation and any affiliate thereof; and the Federal Home Loan Banks.

Safety and Soundness Act would be defined to mean the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*), as amended by the Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289, 122 Stat. 2654 (2008).

Security would be defined as all interests in debt or equity instruments. The term includes, without limitation, secured and unsecured bonds, debentures, notes, securitized assets and commercial paper including loans securitized by mortgages or deeds of trust and securities backed by such instruments, as well as all types of preferred and common stock. The term encompasses current and contingent ownership interests including any beneficial or legal interest derived from a trust. Such interest includes any right to acquire or dispose of any long or short position in such securities and also includes, without limit, interests convertible into such securities, as well as options, rights, warrants, puts, calls and straddles with respect thereto. The term shall not, however, be construed to include deposit accounts, such as checking, savings, or money market deposit accounts.

Section 9001.103 Waivers

Proposed § 9001.103 would authorize the DAEO to grant employees of FHFA written waivers of any provision of the proposed FHFA regulation based upon a determination that the waiver will not result in conduct inconsistent with 5 CFR part 2635 or otherwise prohibited by law, and that application of the provision would not be necessary to ensure public confidence in the impartiality and objectivity with which the programs of FHFA are administered. In granting a waiver under proposed § 9001.103, the DAEO may require the employee to take further action, including executing a written disqualification statement. This proposed provision is intended, in appropriate cases, to ease the burden that these supplemental regulations as proposed would impose on employees of FHFA while ensuring that employees do not engage in actions or hold financial interests that may interfere with the objective and impartial performance of their official duties.

Section 9001.104 Prohibited Financial Interests

Proposed § 9001.104(a) would prohibit FHFA employees and the employees' spouse and minor children from owning or controlling certain financial interests that are related to or affected by the operations of FHFA, such as securities owned, issued, guaranteed, securitized, or collateralized by the regulated entities. This prohibition would not apply to special Government employees.[4] The prohibition of proposed § 9001.104(a) is based on the view of FHFA that permitting FHFA employees and their spouse and minor children directly or indirectly to own or control securities owned, issued, guaranteed, securitized, or collateralized by the regulated entities would cause a reasonable person to question the impartiality with which FHFA programs are administered. Specifically, FHFA believes that there is a direct and appropriate nexus between the prohibition against owning or controlling such securities as applied both to employees and to the spouses and minor children of employees and the efficiency of the service.

In addition, while Federal conflict of interest statutes and the Standards prohibit an employee of FHFA from participating in matters in which the employee or the employee's spouse or minor children have a conflicting financial interest, FHFA has determined that a broader ban would be more effective in ensuring that no reasonable

[4] The term "special Government employee" is defined in 5 CFR 2635.102 to mean "those executive branch officers or employees specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period."

person could question the impartiality and objectivity of the agency's actions. The broader ban of § 9001.104(a) establishes a clear prohibition that will be easily understood by observers of FHFA.

Moreover, the proposed prohibition would substantially reduce the burden on the FHFA and FHFA employees to determine the scope of the prohibition for each employee. By promulgating a broad ban that excludes all securities owned, issued, guaranteed, securitized, or collateralized by the regulated entities, proposed § 9001.104(a) would substantially reduce the need for FHFA employees, the DAEO, and other agency ethics officials or counselors to determine the financial interests prohibited by each employee's duties. The proposed rule should be easier for FHFA to implement and for employees to follow.

Proposed § 9001.104(b) also would attribute to an FHFA employee, or to the employee's spouse and minor children, securities he or she would be prohibited from holding directly by § 9001.104(a) that are held by certain described third-party entities.

Proposed § 9001.104(c) would permit an FHFA employee and the employee's spouse and minor children to own interests in publicly-traded or publicly-available diversified mutual or other collective diversified investment funds that contain within their portfolios interests that they would be prohibited from holding by proposed § 9001.104(c). Under this provision, ownership of such investment funds would be permitted as long as the employee or the employee's spouse or minor children do not have the ability to control the fund or its portfolio, and the fund does not have an objective or practice of concentrating its investments in securities of a regulated entity or the regulated entities generally, and less than 25 percent of the total holdings of the fund are comprised of securities owned, issued, guaranteed, securitized, or collateralized by one or more regulated entities.

This exception to proposed § 9001.104(a) reflects the view of FHFA that the prohibition on owning or controlling securities of the regulated entities should not be extended to publicly-traded or publicly-available mutual funds or other collective investment funds that are diversified and over which employees have no control, since it would be unreasonable to require employees to divest themselves of such mutual funds based on investment decisions in which they played no role. FHFA believes that allowing an FHFA employee and the employee's spouse and minor children to own interests in publicly-traded or publicly-available diversified mutual funds and collective investment funds would not endanger the impartiality or objectivity of FHFA, even if these funds held some limited interest in securities owned, issued, securitized, guaranteed, or collateralized by one or more of the regulated entities.

Proposed § 9001.104(d) would require new employees of FHFA, within 30 days of commencing employment, to provide to the DAEO in writing all financial interests acquired prior to the commencement of their employment with FHFA that they are prohibited from holding by § 9001.104(a). Employees would be required to divest such interests, within 90 days of the date reported, unless they receive a written waiver from the DAEO in accordance with § 9001.103. The proposed section would impose a similar reporting and divestiture requirement upon employees who acquire, without specific intent, financial interests prohibited by § 9001.104(a).

Section 9001.105 Outside Employment

The proposed regulation is designed to balance several important ethical principles against an employee's right to engage in outside activities. Paragraph (a) of the proposed section would prohibit an FHFA employee, except for a special Government employee, from engaging in paid or unpaid employment with (1) a person, other than a State or local government, who is a registered lobbyist engaged in lobbying activities concerning the FHFA programs; (2) any regulated entity, or (3) the Office of Finance of the Federal Home Loan Bank System. FHFA is of the view that such a policy against active participation in such businesses is necessary to protect against questions regarding the impartiality and objectivity of employees and the administration of the programs of FHFA. FHFA believes that it would hinder FHFA in meeting its missions if members of the public could question whether employees are using their public positions or connections at FHFA to advance alternate careers.

Furthermore, in accordance with 5 CFR 2635.803, FHFA is of the view that it is necessary or desirable for the purpose of administering its ethics program to require FHFA employees to obtain approval before engaging in outside employment or activities. An approval requirement would help to ensure that potential ethical problems are resolved before employees begin outside employment or activities that could involve a violation of applicable statutes and standards of conduct.

Thus, proposed § 9001.105(b) would provide that an FHFA employee, other than a special Government employee, must obtain advance written approval from the employee's supervisor and the concurrence of the DAEO before engaging in any outside employment. Proposed paragraph (c) to § 9001.105 broadly defines outside employment to cover any form of non-Federal employment or business relationship involving the provision of personal services, whether or not for compensation, other than in the discharge of official duties. It also includes writing when done under an arrangement with another person or entity for production or publication of the written product. It does not, however, include participation in the activities of nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service, or civic organizations, unless such activities are for compensation other than reimbursement of expenses, the organization's activities are devoted substantially to matters relating to the employee's official duties as defined in 5 CFR 2635.807(a)(2)(i)(B) through (E) and the employee will serve as officer or director of the organization, or the activities will involve the provision of consultative or professional services. *Consultative services* is proposed to mean the provision of personal services by an employee, including the rendering of advice or consultation, which requires advanced knowledge in a field of science or learning customarily acquired by a course of specialized instruction and study in an institution of higher education, hospital, or similar facility. *Professional services* is proposed to mean the provision of personal services by an employee, including the rendering of advice or consultation, which involves application of the skills of a profession as defined in 5 CFR 2636.305(b)(1) or involves a fiduciary relationship as defined in 5 CFR 2636.305(b)(2).

A note following proposed paragraph (c) of § 9001.105 pertains to the special approval requirement set out in both 18 U.S.C. 203(d) and 205(e), respectively, for certain representational activities otherwise covered by the conflict of interest restrictions on compensation and activities of employees in claims against and other matters affecting the Government. The note, as proposed, explains that an employee who wishes to act as agent or attorney for, or otherwise represent his or her parents, spouse, children, or any person for whom, or any estate for which, he or she is serving as guardian, executor,

administrator, trustee, or other personal fiduciary in such matters must obtain the approval required by law of the Government official responsible for the employee's appointment in addition to the regulatory approval that would be required in proposed § 9001.105.

As proposed, § 9001.105(d) sets out the procedures for requesting prior approval to engage in outside employment initially, or within seven calendar days of a significant change in the nature or scope of the outside employment or the employee's official position. Proposed paragraph (e) of § 9001.105 would provide that approval would be granted only upon a determination that the outside employment is not expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635 and this proposed part.

Proposed § 9001.105(f) would provide that the DAEO may issue written instructions governing the submission of requests for approval of outside employment, which may exempt categories of employment from the prior approval requirement based on a determination that employment within those categories would generally be approved and would likely not involve conduct prohibited by Federal law or regulation, including 5 CFR part 2635 and this proposed part.

Section 9001.106 Restrictions Resulting From Employment of Family and Household Members

Proposed § 9001.106 would prohibit an employee of FHFA from participating in any matter in which a regulated entity is a party if the regulated entity employs, as an employee or consultant, his or her spouse, child, parent, or sibling, or member of his or her household unless the DAEO has authorized the employee to participate in the matter using the standard in 5 CFR 2635.502(d). Proposed § 9001.106 would require such an employee to make a written report to the DAEO within 30 days of the employment by a regulated entity of the employee's spouse, child, parent, sibling, or member of his or her household. This requirement is intended to eliminate the potential for any appearance of preferential treatment in those instances where employment of a family member or a member of the employee's household would be likely to raise questions regarding the appropriateness of actions taken by the employee or FHFA.

Section 9001.107 Other Limitations

Proposed § 9001.107(a) would reference the statutory restriction on financial interests applicable to the Director, the Deputy Director of the Division of Enterprise Regulation, the Deputy Director of the Division of Federal Home Loan Bank Regulation, and the Deputy Director for Housing Mission and Goals. These individuals are subject to additional financial interest limitations set forth in section 1312(g) of the Safety and Soundness Act (12 U.S.C. 4512(g)). Section 1312(g) provides that the Director and each Deputy Director may not—

(1) Have any direct or indirect financial interest in any regulated entity or entity-affiliated party; [5]

(2) Hold any office, position, or employment in any regulated entity or entity-affiliated party; or

(3) Have served as an executive officer or director of any regulated entity or entity-affiliated party at any time during the 3-year period preceding the date of appointment or designation of such individual as Director or Deputy Director, as applicable.

Proposed paragraph (b) of § 9001.107 would provide that if an employee or the spouse or minor children of the employee directly or indirectly owns a financial interest in a member of a Bank or in a financial institution such as a mortgage bank, mortgage broker, bank, thrift, or other financial institution that originates, insures, or services mortgages that are owned, issued, guaranteed, securitized, or collateralized by a regulated entity, the employee is cautioned not to violate the statutory prohibition against financial conflicts of interest set forth in 18 U.S.C. 208. The proposed language would note that the government-wide *de minimis* and other exceptions set forth in 5 CFR 2640.202 are applicable to the ownership or control of interests in such financial institutions. Employees are encouraged to seek a determination from the DAEO as to whether the financial interest in the member of a Bank or in the financial institution creates a financial conflict of interest or an appearance of a conflict of interest and whether the employee should disqualify himself or herself from participating in an official capacity in a particular matter involving the financial institution.

Section 9001.108 Prohibited Recommendations

Proposed § 9001.108 would prohibit an employee of FHFA from recommending, suggesting, or giving advice to any person with respect to financial transactions or investment actions involving the acquisition, sale, or divestiture of securities of a regulated entity. The Standards at 5 CFR 2635.703 prohibit an employee from allowing the improper use of nonpublic information to further his or her private interest or that of another, whether through advice or recommendation or by knowing unauthorized disclosure. The proposed section would supplement 5 CFR 2635.703 in that the section expressly would prohibit FHFA employees from using or creating the appearance of using information that is not available to the general public to further a private interest. The proposed prohibition is also intended to eliminate any misunderstanding or harm that could result from such a recommendation. For example, an investor should not be misled into believing, pursuant to the recommendation of an FHFA employee, that the securities of a particular regulated entity regulated by FHFA is a sound buy because the investor believes that the employee may have access to inside information.

Section 9001.109 Prohibited Purchase of Assets

Proposed § 9001.109 would prohibit employees, the spouses of employees and the minor children of employees of FHFA from purchasing real or personal property from the regulated entities unless it is sold at public auction or by other means that would ensure that the selling price of the property is the asset's fair market value. It is proposed as a supplement to the general prohibition in 5 CFR 2635.702 against the use of public office for private gain.

Regulatory Impacts

Paperwork Reduction Act

The proposed regulation does not contain any information collection requirement that requires the approval of OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation does not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the proposed regulation under the Regulatory

[5] The term "entity-affiliated party" is defined in section 1301(11) of the Safety and Soundness Act (12 U.S.C. 4502(11)).

Flexibility Act. FHFA certifies that the proposed regulation is not likely to have a significant economic impact on a substantial number of small business entities because the regulation is applicable only to employees of FHFA.

List of Subjects in 5 CFR Part 9001

Administration, Conflicts of interest, Ethics, Government employees.

Accordingly, for the reasons stated in the preamble, FHFA, with the concurrence of OGE, is proposing to amend title 5 of the Code of Federal Regulations by adding a new chapter LXXX, consisting of part 9001, to read as follows:

CHAPTER LXXX—FEDERAL HOUSING FINANCE AGENCY

PART 9001—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE FEDERAL HOUSING FINANCE AGENCY

Sec.

9001.101 General.
9001.102 Definitions.
9001.103 Waivers.
9001.104 Prohibited financial interests.
9001.105 Outside employment.
9001.106 Restrictions resulting from employment of family and household members.
9001.107 Other limitations.
9001.108 Prohibited recommendations.
9001.109 Prohibited purchase of assets.

Authority: 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); 12 U.S.C. 4526; E.O. 12674, 54 FR 15159; 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547; 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.402(c), 2635.403(a), 2635.502(e), 2635.604, 2635.702, 2635.703, 2635.802(a), 2635.803.

§ 9001.101 General.

(a) *Purpose and scope.* In accordance with 5 CFR 2635.105, the purpose of this regulation is to supplement the Standards of Ethical Conduct for Employees of the Executive Branch contained in 5 CFR part 2635. The regulation applies to employees of the Federal Housing Finance Agency (FHFA). Employees are required to comply with 5 CFR part 2635, this part, guidance and procedures established pursuant to this part, and any additional rules of conduct that the FHFA is authorized to issue. Employees should contact the DAEO if they have questions about any provision of this regulation or other ethics-related matters.

(b) *Cross-references*—(1) *Regulations.* FHFA employees are also subject to the regulations concerning executive branch financial disclosure contained in 5 CFR part 2634, the regulations concerning executive branch financial interests contained in 5 CFR part 2640, and the regulations concerning executive branch employee responsibilities and conduct contained in 5 CFR part 735.

(2)(i) *Statutory restriction.* Section 1319D of the Act, 12 U.S.C. 4523, prohibits the Director or any former officer or employee of the FHFA who, while employed by the FHFA, was compensated at a rate in excess of the lowest rate for a position classified higher than GS–15 of the General Schedule under section 5107 of title 5, United States Code, from accepting compensation from an enterprise during the two-year period beginning on the date of his or her separation from employment by the FHFA.

(ii) *Notice to employees.* The DAEO shall notify employees on an annual basis of the rate of compensation that triggers the subsequent employment restriction.

§ 9001.102 Definitions.

For purposes of this part, the term:

Affiliate means any entity that controls, is controlled by, or is under common control with another entity.

Designated Agency Ethics Official, or *DAEO,* as also used in 5 CFR part 2635, and "alternate DAEO" mean the individuals so designated by the Director, FHFA. The DAEO is responsible for designating agency ethics officials and ethics designees, as such terms are used in 5 CFR part 2635. The alternate DAEO acts as the DAEO in the DAEO's absence.

Director means the Director of FHFA or his or her designee.

Employee means an officer or employee of FHFA, including a special Government employee. For purposes of this part, it also means an individual on detail from another agency to FHFA for a period of more than 30 days.

Enterprise means the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.

Federal Home Loan Bank or *Bank* means a Bank established under the Federal Home Loan Bank Act; the term "Federal Home Loan Banks" means, collectively, all the Federal Home Loan Banks.

Federal Home Loan Bank System means the Federal Home Loan Banks under the supervision of the Federal Housing Finance Agency.

Regulated entity means the Federal National Mortgage Association and any affiliate thereof; the Federal Home Loan Mortgage Corporation and any affiliate thereof; or any Federal Home Loan Bank; the term "regulated entities" means, collectively, the Federal National Mortgage Association and any affiliate thereof; the Federal Home Loan Mortgage Corporation and any affiliate thereof; and the Federal Home Loan Banks.

Safety and Soundness Act means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*), as amended by the Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289, 122 Stat. 2654 (2008).

Security means all interests in debt or equity instruments. The term includes, without limitation, secured and unsecured bonds, debentures, notes, securitized assets and commercial paper including loans securitized by mortgages or deeds of trust and securities backed by such instruments, as well as all types of preferred and common stock. The term encompasses current and contingent ownership interests including any beneficial or legal interest derived from a trust. Such interest includes any right to acquire or dispose of any long or short position in such securities and also includes, without limit, interests convertible into such securities, as well as options, rights, warrants, puts, calls and straddles with respect thereto. The term shall not, however, be construed to include deposit accounts, such as checking, savings, or money market deposit accounts.

§ 9001.103 Waivers.

(a) *General.* The DAEO may waive any provision of this part upon finding that the waiver will not result in conduct inconsistent with 5 CFR part 2635 or otherwise prohibited by law, and that application of the provision is not necessary to ensure public confidence in the impartiality and objectivity with which the programs of the FHFA are administered. Each waiver shall be in writing and supported by a statement of the facts and findings upon which it is based and may impose appropriate conditions, including but not limited to requiring the employee to execute a written disqualification statement or an agreement not to acquire additional securities.

(b) *Waiver of prohibitions relating to ownership or control of securities.* The DAEO may grant a waiver permitting the employee or the employee's spouse or minor children to own or control, directly or indirectly, any security prohibited under § 9001.104, if, in addition to the standards under paragraph (a) of this section:

(1) Extenuating circumstances exist, such as ownership or control of the security was acquired:

(i) Prior to employment with FHFA;

(ii) Through inheritance, gift, merger, acquisition, or other change in corporate structure, or otherwise without specific

intent on the part of the employee, or employee's spouse or minor children, to acquire the security; or

(iii) By an employee's spouse or minor children as part of a compensation package in connection with employment or prior to marriage to the employee;

(2) The amount of the prohibited financial interest has a market value of less than the *de minimis* amount set forth in 5 CFR 2640.202(a);

(3) The employee makes a prompt and complete written disclosure of the interest; and

(4) If the employee is required to disqualify himself or herself from certain assignments, the disqualification does not unduly interfere with the full performance of the employee's duties.

§ 9001.104 Prohibited financial interests.

(a) *General prohibition.* This section applies to all employees, except special Government employees. Except as permitted in paragraph (c) of this section, an employee or an employee's spouse or minor children, shall not directly or indirectly own or control securities owned, issued, guaranteed, securitized, or collateralized by a regulated entity.

(b) *Restrictions arising from third-party relationships.* If any of the entities listed in paragraphs (b)(1) through (6) of this section owns securities that an employee would be prohibited from owning directly by paragraph (a) of this section, the employee is deemed to hold the securities indirectly. The entities are—

(1) A partnership in which the employee or employee's spouse or minor children are general partners;

(2) A partnership in which the employee or employee's spouse or minor children individually or jointly hold more than a 10 percent limited partnership interest;

(3) A closely held corporation in which the employee or employee's spouse or minor children individually or jointly hold more than a 10 percent equity interest;

(4) A trust in which the employee or employee's spouse or minor children have a legal or beneficial interest;

(5) An investment club or similar informal investment arrangement between the employee or employee's spouse or minor children and others; or

(6) Any other entity in which the employee or employee's spouse or minor children individually or jointly hold more than a 10 percent equity interest.

(c) *Exceptions to prohibition for certain interests.* Notwithstanding paragraphs (a) and (b) of this section, an employee or an employee's spouse or minor children may directly or indirectly own or control:

(1) A security for which a waiver has been granted pursuant to § 9001.103; and

(2) An interest in a publicly-traded or publicly-available diversified mutual fund or other collective diversified investment fund, including a widely-held pension or other retirement fund if:

(i) Neither the employee, the employee's spouse, nor the employee's minor children exercise or have the ability to exercise control over the financial interests held by the fund; and

(ii) The fund does not indicate in its prospectus the objective or practice of concentrating its investments in securities of a regulated entity or regulated entities generally, and less than 25 percent of the total holdings of the fund are comprised of securities owned, issued, guaranteed, securitized, or collateralized by one or more regulated entities.

(d) *Reporting and divestiture.* An employee must provide, in writing, to the DAEO any financial interest prohibited under paragraph (a) of this section acquired prior to the commencement of employment with the FHFA or without specific intent, as through gift, inheritance, or marriage, within 30 days from the start of employment or acquisition of such interest. Such financial interest must be divested within 90 days from the date reported unless a waiver is granted in accordance with § 9001.103.

§ 9001.105 Outside employment.

(a) *Prohibited outside employment.* Employees, except special Government employees, shall not engage in:

(1) Employment with a person or entity, other than a State or local government, that is registered as a lobbyist under the Lobbying Disclosure Act of 1995 (2 U.S.C. chapter 26) and engages in lobbying activities concerning the FHFA programs; or

(2) Employment with any regulated entity or with the Office of Finance of the Federal Home Loan Bank System.

(b) *Prior approval for other outside employment.* Before engaging in any outside employment that is not prohibited under paragraph (a) of this section, with or without compensation, an employee of the FHFA, other than a special Government employee, must obtain written approval from the employee's supervisor and the concurrence of the DAEO. Nonetheless, special Government employees remain subject to other statutory and regulatory provisions governing their outside activities, including 18 U.S.C. 203(c) and 205(c), as well as applicable provisions of 5 CFR part 2635.

(c) *Definition of outside employment.* For purposes of paragraph (b) of this section, *outside employment* means any form of non-Federal employment or business relationship involving the provision of personal services, whether or not for compensation. It includes, but is not limited to, services as an officer, director, employee, agent, advisor, attorney, consultant, contractor, general partner, trustee, teacher, or speaker. It includes writing when done under an arrangement with another person or entity for production or publication of the written product. The definition does not include positions as trustee for a family trust for which the only beneficiaries are the employee, the employee's spouse, the employee's minor or dependent children, or any combination thereof. The definition also does not include participation in the activities of a nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service or civic organization, unless:

(1) The employee will receive compensation other than reimbursement of expenses;

(2) The organization's activities are devoted substantially to matters relating to the employee's official duties as defined in 5 CFR 2635.807(a)(2)(i)(B) through (E) and the employee will serve as officer or director of the organization; or

(3) The activities will involve the provision of consultative or professional services. *Consultative services* means the provision of personal services by an employee, including the rendering of advice or consultation, which requires advanced knowledge in a field of science or learning customarily acquired by a course of specialized instruction and study in an institution of higher education, hospital, or similar facility. *Professional services* means the provision of personal services by an employee, including the rendering of advice or consultation, which involves application of the skills of a profession as defined in 5 CFR 2636.305(b)(1) or involves a fiduciary relationship as defined in 5 CFR 2636.305(b)(2).

Note to § 9001.105(c): There is a special approval requirement set out in both 18 U.S.C. 203(d) and 205(e), respectively, for certain representational activities otherwise covered by the conflict of interest restrictions on compensation and activities of employees in claims against and other matters affecting the Government. Thus, an employee who wishes to act as agent or attorney for, or otherwise represent his or her parents, spouse, children, or any person for whom, or any estate for which, he or she is serving as

guardian, executor, administrator, trustee, or other personal fiduciary in such matters must obtain the approval required by law of the Government official responsible for the employee's appointment in addition to the regulatory approval required in this section.

(d) *Procedure for requesting approval*—(1) The approval required by paragraph (b) of this section shall be requested by e-mail or other form of written correspondence in advance of engaging in outside employment as defined in paragraph (c) of this section.

(2) The request for approval to engage in outside employment or certain other activities shall set forth, at a minimum:

(i) The name of the employer or organization;

(ii) The nature of the legal activity or other work to be performed;

(iii) The title of the position; and

(iv) The estimated duration of the outside employment.

(3) Upon a significant change in the nature or scope of the outside employment or in the employee's official position within FHFA, the employee must, within seven calendar days of the change, submit a revised request for approval.

(e) *Standard for approval.* The DAEO may grant the approval required by paragraph (b) of this section only upon his or her written determination that the outside employment is not expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635 and this part.

(f) *Issuance of instructions.* The DAEO may issue written instructions governing the submission of requests for approval of outside employment under paragraph (d) of this section. The instructions may exempt categories of employment from the prior approval requirement of paragraph (b) of this section based on a determination by the DAEO that employment within those categories of employment would generally be approved and is not likely to involve conduct prohibited by Federal law or regulation, including 5 CFR part 2635 and this part.

§ 9001.106 Restrictions resulting from employment of family and household members.

(a) *Disqualification of employee.* An employee may not participate in any particular matter in which a regulated entity is a party if the regulated entity employs as an employee or a consultant his or her spouse, child, parent, or sibling, or member of his or her household unless the DAEO has authorized the employee to participate in the matter using the standard set forth in 5 CFR 2635.502(d).

(b) *Reporting certain relationships.* Within 30 days of the spouse, child, parent, sibling, or member of the employee's household being employed by the regulated entity, the employee shall provide in writing notice of such employment to the DAEO.

§ 9001.107 Other limitations.

(a) *Director and Deputy Directors.* The Director, the Deputy Director of the Division of Enterprise Regulation, the Deputy Director of the Division of Federal Home Loan Bank Regulation, and the Deputy Director for Housing Mission and Goals are subject to additional financial interest limitations as set forth in section 1312(g) of the Safety and Soundness Act, 12 U.S.C. 4512(g).

(b) *Financial interests in Bank members and other financial institutions.* If an employee or the spouse or minor children of the employee directly or indirectly owns a financial interest in a member of a Bank or in a financial institution such as a mortgage bank, mortgage broker, bank, thrift, or other financial institution that originates, insures, or services mortgages that are owned, guaranteed, securitized, or collateralized by a regulated entity, the employee is cautioned not to violate the statutory prohibition against financial conflicts of interest set forth in 18 U.S.C. 208. The government-wide *de minimis* and other exceptions set forth in 5 CFR 2640.202 are applicable to the ownership or control of interests in such financial institutions. Employees are encouraged to seek a determination from the DAEO as to whether the financial interest in the member of the Bank or in the financial institution creates a financial conflict of interest or an appearance of a conflict of interest and whether the employee should disqualify himself or herself from participating in an official capacity in a particular matter involving the financial institution.

§ 9001.108 Prohibited recommendations.

Employees shall not make any recommendation or suggestion, directly or indirectly, concerning the acquisition, sale, or divestiture of securities of a regulated entity.

§ 9001.109 Prohibited purchase of assets.

An employee or the employee's spouse or minor children shall not purchase, directly or indirectly, any real or personal property from a regulated entity, unless it is sold at public auction or by other means which would assure that the selling price is the asset's fair market value.

Dated: January 18, 2010.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

Approved: April 8, 2010.

Robert I. Cusick,

Director, Office of Government Ethics.

[FR Doc. 2010–8649 Filed 4–15–10; 8:45 am]

BILLING CODE 8070–01–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 94

[Docket No. APHIS-2009-0034]

RIN 0579-AD12

Changes in Disease Status of the Brazilian State of Santa Catarina with Regard to Certain Ruminant and Swine Diseases

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the regulations governing the importation of certain animals and animal products by adding the Brazilian State of Santa Catarina to the list of regions we recognize as free of foot-and-mouth disease, rinderpest, swine vesicular disease, classical swine fever, and African swine fever. We are proposing this action at the request of the Government of Brazil and after conducting a risk evaluation that concludes that the Brazilian State of Santa Catarina is free of these diseases. This proposed action would relieve certain restrictions on the importation into the United States of live swine, swine semen, pork meat, pork products, live ruminants, ruminant semen, ruminant meat, and ruminant products from Santa Catarina while continuing to protect against the introduction of these diseases into the United States.

DATES: We will consider all comments that we receive on or before June 15, 2010.

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

- Federal eRulemaking Portal: Go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0034*) to submit or view comments and to view supporting and related materials available electronically.
- Postal Mail/Commercial Delivery: Please send two copies of your comment to Docket No. APHIS-2009-0034,

Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2009-0034.

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

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

FOR FURTHER INFORMATION CONTACT: Dr. Silvia Kreindel, Senior Staff Veterinarian, Regionalization Evaluation Services Staff, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737; (301) 734-4356 or (301) 734-8419.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR part 94 (referred to below as the regulations) govern the importation into the United States of specified animals and animal products in order to prevent the introduction of various animal diseases, including rinderpest, foot-and-mouth disease (FMD), African swine fever (ASF), classical swine fever (CSF), and swine vesicular disease (SVD). These are dangerous and destructive communicable diseases of swine and ruminants.

Section 94.1 of the regulations prohibits, with certain exceptions, the importation into the United States of live swine, live ruminants, and products from these species from regions where FMD or rinderpest is known to exist. Rinderpest or FMD exists in all regions of the world except for certain regions that are listed as free of rinderpest or free of both rinderpest and FMD in § 94.1. Section 94.11 of the regulations lists regions of the world that have been determined to be free of rinderpest and FMD, but that are subject to certain restrictions because of their proximity to or trading relationships with rinderpest- or FMD-affected regions. Section 94.8 of the regulations restricts the importation into the United States of pork and pork products from regions where ASF is known to or reasonably believed to exist. ASF is known to or reasonably believed to exist in those regions of the world listed in § 94.8. Section 94.9 of the regulations restricts the importation into the United States of pork and pork products from regions where CSF is known to exist, and § 94.10 prohibits, with certain exceptions, the importation of live swine from regions where CSF is known to exist. Sections 94.9 and 94.10 provide that CSF exists in all regions of the world except the regions listed in those sections. Section 94.12 of the regulations restricts the importation into the United States of pork and pork products from regions where SVD is known to exist. SVD exists in all regions of the world except for certain regions that are listed as free of SVD in this section.

The Government of Brazil has requested that the U.S. Department of Agriculture (USDA) consider Santa Catarina to be free of rinderpest, FMD, ASF, CSF, and SVD in order to initiate trade in fresh pork. Declaring Santa Catarina to be free of these diseases would relieve restrictions on the importation of not just fresh pork but also additional commodities that could potentially carry these diseases, such as live swine, swine semen, pork meat, pork products, live ruminants, ruminant semen, ruminant meat, and ruminant products. In response to the Government of Brazil's request, the USDA's Animal and Plant Health Inspection Service (APHIS) has conducted an evaluation of the disease status of Santa Catarina with regard to FMD, CSF, SVD, and ASF, which included one site visit to Santa Catarina and three site visits to other Brazilian States. The risk evaluation, "APHIS Evaluation of the Status of the Brazilian State of Santa Catarina Regarding Foot-and-Mouth Disease, Classical Swine Fever, Swine Vesicular Disease, and African Swine Fever," may be obtained by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. The document may also be viewed on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

In the risk evaluation, we concluded that Santa Catarina is free of FMD, ASF, CSF, and SVD and has adequate veterinary infrastructures in place to prevent, control, and manage outbreaks of these diseases if they were to occur. Rinderpest was not considered within the scope of the risk evaluation as it is not endemic to the Americas and has never been established within Brazil. We are therefore proposing to amend the regulations by adding Santa Catarina to the list in § 94.1 of regions that are free of rinderpest and FMD, the list in § 94.11 of regions that are declared to be free of rinderpest and FMD but that are subject to certain restrictions because of their proximity to or trading relationships with rinderpest or FMD-affected regions, the lists in §§ 94.9 and 94.10 of regions that are free of CSF, and the list in § 94.12 of regions that are free of SVD. We are also proposing to exclude Santa Catarina from the list in § 94.8 of regions where ASF is known to or reasonably believed to exist.

Risk Evaluation

Drawing on data submitted by the Government of Brazil and observations from our site visit to the region under consideration, we have evaluated the animal health status of Santa Catarina relative to FMD, ASF, CSF, and SVD. Our evaluation was conducted according to the 11 factors identified in § 92.2, "Application for recognition of the animal health status of a region," which are used to determine the level of risk associated with importing animals or animal products into the United States from a given region. A summary evaluation of each factor is discussed below.

Veterinary Authority and Infrastructure

Federal and State authorities provide the two main structures for Brazil's veterinary services. Brazil's Ministry of Agriculture, Livestock, and Food Supply (MAPA), through the Department of Animal Health, has the primary Federal authority governing all animal health programs. MAPA coordinates all aspects of the national animal health system, including developing animal disease control strategies, conducting laboratory diagnosis, and auditing State veterinary services. State personnel are responsible for executing Federal programs, laws, and policies at the State level. The responsibilities of state officials for carrying out Federal programs are outlined in standard operating procedures developed with Federal officials. Additionally, MAPA has a system of official veterinarians and support staff in place for carrying out field programs and for import controls and animal quarantine. The Brazilian State of Santa Catarina's veterinary services implements Federal animal health programs at the field level in coordination with the Companhia Integrada de Desenvolvimento Agricola de Santa Catarina (CIDASC), an integrated public company. Regional and local officers of the official state veterinary services are part of the CIDASC. The work of CIDASC is subject to inspection and auditing by MAPA. APHIS considers that MAPA and the Brazilian State of Santa Catarina have

sufficient legal authority to carry out official disease control, eradication, and quarantine activities.

Review of veterinary infrastructure with MAPA and CIDASC officials demonstrated an infrastructure adequate for carrying out surveillance programs in Santa Catarina and for rapidly detecting FMD, CSF, ASF, and SVD. The technical infrastructure is adequate, and officials use advanced technologies to conduct animal health programs. Santa Catarina's local veterinary unit offices are adequately staffed, with strong local contacts, coverage, and control mechanisms. Personnel appeared to be adequately trained in identifying the clinical signs of FMD, SVD, ASF, and CSF. Local veterinary units also regularly provide information on disease signs and reporting requirements to producers within their coverage area. The private sector is strongly committed to general animal health activities as well as disease eradication and traceability (identification) systems, and shows its support by substantial financial contributions. With regard to indemnity procedures, we concluded that sufficient funds are available to compensate owners for depopulated, exposed, and affected animals. The Federal authorities provide money for payments from the national treasury, and money also comes from private indemnity funds created and administered by producers.

Disease Status in the Region

There is no evidence of any FMD, CSF, SVD, or ASF infections or outbreaks in Santa Catarina. No outbreaks of FMD have occurred in Santa Catarina since 1993, and the World Organization for Animal Health (OIE) recognized Santa Catarina as free of FMD without vaccination in 2007. No outbreaks of ASF have occurred in Santa Catarina since 1981, and no outbreaks of CSF have occurred in Santa Catarina since 1990. SVD has never occurred in Brazil.

Disease Status of Adjacent Regions and Separation Measures

Adjacent regions that were considered in our risk analysis were the Brazilian States of Rio Grande Do Sul and Paraná and the neighboring country of Argentina. Santa Catarina is surrounded by the Brazilian States of Rio Grande Do Sul and Paraná, both recognized by the OIE as free of FMD with vaccination. The last FMD outbreak in Rio Grande Do Sul occurred in 2001, and the last FMD outbreak in Paraná occurred in 2005. FMD outbreaks in Rio Grande Do Sul in 2000 and 2001 were linked to outbreaks in Uruguay and Argentina. Argentina borders Santa Catarina, Rio Grande Do Sul, and Paraná. Numerous FMD outbreaks occurred throughout Argentina from July 2000 through December 2000 and March 2001 through January 2002. The most recent FMD outbreak in Argentina was reported in 2006. Brazil appears to have successfully prevented the introduction of FMD from Argentina during some but not all outbreaks in that country.

Santa Catarina is located within a CSF-free zone in southern Brazil, as are both States adjoining Santa Catarina. No cases of CSF have been detected in the CSF-free zone since it was created in 2001. Although CSF has been detected in recent years in the CSF-infected zone in northern Brazil, movement controls in place between the CSF-infected and CSF-free zones have prevented introduction of the disease into the CSF-free area. The last reported case of CSF in Argentina occurred in 1999, and CSF does not appear to be circulating within Argentina at this time; therefore, it is not likely that transmission of disease would occur from this source.

Brazil has had no outbreaks of ASF since 1981 and has been declared officially free of ASF since 1984. ASF has never been reported in Argentina. Therefore, it is highly unlikely that the virus exists in areas neighboring Santa Catarina or that these areas pose a risk for disease transmission. SVD has never been reported anywhere within Brazil or Argentina.

Disease Control Programs

Brazil's animal health service has a surveillance system that covers the entire country and has activities designed to detect and prevent the introduction of FMD, CSF, ASF, and SVD and quickly eradicate them. APHIS considers that Santa Catarina has a control program and a national plan sufficient to respond quickly to any emergencies related to FMD, CSF, ASF, and SVD. All official service field staff, community participants, and private sector veterinarians are trained and required to look for signs of notifiable diseases, including FMD, CSF, ASF, and SVD. Santa Catarina maintains a surveillance program at the field level on farms, in slaughterhouses, and at animal gathering locations. Local veterinary unit personnel carry out special visits to certain herds that are classified as "risky" by the official service. Animals are individually inspected by personnel from the official service for signs of vesicular disease before slaughtering. Other body parts, including the tongue and feet, are examined during postmortem inspection. All animals coming into fairs, auctions, or exhibitions are clinically inspected by the official veterinarians.

When a notifiable disease is suspected, Santa Catarina has a structured system of notification and official involvement to investigate. Suspected disease outbreaks must be immediately reported to the local unit or to an authority that would notify the local unit. The suspect premises is immediately quarantined, movement of animals is prohibited, and samples are collected and sent to a laboratory to confirm the diagnosis. All actions are carried out as if the herd is infected until proven otherwise.

Vaccination Status of the Region

Santa Catarina does not vaccinate for FMD, CSF, ASF, or SVD. In the absence of vaccination, it is likely that clinical signs resulting from an incursion of disease would be quickly identified. The Brazilian Ministry of Agriculture may approve emergency CSF or FMD vaccinations if necessary as part of outbreak control measures.

Degree of Separation from Adjacent Regions

A combination of geographical and administrative barriers has prevented the introduction of FMD, CSF, ASF, and SVD into Santa Catarina. The lack of disease history since 2006 for any of the diseases under evaluation in the areas adjacent to Santa Catarina further reduces the likelihood of their introduction.

Geographic barriers limit introduction of diseases into Santa Catarina by impeding the natural and human-mediated movements of animals and animal products. Santa Catarina is bounded on the east by the Atlantic Ocean. The northern border of Santa Catarina, with Paraná, is composed of rivers and the Serra do Mar mountain ridge. The southern border, with Rio Grande do Sul, is defined in large part by rivers. The western border, with the Province of Misiones, Argentina, is defined primarily by a river, the Rio Peperi-Guaçú. In Misiones, the border area is formed mainly by protected natural areas, including the Yaboti Biosphere Reserve.

Administrative barriers provide most of the controls for movements of animals and their products into Santa Catarina. Importation of products is controlled through 67 fixed inspection posts, and movement controls are in place between Santa Catarina and other areas of Brazil to prevent the introduction of FMD and CSF.

Movement controls are discussed in greater detail in the next section.

Animal Movement Controls and Biosecurity

Domestic movement controls within Brazil are stringent. The Brazilian Ministry of Agriculture requires that all cattle owners identify their animals with a unique brand. Sheep and swine are identified by a brand or notch in the ear. A system of permits is used by the official veterinary service to control animal movements. Movement restrictions are in place between Santa Catarina and other areas of Brazil affected with FMD or where FMD vaccination is practiced. All animals at risk for FMD must undergo clinical inspection and quarantine at both their points of origin and their destination. Movement restrictions are also in place between the CSF-free zone in southern Brazil, which encompasses Santa Catarina, and the CSF-infected zone in northern Brazil.

Santa Catarina has adequate controls at ports of entry for legal importation of animals and animal products that could carry FMD, CSF, SVD, or ASF. All animals and products must enter and leave Santa Catarina via one of the 67 fixed inspection stations. All imported animals must be accompanied by a zoosanitary certificate. Dairy and breeding animals require individual identification. Imported animals intended for slaughter must be transported in a sealed vehicle and must go to a federally inspected plant. If an animal arrives at the border with clinical signs of disease, it is sent back to the place of origin; however, animals that show signs of FMD are quarantined and tested. All animal products imported into Brazil must have an import permit, comply with all sanitary health requirements, and originate from an establishment approved to export to Brazil. All imported animal products are inspected and must receive authorization from the official veterinarian at the point of entry to be released into Santa Catarina.

Santa Catarina restricts the importation of animals and products at risk of FMD from countries where FMD has occurred. Swine destined for import must originate from a country or region considered free from ASF, SVD, and CSF. Movement controls and biosecurity measures are in place for imports from higher risk areas for CSF.

Brazilian law prohibits all transport of animal products from anywhere in the world without proper permits, and Santa Catarina has a legal framework and authority to deal with the entry of illegal animals or animal products into the State. Airline passengers and luggage are checked for animal and plant products. Shipments arriving by sea are also checked for animals and animal products, while ship passengers receive random checks for the presence of animals and animal products. All prohibited animals and animal products are confiscated and slaughtered or destroyed.

Livestock Demographics and Marketing Practices

Santa Catarina is primarily known for its swine production. The domestic livestock population within Santa Catarina consists of 5,250,000 domestic swine, 2,750,000 cattle, 196,000 sheep, 37,000 goats, and 16,000 farmed wild boar. Most of Santa Catarina's cattle are dairy cattle.

The majority of Santa Catarina's swine industry consists of a vertically integrated production system that covers all stages of production from breeding stock to processing. The production system is governed by contract requirements that include biosecurity standards, traceability requirements, required reporting of disease or production problems to the company veterinary representative, and periodic training in disease and production measures. Integrated swine farms receive frequent official veterinarian visits. APHIS finds that controls and biosecurity measures at commercial swine farms effectively mitigate introduction and spread of disease.

During the 2008 site visit, APHIS visited several individual facilities operating within an integrated system, including dairy operations. All the farms visited followed required biosecurity measures, with certified breeding farms following more restrictive biosecurity measures. APHIS finds that Santa Catarina has adequate control of inspection activities within integrated production systems.

Santa Catarina's animal identification system was fully implemented at the end of 2008. The system is comprehensive and allows officials to trace, from birth to death, the movement of cattle and swine within the State.

Santa Catarina has adequate controls and inspection measures at slaughter facilities and animal concentration points. There are 58 slaughterhouses for swine in Santa Catarina, including 18 federally inspected slaughterhouses and 40 State-inspected slaughterhouses. Santa Catarina contains 97 federally inspected and 60 State-inspected dairy facilities. CIDASC inspects fairs, exhibitions, and events where animals are gathered.

Disease Surveillance Capability

Brazil has a two-phase surveillance system that effectively uses active and passive surveillance. Phase I relies on active surveillance and focuses primarily on serological testing to document freedom from disease. Santa Catarina is currently in Phase II. Phase II, which consists of monitoring, begins once freedom from infection has been established. The main goals in this phase are to prevent the reintroduction of the disease, maintain good sanitary conditions, and provide technical grounds to demonstrate the continual absence of disease and viral activity in the zone. Passive surveillance is the primary type employed in Phase II, although active surveillance is also used. Passive surveillance activities include observations made during: (1) Animal movement control activities and trade of animal products, (2) farm inspections, (3) slaughterhouse inspections, and (4) inspections during livestock fairs. Passive surveillance takes advantage of the community structure in Brazil and relies heavily on the participation of the community. Serological testing complements passive surveillance in specific "high-risk" farms and is also conducted whenever there is a suspicion of disease. The surveillance and monitoring follow OIE guidelines, therefore, APHIS concluded that the serologic sampling is valid and the sampling coverage is adequate.

Diagnostic Laboratory Capability

Brazil has three laboratories, supervised by the Brazilian Ministry of Agriculture, for diagnosing FMD. These are located in Recife (Pernambuco State), Para (Belen State), and Pedro Leopoldo (Minas Gerais State). The Pan-American Foot-and-Mouth Disease Center laboratory in Rio de Janeiro is the reference laboratory. The Recife laboratory also performs routine serology for CSF, and for SVD and ASF if necessary.

Based on our site visits, we concluded that Brazil has the diagnostic capability to adequately test samples for the presence of the FMD, CSF, SVD, and ASF viruses. The laboratories in Recife, Para, and Pedro Leopoldo have adequate quality control activities; adequate laboratory equipment, which is routinely monitored and calibrated; sufficient staff; and an effective and efficient recordkeeping system for storage and retrieval of data. The tests used to investigate evidence of viral activity are consistent with OIE guidelines. The staff members at the facilities visited in 2002 and 2008 were

well-trained and motivated. Samples are turned around quickly.

Emergency Response Capability

Brazil has effective disease control and response programs for FMD and other notifiable swine and ruminant diseases. FMD, SVD, CSF, and ASF are notifiable diseases. The Brazilian State of Santa Catarina has a specific contingency plan for immediate, effective action in an animal emergency, and each municipality has a local emergency operational plan. Local emergency plans are detailed, and emergency response kits are extremely well-stocked. If a sanitary emergency or documented disease event occurs, the Brazilian State of Santa Catarina has a legal framework to authorize needed actions and handle animal health emergencies. A notification system ensures a timely emergency response. Once notification of an emergency occurs, the State establishes coordinating committees and emergency animal health technical groups, defines strategies and plans of action, and, when necessary, carries out the appropriate control measures within a timeframe compatible with a state of emergency. Quarantine and movement restriction decisions are made by State officials with input from Federal authorities. Based on observations made during the 2008 site visit, APHIS concludes the Brazilian State of Santa Catarina has the capabilities to respond rapidly and effectively to an animal disease outbreak and limit the spread of the disease should an outbreak occur. Therefore, we are proposing to amend §§ 94.1, 94.8, 94.9, 94.10, and 94.12 to declare the Brazilian State of Santa Catarina to be free of FMD, rinderpest, SVD, CSF, and ASF. This action would relieve restrictions on the importation of live swine, live ruminants, and products from these species under certain conditions from Santa Catarina.

However, because the Brazilian State of Santa Catarina has a common land border with Argentina, a region where FMD exists, the importation of meat and other products from ruminants or swine into the United States from Santa Catarina would continue to be subject to certain restrictions. For this reason, we are proposing to add Santa Catarina to the list in § 94.11(a) of regions declared free of rinderpest and FMD but that are subject to special restrictions on the importation of their meat and other animal products into the United States. The regions listed in § 94.11(a) are subject to these special restrictions because they: (1) Supplement their national meat supply by importing fresh (chilled or frozen) meat of ruminants or swine from regions that are designated in § 94.1(a) as regions where rinderpest or FMD exists, (2) have a common land border with regions where rinderpest or FMD exists, or (3) import ruminants or swine from regions where rinderpest or FMD exists under conditions less restrictive than would be acceptable for importation into the United States.

Under § 94.11, meat and other animal products of ruminants and swine, including ship stores, airplane meals, and baggage containing these meat or animal products, may not be imported into the United States except in accordance with § 94.11 and the applicable requirements of the USDA's Food Safety and Inspection Service at 9 CFR chapter III.

Section 94.11 generally requires that the meat and other animal products of ruminants and swine be: (1) Prepared in an inspected establishment that is eligible to have its products imported into the United States under the Federal Meat Inspection Act; and (2) accompanied by an additional certificate, issued by a full-time salaried veterinary official of the national government of the exporting region, assuring that the meat or other animal products have not been commingled with or exposed to meat or other animal products originating in, imported from, transported through, or that have otherwise been in a region where rinderpest or FMD exists.

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this proposed rule. The economic analysis examines the potential economic effects of this action on small entities, as required by the Regulatory Flexibility Act. The proposed action is not expected to result in beef or other ruminant meat exports to the United States of any appreciable quantity and trade effects for pork products are likely to be insignificant. The analysis, however, identifies swine producers and slaughter facilities as the small entities most likely to be affected by this action and considers the effects of increased imports of pork. Based on the information presented in the analysis, we expect that swine producers and slaughter facilities would experience minimal economic effects from the small increase of pork imports (a net increase of less than 3 percent) as a result of this action. Based on the information presented in the analysis, APHIS certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. We invite comment on our economic analysis, which is posted with this proposed rule on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov) and may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT**.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (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) administrative proceedings will not be required before parties may file suit in court challenging this rule.

National Environmental Policy Act

To provide the public with documentation of APHIS' review and analysis of any potential environmental impacts associated with the proposed rule for updating the disease status of Santa Catarina, we have prepared an environmental assessment. The environmental assessment was prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 et seq.), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500-1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

The environmental assessment may be viewed on the Regulations.gov Web site or in our reading room. (A link to Regulations.gov and information on the location and hours of the reading room are provided under the heading **ADDRESSES** at the beginning of this proposed rule.) In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Paperwork Reduction Act

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

List of Subjects in 9 CFR Part 94

Animal diseases, Imports, Livestock, Meat and meat products, Milk, Poultry and poultry products, Reporting and recordkeeping requirements.

Accordingly, we propose to amend 9 CFR part 94 as follows:

PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, EXOTIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, CLASSICAL SWINE FEVER, SWINE VESICULAR DISEASE, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS

1. The authority citation for part 94 continues to read as follows:

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

§ 94.1 [Amended]

2. In § 94.1, paragraph (a)(2) is amended by adding the words "the Brazilian State of Santa Catarina," after the word "Bermuda,".

§ 94.8 [Amended]

3. In § 94.8, the introductory text is amended by adding the words "(except the State of Santa Catarina)" after the word "Brazil".

§ 94.9 [Amended]

4. In § 94.9, paragraph (a) is amended by adding the words "the Brazilian State of Santa Catarina;" after the word "Australia;".

§ 94.10 [Amended]

5. In § 94.10, paragraph (a) is amended by adding the words "the Brazilian State of Santa Catarina;" after the word "Australia;".

§ 94.11 [Amended]

6. In § 94.11, paragraph (a) is amended by adding the words "the Brazilian State of Santa Catarina," after the word "Belgium,".

§ 94.12 [Amended]

7. In § 94.12, paragraph (a) is amended by adding the words "the Brazilian State of Santa Catarina;" after the word "Belgium,".

Done in Washington, DC, this 12th day of April 2010.

Cindy Smith

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2010–8765 Filed 4–15–10: 8:45 am]

BILLING CODE 3410–34–S

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 1000

[Docket No. FR–5275–N–08]

Native American Housing Assistance and Self-Determination Reauthorization Act of 2008: Negotiated Rulemaking Committee Meeting

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice of negotiated rulemaking committee meeting.

SUMMARY: This document announces a meeting of the negotiated rulemaking committee that was established pursuant to the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008. The primary purpose of the committee is to discuss and negotiate a proposed rule that would change the regulations for the Indian Housing Block Grant (IHBG) program and the Title VI Loan Guarantee program.

DATES: The committee meeting will be held on Tuesday, May 11, 2010, Wednesday, May 12, and Thursday, May 13, 2010. On all three days the meeting will begin at 8 a.m. and is scheduled to end at 5 p.m.

ADDRESSES: The meeting will take place at the Westin Westminster Hotel, 10600 Westminster Boulevard, Westminster, Colorado 80020; telephone number (303) 410–5000 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4126, Washington, DC 20410; telephone number 202–401–7914 (this is not a toll-free number). Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

The Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 (Pub. L. 110–411, approved October 14, 2008) (NAHASDA Reauthorization) reauthorizes The Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA) through September 30, 2013, and makes a number of amendments to the statutory requirements governing the Indian Housing Block Grant Program (IHBG) and Title VI Loan Guarantee programs. For more information on the IHBG and Title VI of NAHASDA, please see the background section of the Notice of Negotiated Rulemaking Committee Meeting published on February 22, 2010 at (75 FR 7579). The NAHASDA Reauthorization amends section 106 of NAHASDA to provide that HUD shall initiate a negotiated rulemaking in order to implement aspects of the 2008 Reauthorization Act that require rulemaking. On January 5, 2010 (75 FR 423), HUD published a **Federal Register** notice announcing the final list of members of the negotiated rulemaking committee (the Native American Housing Assistance & Self-Determination Negotiated Rulemaking Committee).

II. Negotiated Rulemaking Committee Meeting

This document announces the third meeting of the Native American Housing Assistance & Self-Determination Negotiated Rulemaking Committee. The committee meeting will take place as described in the **DATES** and **ADDRESSES** sections of this document. The meeting will be open to the public without advance registration. Public attendance may be limited to the space available. Members of the public may be allowed to make statements during the meeting, to the extent time permits, and to file written statements with the committee for its consideration. Written statements should be submitted to the address listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

Dated: April 9, 2010.

Deborah Hernandez,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 2010–8665 Filed 4–15–10; 8:45 am]

BILLING CODE 4210–67–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2009–0052; FRL–9136–5]

Approval and Promulgation of Air Quality Implementation Plans; Wyoming; Revisions to the Wyoming Air Quality Standards and Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve two State Implementation Plan (SIP) revisions submitted by the State of Wyoming on September 11, 2008. Wyoming has revised its Air Quality Standards and Regulations, specifically Chapter 1, Section 5, *Unavoidable equipment malfunction,* and Chapter 1, Section 6, *Credible evidence.* EPA is taking this action under section 110 of the Clean Air Act. In the "Rules and Regulations" section of this **Federal Register,** EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial SIP revision and anticipates no adverse comments. A detailed rationale for the approval is set forth in the preamble to the direct final rule. If EPA receives no adverse comments, EPA will not take further action on this proposed rule. If EPA receives adverse comments, EPA will withdraw the direct final rule and it will not take effect. EPA will address all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

DATES: Written comments must be received on or before May 17, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2009–0052, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: dolan.kathy@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- *Mail:* Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Please see the direct final rule which is located in the Rules Section of this **Federal Register** for detailed instruction on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Kathy Dolan, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. 303–312–6142, *dolan.kathy@epa.gov.*

SUPPLEMENTARY INFORMATION: See the information provided in the Direct Final action of the same title which is located in the Rules and Regulations Section of this **Federal Register**.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: April 1, 2010.

Carol L. Campbell,

Acting Deputy Regional Administrator, Region 8.

[FR Doc. 2010–8404 Filed 4–15–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2010–0277; FRL–9137–9]

Revisions to the Arizona State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Maricopa County Air Quality Department (MCAQD) portion of the Arizona State Implementation Plan (SIP). These revisions concern opacity standards related to multiple pollutants, including particulate matter (PM) emissions from several different types of sources, ranging from fugitive dust to diesel generators. We are approving a local rule that regulates these emission sources 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 May 17, 2010.

ADDRESSES: Submit comments, identified by docket number [EPA–R09–OAR–2010–0277], by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.
- *E-mail: steckel.andrew@epa.gov.*
- *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: Joanne Wells, EPA Region IX, (415) 947–4118, *wells.joanne@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

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I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule addressed by this proposal with the date that it was adopted by the local air agency and submitted by the Arizona Department of Environmental Quality (ADEQ).

TABLE 1—SUBMITTED RULES

Local agency	Rule number	Rule title	Amended	Submitted
MCAQD	300	Visible Emissions	03/12/08	07/10/08

On March 13, 2009, EPA determined this rule met the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review.

B. Are there other versions of this rule?

On April 12, 1982, EPA approved a previous version of Rule 300 (Rule 30) into the SIP. Please see 47 FR 15579. The MCAQD adopted revisions to the SIP-approved version on July 13, 1988 and ADEQ submitted them to us on January 4, 1990. However, EPA did not take action on this submittal. MCAQD also revised Rule 300 on August 5, 1994 and February 7, 2001, but did not submit these versions to EPA. While we can act on only the most recently submitted version, we have reviewed materials provided with previous submittals.

C. What is the purpose of the submitted rule revisions?

PM contributes to effects that are harmful to human health and the environment, including premature mortality, aggravation of respiratory and cardiovascular disease, decreased lung function, visibility impairment, and damage to vegetation and ecosystems. Section 110(a) of the CAA requires States to submit regulations that control PM emissions.

MCAQD Rule 300 is designed to limit the emissions of particulate matter or other pollutants such as oxides of nitrogen from a variety of activities and sources using a 20% opacity standard. These sources may include construction sites, unpaved roads, disturbed soil in open areas, and power plants. MCAQD amended Rule 300 to change the opacity limit from 40% to 20% and change the procedure for determining compliance with the 20% opacity limitation from "averaging to aggregating." The rule was also renumbered from Rule 30 to Rule 300, reformatted, and 4 exceptions were added. EPA's technical support document (TSD) has more information about this submitted rule and its revisions.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rule?

Generally, SIP rules must be enforceable (see section 110(a) of the Act) and must not relax existing requirements (see sections 110(l) and 193). In addition, SIP rules must implement Reasonably Available Control Measures (RACM), including Reasonably Available Control Technology (RACT), in moderate PM nonattainment areas, and Best Available Control Measures (BACM), including Best Available Control Technology (BACT), in serious PM nonattainment areas (see CAA sections 189(a)(1) and 189(b)(1)). The MCAQD regulates a PM nonattainment area classified as serious (see 40 CFR part 81), so Rule 300 must implement RACM and BACM.

Guidance and policy documents that we use to evaluate enforceability and RACM or BACM requirements consistently include the following:

1. "Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations; Clarification to Appendix D of November 24, 1987 **Federal Register** Notice," (Blue Book), notice of availability published in the May 25, 1988 **Federal Register**.

2. "Guidance Document for Correcting Common VOC & Other Rule Deficiencies," EPA Region 9, August 21, 2001 (the Little Bluebook).

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); 57 FR 18070 (April 28, 1992).

4. "State Implementation Plans for Serious PM–10 Nonattainment Areas, and Attainment Date Waivers for PM–10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 59 FR 41998 (August 16, 1994).

5. "PM–10 Guideline Document," EPA 452/R–93–008, April 1993.

6. "Fugitive Dust Background Document and Technical Information Document for Best Available Control Measures," EPA 450/2–92–004, September 1992.

B. Does the rule meet the evaluation criteria?

We believe this rule is consistent with the relevant policy and guidance regarding enforceability, RACM, BACM, and SIP relaxations. The TSD has more information on our evaluation.

C. EPA Recommendations To Further Improve the Rule

The TSD describes several rule revisions that we recommend for the next time the local agency modifies the rule, but that are not currently the basis for disapproval of the rule.

D. Public Comment and Final Action

Because EPA believes the submitted rule 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 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, Particulate matter, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: April 1, 2010.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2010–8764 Filed 4–15–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2010–0237; FRL–9138–5]

Revisions to the California State Implementation Plan, Yolo-Solano Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Yolo-Solano Air Quality Management District (YSAQMD) portion of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC), oxides of nitrogen (NO_X), oxides of sulfur (SO_X), particulate matter (PM), and carbon monoxide (CO) emissions from the permanent curtailment of burning rice straw. We are approving a local rule that regulates these emission sources 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 May 17, 2010.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2010–0237, by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

• *E-mail: steckel.andrew@epa.gov.*

• *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: Lily Wong, EPA Region IX, (415) 947–4114, *wong.lily@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

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I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule addressed by this proposal with the dates that it was adopted by the local air agency and submitted by the California Air Resources Board.

TABLE 1—SUBMITTED RULE

Local agency	Rule #	Rule title	Adopted	Submitted
YSAQMD	3.21	Rice Straw Emission Reduction Credits	12/10/08	03/17/09

On April 20, 2009, EPA determined that the submittal for YSAQMD Rule 3.21 met the completeness criteria in 40 CFR part 51 Appendix V, which must be met before formal EPA review.

B. Are there other versions of this rule?

There are no previous versions of Rule 3.21 in the SIP.

C. What is the purpose of the submitted rule?

VOCs and NO_X help produce ground-level ozone and smog, which harm human health and the environment. PM contributes to effects that are harmful to human health and the environment, including premature mortality, aggravation of respiratory and cardiovascular disease, decreased lung function, visibility impairment, and damage to vegetation and ecosystems. Section 110(a) of the CAA requires States to submit regulations that control VOC, NO_X, and PM emissions.

Historically, the practice of rice growing included burning the field stubble or straw following harvest to kill weeds and insects and prepare the field for next year's plantings. The purpose of Rule 3.21 is to provide procedures to quantify, certify and issue emission reduction credits (ERCs) that have resulted from the permanent curtailment of rice straw burning in YSAQMD. Approval of Rule 3.21 into the SIP would allow these ERCs to be used as offsets under YSAQMD's New Source Review (NSR) rule. EPA's technical support document (TSD) has more information about this rule.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rule?

Generally, SIP rules must be enforceable (*see* section 110(a) of the Act), and must not relax existing requirements (*see* sections 110(l) and 193). In addition, a rule of this type that generates emission reduction credits for use as offsets in the NSR program must meet the NSR requirement for valid offsets (*see* section 173(c)) and should meet the criteria set forth in EPA's guidance concerning economic incentive programs.

Guidance and policy documents that we use to evaluate these criteria consistently include the following:

1. "Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations; Clarification to Appendix D of November 24, 1987 **Federal Register** Notice," (Blue Book), notice of availability published in the May 25, 1988 **Federal Register.**

2. "Guidance Document for Correcting Common VOC & Other Rule Deficiencies," EPA Region 9, August 21, 2001 (the Little Bluebook).

3. "State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule," (the NO_x Supplement), 57 FR 55620, November 25, 1992.

4. New Source Review—Section 173(c) of the CAA and 40 CFR part 51, appendix S, "Emission Offset Interpretative Ruling" require certain sources to obtain emission reductions to offset increased emissions from new projects.

5. "Improving Air Quality with Economic Incentive Programs," EPA–452/R–01–001, January 2001.

B. Does the rule meet the evaluation criteria?

We believe this rule is consistent with the relevant policy and guidance regarding enforceability, SIP relaxations, and economic incentive programs; and ensures that the emission reductions are real, surplus, quantifiable, enforceable, and permanent. This rule includes detailed emissions quantification protocols and enforceable procedures which provide the necessary assurance that the emission reduction credits issued will meet the criteria for valid NSR offsets. The TSD has more information on our evaluation.

C. Public Comment and Final Action

Because EPA believes the submitted rule 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 rule 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, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: April 1, 2010.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2010–8771 Filed 4–15–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2010–0017]
[MO 92210–0–0008]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to List a Distinct Population Segment of the Fisher in Its United States Northern Rocky Mountain Range as Endangered or Threatened with Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list a distinct population segment (DPS) of the fisher *(Martes pennanti*) in its Northern Rocky Mountain (NRM) range, including portions of Montana, Idaho, and Wyoming, as endangered or threatened and designate critical habitat under the Endangered Species Act of 1973, as amended (Act). Based on our review, we find that the petition presents substantial scientific or commercial information indicating that listing a DPS of fisher in the NRMs of the United States may be warranted. Therefore, with the publication of this notice, we are initiating a review of the status of the species to determine if listing the fisher in the NRMs of the United States is warranted. To ensure that this status review is complete, we are requesting scientific and commercial data and other information regarding this species or DPS. Based on the status review, we will issue a 12–month finding on the petition, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act. We will make a determination on critical habitat for this species if and when we initiate a listing action.

DATES: To allow us adequate time to conduct this review, we request that we receive information on or before June 15, 2010. After this date, you must submit information directly to the Montana Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** section below). Please note that we may not be able to address or incorporate information that we receive after the above requested date.

ADDRESSES: You may submit information by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Search for docket number FWS–R6–ES–2010–0017 and then follow the instructions for submitting comments.
- *U.S. mail or hand-delivery*: Public Comments Processing, Attn: FWS–R6–ES–2010–0017; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all information received on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Information Requested section below for more details).

FOR FURTHER INFORMATION CONTACT: Mark Wilson, Field Supervisor, Montana Ecological Services Field Office, 585 Shepard Way, Helena, MT; telephone (406) 449–5225. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Information Requested

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly review the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on the fisher from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We seek information on:

(1) The species' biology, range, and population trends, including:

(a) Habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

(d) Historical and current population levels, and current and projected trends;

(e) Past and ongoing conservation measures and programs for the species, its habitat, or both;

(f) Information on the fisher species rangewide for the purpose of determining if the fisher in its NRM range constitutes a DPS or a significant portion of the range of the species; and

(g) Differences between Canada and the United States in control of exploitation, management, conservation status, or regulatory mechanisms pertaining to the fisher and its habitat that would support the use of the international boundary to delimit a DPS in the NRMs.

(2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

Please include sufficient information with your submission (such as full references and page numbers) to allow us to verify any scientific or commercial information you include.

If, after the status review, we determine that listing the fisher in the NRMs as a DPS is warranted, we will propose critical habitat (see definition in section 3(5)(A) of the Act), in accordance with section 4 of the Act, to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, within the geographical range currently occupied by the fisher, we request data and information on:

(1) What may constitute "physical or biological features essential to the conservation of the species";

(2) Where these features are currently found; and

(3) Whether any of these features may require special management considerations or protection, including managing for the potential effects of climate change.

In addition, we request data and information on "specific areas outside the geographical area occupied by the species" that are "essential to the conservation of the species." We also are seeking information documenting the historic range and distribution within that range of the fisher in Montana, Wyoming, Idaho, and other areas adjacent to these States, and the contiguous land areas in Canada including the provinces of British Columbia and Alberta. The Service does not designate critical habitat in areas where a species is not listed; however, identifying the historic distribution of fisher in areas contiguous with the NRMs may inform the extent and type of habitat that may be required for recovery. Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat meets the definition of critical habitat in section 3 of the Act

and the requirements of section 4 of the Act.

Submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made "solely on the basis of the best scientific and commercial data available."

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section. If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the website. If you submit a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

Information and supporting documentation that we received and used in preparing this finding, will be available for public inspection at *http://www.regulations.gov*, or by appointment during normal business hours, at the U.S. Fish and Wildlife Service, Montana Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90–day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly commence a review of the status of the species, which is subsequently summarized in our 12–month finding.

Petition History

On March 6, 2009, we received a petition dated February 24, 2009, from the Defenders of Wildlife, Center for Biological Diversity, Friends of the Bitterroot, and Friends of the Clearwater (petitioners) requesting that the fisher in the United States NRMs be considered a DPS and listed as endangered or threatened, and critical habitat be designated under the Act. The petition clearly identified itself as such and included the requisite identification information for the petitioners, as required by 50 CFR 424.14(a). In an April 9, 2009, letter to the petitioners, we responded that we had reviewed the information presented in the petition and determined that issuing an emergency regulation temporarily listing the species under section 4(b)(7) of the Act was not warranted. We also stated that we could not address the petition further at that time because of staff and budget limitations. This finding addresses the petition.

Previous Federal Actions

On June 5, 1990, we received a petition dated May 29, 1990, from Mr. Eric Beckwitt, Forest Issues Task Force, Sierra Biodiversity Project, and others requesting that the Pacific fisher (*Martes pennanti pacifica*) be listed as an endangered species in California, Oregon, and Washington under the Act. On January 11, 1991, we published a 90–day finding (56 FR 1159) indicating that the fisher in the Pacific States is a distinct population that is geographically isolated from populations in the Rocky Mountains and British Columbia and represents a listable entity under the Act. The finding also indicated that the petition had not presented substantial information indicating that a listing may be warranted because of a lack of information on fisher habitat needs, population size and trends, and demographic parameters (56 FR 1159).

On December 29, 1994, we received a petition dated December 22, 1994, from the Biodiversity Legal Foundation requesting that two fisher populations in the western United States, including the States of Washington, Oregon, California, Idaho, Montana, and Wyoming, be listed as threatened under the Act. Based on our review, we found that the petition did not present substantial information indicating that listing the two western United States fisher populations as a DPS was warranted (61 FR 8016, March 1, 1996). The best scientific evidence at that time indicated that the range of the fisher was contiguous across Canada with some areas having abundant populations, and through southward peninsular extensions, was contiguous with the United States Rocky Mountain and Pacific populations (61 FR 8016). No evidence was presented in the petition to support physical, physiological, ecological, or behavioral separations (61 FR 8016).

On December 5, 2000, we received a petition dated November 28, 2000, from 12 organizations, with the lead organizations identified as the Center for Biological Diversity and the Sierra Nevada Forest Protection Campaign, requesting that the West Coast DPS of the fisher, including portions of California, Oregon and Washington, be listed as endangered and critical habitat be designated under the Act. A court order was issued on April 4, 2003, by the U.S. District Court, Northern District of California, that required the Service to submit for publication in the **Federal Register** a 90–day finding on the 2000 petition (*Center for Biological Diversity, et al. v. Norton et al., No. C 01—2950 SC*). On July 10, 2003, we published a 90–day petition finding that the petition provided substantial information that listing may be warranted and initiated a 12–month status review (68 FR 41169). On April 8, 2004, we published a warranted 12–month finding for listing of the fisher's West Coast DPS (69 FR 18770). A listing action was precluded by higher priorities and the West Coast DPS was added to our candidate species list.

The West Coast fisher was included in the Service's candidate notices of review in 2005, 2006, 2007, 2008, and 2009 (70 FR 24870, May 11, 2005; 71 FR 53756, September 12, 2006; 72 FR 69034, December 6, 2007; 73 FR 75176, December 10, 2008; 74 FR 57804, November 9, 2009).

Species Information

Description

The fisher, as described by Powell (1981, p. 1), is light brown to dark blackish-brown, with the face, neck, and shoulders sometimes being slightly gray. The chest and underside often have irregular white patches. The fisher has a long body with short legs and a long bushy tail. At 3 to 6 kilograms (kg) (6.6 to 13.2 pounds (lbs)), male fishers weigh about twice as much as females (1.5 to 2.5 kg (3.3 to 5.5 lbs)). Males range in length from 90 to 120 centimeters (cm) (35 to 47 inches (in)), and females range from 75 to 95 cm (29 to 37 in) in length. Fishers may show regional variation in typical body weight. For example,

fishers in the Pacific States may weigh less than fishers in the eastern United States (Seglund 1995, p. 21; Dark 1997, p. 61; Aubry and Lewis 2003, p. 87).

Taxonomy

We accept the characterization of the fisher as a species, *Martes pennanti*, based on the review of the systematics of the genus *Martes* by Anderson (1994, pp. 21–25). The fisher is classified in the order Carnivora, family Mustelidae, a family that also includes weasels, mink, martens, and otters (Anderson 1994, p. 14). It is a member of the genus *Martes*, subgenus *Pekania*, and occurs only in North America (Anderson 1994, pp. 22–23). Goldman (1935, p. 177) recognized three subspecies of fisher, although he stated they were difficult to distinguish: (1) *Martes pennanti pennanti* in the east and central regions; (2) *M. p. columbiana* in the central and northwestern regions that include the NRMs; and (3) *M. p. pacifica* in the western region. A subsequent analysis questioned whether there is a sufficient basis to support recognition of different subspecies (Hagmeier 1959, entire). Although subspecies taxonomy as described by Goldman (1935, p. 177) is often used in literature to describe or reference fisher populations in different regions of its range, and recent consideration of genetic variation indicates patterns of population subdivision similar to the earlier described subspecies, it is not clear whether Goldman's designations of subspecies are taxonomically valid (Kyle *et al.* 2001, p. 2345; Drew *et al.* 2003, p. 59). For the purposes of this finding, we are evaluating whether the petition presents substantial information that the fisher in the NRM qualifies as a DPS of the full species (i.e., *M. pennanti*), because that is the action requested by the petition.

Biology and Habitat

Fishers are opportunistic predators primarily of snowshoe hares, squirrels, mice, and birds (Powell 1993, p. 18). Carrion and plant material (e.g., berries) also are consumed (Powell 1993, p. 18). The fisher is one of the few predators that kills porcupines, and porcupine remains have been found more often in the gastrointestinal tract and scat of fisher than any other predator (Powell 1993, p. 135). As dietary generalists, fishers tend to forage in areas where prey is both abundant and vulnerable to capture (Powell 1993, p. 100).

Fishers are estimated to live up to 10 years (Arthur *et al.* 1992, p. 404; Powell *et al.* 2003, p. 644). Both sexes reach maturity their first year but may not be effective breeders until 2 years of age (Powell *et al.* 2003, p. 638). Fishers are solitary except during the breeding season, which is generally from late February to the middle of May (Wright and Coulter 1967, p. 77; Frost *et al.* 1997, p. 607). Uterine implantation of embryos occurs 10 months after copulation; active gestation is estimated to be between 30 and 60 days; and birth occurs nearly 1 year after copulation (Wright and Coulter 1967, pp. 74, 76; Frost *et al.* 1997, p. 609; Powell *et al.* 2003, p. 639). Litter sizes for fishers range from one to six with a mean of two to three kits (Powell *et al.* 2003, pp. 639–640). Newborn kits are entirely dependent and may nurse for 10 weeks or more after birth (Powell 1993, p. 67). Kits develop their own home ranges by one year of age (Powell *et al.* 2003, p. 640). Populations of fisher fluctuate in size, and reproductive rates may vary widely from year to year in response to the availability of prey (Powell and Zielinski 1994, p. 43).

Fisher home ranges vary in size across North America from 16 to 122 square kilometers (km^2) (4.7 to 36 square miles (mi^2)) for males and from 4 to 53 km^2 (1.2 to 15.5 mi^2) for females (Powell and Zielinski 1994, p. 58; Lewis and Stinson 1998, pp. 7–8; Zielinski *et al.* 2004, p. 652). In the NRM, home ranges for males range from approximately 30 to 120 km^2 (8.7 to 35 mi^2) during winter and summer (Jones 1991, p. 83). Females range from 6 to 75 km^2 (1.7 to 22 mi^2) during winter, with a reduction in summer from 6 to 60 km^2 (1.7 to 17.5 mi^2) (Jones 1991, p. 83). The abundance of vulnerable prey may play a role in home range selection (Powell and Zielinski 1994, p. 57). Fishers exhibit territoriality with little overlap between members of the same sex; however, overlap between opposite sexes is extensive and possibly related to the density of prey (Powell and Zielinski 1994, p. 59).

Fishers live in coniferous and mixed conifer and hardwood forests and avoid areas with little or no cover (Powell and Zielinski 1994, p. 39). They are found commonly in mature forest cover and prefer late-seral forests over other habitats (Powell and Zielinski 1994, p. 52). Riparian forests and habitat close to open water such as streams are important to fishers in northern California and the Rocky Mountains of Idaho (Buskirk and Powell 1994, p. 285). In Idaho, old-growth forests of grand and subalpine fir are used extensively (Jones 1991, p. 113). The physical structure of the forest and prey associated with forest structures are thought to be the critical features that explain fisher habitat use, rather than specific forest types (Buskirk and Powell 1994, p. 286), and habitat use can vary by season and by activity (Jones 1991, p. 88). In the Rocky Mountains, fishers avoid areas of deep, fluffy snow and select riparian areas with relatively gentle slopes and dense canopy cover that may provide protection from snow during winter (Powell and Zielinski 1994, p. 54). Cavities and branches in trees, snags, stumps, rock piles, and down timber are used as resting sites, and large diameter live or dead trees are selected for natal and maternal dens (Powell and Zielinski 1994, pp. 47, 56). Powell and Zielinski (1994, p. 54) suggest that habitat suitable for resting and denning sites may be more limiting for fishers than foraging habitat.

A more extensive review of fisher biology can be found in the Service's 12–month finding on a petition to list the West Coast DPS of the fisher (69 FR 18770, April 8, 2004).

Distribution

At the time of European settlement, fishers were found in the forests across North America in Canada from approximately 60° north latitude, extending south into the United States along the Appalachian, Pacific Coast, and NRMs (Gibilisco 1994, p. 60). In the late 1800s and early 1900s, fishers experienced reductions in range, decreases in population numbers, and local extirpations attributed to over-trapping, predator control, and habitat destruction in the United States, and to a lesser extent in Canada (Brander and Books 1973, p. 53; Douglas and Strickland 1987, p. 512; Powell and Zielinski 1994, p. 39). Since the 1950s, fishers have recovered in some of the central (Minnesota, Wisconsin) and eastern (New England) portions of their historic range in the United States as a result of trapping closures, habitat regrowth, and reintroductions (Brander and Books 1973, pp. 53–54; Powell 1993, p. 80; Gibilisco 1994, p. 61; Lewis and Stinson 1998, p. 3; Proulx *et al.* 2004, pp. 55–57). Fishers have not returned to the areas south of the Great Lakes to Appalachia. In the western range, fisher distribution occurs in a few disjunct and relatively small areas of their former range in Oregon and California, and recently reintroduced individuals represent the species on the Olympic Peninsula of Washington State (Proulx *et al.* 2004, p. 58; National Park Service 2009).

It was believed that fishers were extirpated from the NRMs of the United States by the 1930s (Powell and Zielinski 1994, p. 41). In five separate reintroduction efforts, fishers were translocated from the Midwest and

British Columbia to the NRMs between 1959 and 1991 (Vinkey *et al.* 2006, p. 268; Jones 1991, p. 1). The recent discovery of a native lineage of fisher coexisting with descendents of translocated individuals indicates that fishers in Idaho and Montana were not extirpated as previously thought (Drew *et al.* 2003, p. 57; Vinkey 2003, pp. 9, 30; Schwartz 2007, p. 924). Fishers are distributed in northwest and west-central Montana and northern and north-central Idaho with rare detection in southwestern Idaho (Idaho Department of Fish and Game (IDFG) 2006, pp. 7–24; Vinkey 2003, p. 54). Snowtrack surveys have documented fisher in Glacier National Park in the 1980s and the Greater Yellowstone area in the late 1990s, but more verified records are needed to confirm the presence of fisher in these areas (Vinkey 2003, pp. 52, 60).

Population Status

Accurate information on fisher densities and abundance outside the northeastern United States is limited. Estimates of fisher abundance and vital rates are difficult to obtain and often based on harvest records, trapper questionnaires, and tracking information (Douglas and Strickland 1987, p. 522). Populations may vary widely based on habitat composition and prey availability (York 1996, p. 4). In Maine, the density of female fishers ranged from 0.09 to 0.36 per km^2 (0.39 mi^2) in summer to 0.05 to 0.12 per km^2 (0.39 mi^2) in winter (Arthur *et al.* 1989, pp. 674, 678). In high-quality habitats in British Columbia, fisher densities were between 0.01 and 0.0154 per km^2 (0.39 mi^2), and the total late-winter population in the province was between 1,113 and 2,759 individuals (Weir 2003, p. iv). The Service's (2008, p. 9) review of population data from California shows recent densities of 0.16 fisher per km^2 (0.39 mi^2) in the 65-km^2 (25.1 mi^2) Hoopa Valley Indian Reservation study site, and between 113 to 147 adult female individuals in the southern Sierra Nevada Mountains. Little is known of the status of fishers in the Rocky Mountains. Vinkey (2003, p. 33) evaluated a translocation effort in the Cabinet Mountains of Montana in the 1990s and concluded that the population is small and limited in distribution, based on a small number of captures or detections coupled with a high proportion of recaptures. Vinkey (2003, p. 61) also reviewed historical records and carnivore research in Montana and concluded that the fisher is one of the lowest-density carnivores in the State. One population estimate for the Clearwater region of northern Idaho is possibly 0.04 fishers per km^2 (0.39 mi^2) in an 80 km by 16 km (50 mi by 10 mi) corridor in the Lochsa study area (Lucas 2006, p. 85).

Evaluation of Listable Entities

Under section 3(16) of the Act, we may consider for listing any species, including subspecies, of fish, wildlife, or plants, or any DPS of vertebrate fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). Such entities are considered eligible for listing under the Act (and, therefore, are referred to as listable entities) should we determine that they meet the definition of an endangered or threatened species. In this case, the petitioners have requested that the fisher in the United States NRMs be considered a DPS and listed as endangered or threatened under the Act.

Distinct Vertebrate Population Segment

The Service and the National Marine Fisheries Service (National Oceanic and Atmospheric Administration—Fisheries) developed a joint policy that addresses the recognition of DPSes of vertebrate species for potential listing actions (61 FR 4722, February 7, 1996). Under the DPS policy, two basic elements are considered in the decision regarding the establishment of a population of a vertebrate species as a possible DPS. We must first determine whether the population qualifies as a DPS; this requires a finding that the population is both: (1) Discrete in relation to the remainder of the species to which it belongs; and (2) biologically and ecologically significant to the species to which it belongs. If the population meets the first two criteria under the DPS policy, we then proceed to the third element in the process, which is to evaluate the population segment's conservation status in relation to the Act's standards for listing as an endangered or threatened species. These three elements are applied similarly for additions to or removals from the Federal Lists of Endangered and Threatened Wildlife and Plants.

Our evaluation of significance is made in light of congressional guidance (see Senate Report 151, 96th Congress, 1st Session) that the authority to list DPSes be used "sparingly" while encouraging the conservation of genetic diversity. If we determine that a population segment meets the discreteness and significance standards, then the level of threat to that population segment is evaluated based on the five listing factors established by the Act to determine whether listing the DPS as either endangered or threatened is warranted.

Discreteness

Under our DPS policy, a population segment of a vertebrate species may be considered discrete if it satisfies either one of the following two conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors (quantitative measures of genetic or morphological discontinuity may provide evidence of this separation); or (2) It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act (61 FR 4722).

Substantial information is presented in the petition and other documents in our files indicating that the fishers in the NRMs may be geographically separate from other fisher populations. The range of the fisher in the West Coast Range of Washington, Oregon, and California is considered separated from the NRMs by natural physical barriers, including the nonforested high desert areas of the Great Basin in Nevada and eastern Oregon and the Okanogan Valley in eastern Washington, major highways, urban and rural open-canopied areas, and agricultural development (69 FR 18770). Historic and recent range maps show no connection in the contiguous United States between occurrences in the NRMs and the fisher populations in the Midwest and Great Lakes area (Hagmeier 1956, p. 151; Douglas and Strickland 1987, p. 313; Gibilisco 1994, p. 64; Proulx *et al.* 2004, p. 57).

Prior to 2003, fisher range maps depicted the NRM region interconnected with British Columbia (Gibilisco 1994, p. 64; Lewis and Stinson 1998, p. 3). An analysis of fisher habitat suitability and harvest and survey information indicates that the southernmost extension of fishers in British Columbia likely occurs in the central part of the province over 200 km (124 mi) north of the international border, and that fisher populations in Canada are no longer contiguous with fisher populations in the western United States (Weir 2003, pp. 17–19). Although the fisher distribution has been adjusted to reflect the more recent understanding of fisher habitat ecology, highly fragmented and low suitability fisher habitat does exist in the Kootenay region of southeastern British Columbia between the NRMs of the United States and central British Columbia (Weir 2003, p. 18). Fishers were considered rare or extirpated from the Kootenay

region in the mid-1990s, prompting a reintroduction effort to expand the presence of the species in British Columbia and "to connect isolated US populations with healthy and increasing populations in central B.C." (Fontana *et al.* 1999, p. 1). Fishers released in Canada as part of the relocation program were using habitats in Montana (Fontana *et al.* 1999, p. 18). Weir *et al.* (2003, pp. 19–20) considered the possibility, though unlikely, that the Cabinet Mountains in Montana were the source of two fishers detected in the Kootenay area in southeast British Columbia. A reintroduced fisher population was thought to persist in southeast British Columbia, but the observed survival rate of translocated adults and the few cases of confirmed reproduction in the assessment area were not likely sufficient for the population to expand and become self-sustaining (Weir *et al.* 2003, pp. 24–25).

We have no information indicating that an active connection was established between central British Columbia and the United States as a result of the translocation efforts, or that fishers in the NRMs of Montana and Idaho are functionally connected to larger population areas in Canada. We seek additional information for our status review to clarify the geographic separation of the fisher in the NRMs of the United States from other areas of fisher occupation including Canada, and to clarify a geographical delineation of a NRM DPS.

Substantial information presented in the petition and documents in our files may support discreteness of fishers in the NRMs based on the presence of a unique genetic signature consistent with isolation and a relic native population (Drew *et al.* 2003, p. 59; Vinkey *et al.* 2006, p. 267; Schwartz 2007, p. 924). Descendants of native fisher found in Idaho and west-central Montana have unique haplotypes of the mitochondrial genome that are found nowhere else in fisher populations (Drew *et al.* 2003, p. 59; Vinkey *et al.* 2006, p. 269; Schwartz 2007, p. 922). Populations in the NRMs also demonstrate a genetic legacy consistent with previous translocations from the mid-western United States and British Columbia (Drew *et al.* 2003, p. 59; Vinkey *et al.* 2006, pp. 268–269).

The petition states that the international boundary between the United States and Canada contributes to the discreteness of the NRM fisher population based on significant differences in management of fishers and habitat. However, the petition offers no example of a specific law, regulation, policy, population status, or management prescription that would support the assertion of significant differences. For us to determine that the international boundary serves as a basis for discreteness, we need some evidence that differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist between the two countries that are significant in light of section 4(a)(1)(D) of the Act. The petition did not provide any information that such differences exist.

Information in our files indicates that Canada does not have a national law governing management of national lands like the United States has in the National Forest Management Act (NFMA) of 1976, as amended (16 U.S.C. 1600–1614). A substantial portion of the occupied fisher range in Montana and Idaho is managed under the NFMA. However, we do not have any information indicating that the differences in management between the United States and Canada are significant in light of section 4(a)(1)(D) of the Act. If anything, fishers would have more protection in the United States due to the NFMA. We have no information that fishers are impacted by either the lack of an overarching forest management regulatory mechanism in Canada, or the application of the NFMA in the United States NRMs.

Information in the petition and our files indicates that legal trapping for fishers occurs in both British Columbia and the NRM. In the United States, legal trapping occurs only in Montana; however, we are analyzing the NRMs as a DPS, not as individual States. The petition did not present any information, nor do we have any in our files, that distinguishes differences in trapping regulations or harvest between the United States and Canada, and the application to discreteness. The applicability of the international boundary to the discreteness of a NRM DPS will be investigated further during the species status review.

In summary, the petition and other documents in our files present substantial information indicating that the NRM population of fisher in the United States may meet at least one of the criteria for discreteness under the DPS policy based on marked physical separateness and genetic distinctness.

Significance

If a population segment is considered discrete under one or more of the conditions described in the Service's DPS policy, its biological and ecological significance will be considered in light of congressional guidance that the authority to list DPSes be used "sparingly" while encouraging the conservation of genetic diversity (see Senate Report 151, 96th Congress, 1st Session). In making this determination, we consider available scientific evidence of the discrete population segment's importance to the taxon to which it belongs. Since precise circumstances are likely to vary considerably from case to case, the DPS policy does not describe all the classes of information that might be used in determining the biological and ecological importance of a discrete population. However, the DPS policy describes four possible classes of information that provide evidence of a discrete population segment's biological and ecological importance to the taxon to which it belongs. As specified in the DPS policy (61 FR 4722), this consideration of the population segment's significance may include, but is not limited to, the following:

(1) Persistence of the discrete population segment in an ecological setting unusual or unique to the taxon;

(2) Evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon;

(3) Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range; or

(4) Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

A population segment needs to satisfy only one of these conditions to be considered significant. Furthermore, other information may be used as appropriate to provide evidence for significance.

The petition presents three points supporting the significance of a DPS in the NRMs of the United States: (1) The NRM region of the United States is ecologically unique because it is situated in a unique ecoregion as described by Bailey (1996, entire) and exhibits significant ecological differences from the closest fisher habitat in central British Columbia; (2) the NRM region represents a significant part of the range based on representation and geographic size; and (3) the fisher population in north-central Idaho and west-central Montana share a genetic haplotype unique to the taxon.

The petitioners claim that fishers in the NRMs of the United States exist in an unusual or unique ecological setting based on Bailey's (1996, entire) ecoregion delineations and descriptions of fisher study sites in British Columbia and Idaho (Jones 1991, pp. 3–4; Weir 1995, pp. 20–26). Bailey's ecoregion

classification is a descriptive four-level hierarchy differentiating geographic areas based on climate, vegetation (species dominants) or natural land covers, and soils. It is one of several classification systems used in the past and present by government and private land managers to inform management decisions.

While it appears that the known fisher distribution in the NRMs of the United States is in a different ecoregion classification than the closest population concentration in Canada (Bailey 1996, map), the significance of this difference to the taxon is not explained in the petition. Descriptions of fisher habitat in Idaho (Jones 1991, pp. 3–4) and British Columbia (Weir 1995, pp. 20–26) show considerable similarities in vegetation. Differences are seen in precipitation and temperature between the Idaho and British Columbia sites, but climate conditions also vary within the individual study sites (Weir 1995, pp. 20–26). It is not clear if the descriptions of these small geographic areas are representative of the range of fisher in either British Columbia or the NRMs in the United States.

The petitioners express support for uniqueness based on general descriptions of climate and vegetation. Information in the petition and in our files indicates that fishers inhabit various types of late-successional coniferous forests throughout most of their range, and the dominant tree species, which can be influenced by climate and soils, may vary from region to region (Powell and Zielinski 1994, p. 52). Forest structure and prey availability are more important habitat selection criteria for fishers than the type of forest, tree species, or general climate characteristics (Buskirk and Powell 1994, pp. 286, 295; Weir 1995, p. 19). While the NRM ecoregion may be different from other ecoregions, we did not find any evidence in the petition or in our files indicating that the difference in classification is significant to the fisher.

Information in the petition and in our files supports the petitioner's assertion that a loss of the fisher in the NRMs would result in a significant gap in the range of the fisher. The fisher is only found in Canada and the United States. The distribution of fisher in the United States occurred historically in four peninsular extensions from Canada and constituted the southern-most distribution of fisher in North America. The connection with Canada is now lost, or is highly fragmented, in the western United States. Fishers in the NRMs of the western United States are separate from the eastern United States populations by over 1,280 km (800 mi) of nonforested habitat, lands converted for agriculture, and urban development. In the western United States, the fisher's distribution occurs in the forested areas of the NRMs in northern Idaho and western Montana, and a few disjunct and relatively small areas of the species' former West Coast range in Oregon, Washington, and California. The West Coast fishers are considered separated from the NRMs by natural physical barriers as well as other physical impediments such as major highways, urban and rural open-canopied areas, and agricultural development. The extirpation of fishers in the NRMs would be the loss of one of the four existing southern-most extensions of the taxon's range, and would result in a significant gap in the range of the fisher.

The fisher population in the NRMs of the United States exhibits the genetic legacy of translocations from British Columbia and the Midwest as well as a relic native population once thought extirpated. The loss of the fisher in the NRMs could result in the loss of unique haplotypes of the mitochondrial genome associated with the native population described as genetically distinct from fisher in the remainder of North America (Drew *et al.* 2003, p. 57; Vinkey *et al.* 2006, p. 269; Schwartz 2007, p. 924).

In summary, information in the petition and our files may support the significance of a DPS in the NRMs of the United States based on evidence of genetic distinctness and evidence that loss of the DPS may result in a significant gap in the range of the taxon.

Summary

On the basis of the preceding discussion, we believe that the petition and other documents present substantial information that the NRM population of the fisher in the United States may be both discrete and significant within the meaning of our DPS policy, and therefore may constitute a DPS. A discussion of the potential DPS's conservation status in relation to the Act's standards for listing as an endangered or threatened species follows.

Evaluation of Information for this Finding

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR 424 set forth the procedures for adding a species to, or removing a species from, the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

In making this 90–day finding, we evaluated whether information regarding threats to the fisher in the NRMs, as presented in the petition and other information available in our files, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat

Information Provided in the Petition

The petitioners state that fishers are threatened by habitat loss and destruction from logging and roads (69 FR 18770; Douglas and Strickland 1987, p. 518; Freel 1991, p. 2; Jones 1991, pp. 116–117; Aubry and Houston 1992, p. 75; Buskirk 1992, p. 318; Buck *et al.* 1994, p. 375; Powell and Zielinski 1994, p. 64; IDFG 1995, p. 10; Carroll *et al.* 1999, p. 1357), and habitat loss and destruction is the primary threat to fishers in the NRMs. The petitioners assert that fishers are at risk from naturally occurring and climate change-accelerated fire, insects, and disease outbreaks (Ridler 2008); and they assert, without documentation, that fishers are especially vulnerable to habitat alteration because past logging reduced their range and habitat to a point that any additional loss of habitat from human action threatens the fishers' persistence. The petition states that the majority of fisher habitat in the NRMs is within seven national forests where an average of 8,000 hectares (ha) (20,000 acres (ac)) of forest was logged annually between 2002 and 2006 (U.S. Department of Agriculture (USDA) 2008, entire). An additional average 28,000 ha (70,000 ac) was lost annually to fire, insects, and disease during that period (USDA 2008, entire). Approximately 1.3 million ha (3.2 million ac) of national forest land was logged or experienced fire or disease between 1945 and 2006 (USDA 2008, entire). Other forested lands are managed for timber revenue by private corporations, the States of Montana and Idaho, and Tribal governments; harvest of at least some of these lands is

expected in the future (Idaho Department of Lands 2007, entire; Montana Department of Natural Resources 2008, entire; Plum Creek 2009, entire; Potlatch 2008, entire; Ridler 2008, entire).

The petition lists a wide range of impacts that could deteriorate or cause direct loss of fisher habitats. Silviculture treatments may alter structural and vegetation diversity by a number of mechanisms and reduce cover and den and resting sites (Douglas and Strickland 1987, p. 518; Aubry and Houston 1992, p. 75; Buskirk 1992, p. 318; Buck *et al.* 1994, p. 375; Carroll *et al.* 1999, p. 1375). Roads directly remove habitat, cause displacement, inhibit dispersal, and contribute to increased fisher mortality, fragmentation, and isolation (Freel 1991, p. 2; Jones 1991, pp. 116–117; Powell and Zielinski 1994, p. 62; IDFG 1995, p. 10; Ruediger *et al.* 1999, pp. 1–2). The petition states that forests across the region have high incidence and intensity of fire, insects, and disease outbreaks due to drought and higher temperatures related to climate change; fisher habitat is further reduced by the removal of timber and wildland-urban interface treatments to reduce fire risk.

Evaluation of Information Provided in the Petition and Available in Service Files

Information in the petition and in our files indicates that past habitat loss due to logging, fire, and clearing of land for agriculture and settlement together with trapping contributed to the near extermination of fisher populations over much of their former range in the United States and much of eastern Canada by the early 1900s (Powell and Zielinski 1994, p. 41; Douglas and Strickland 1987, p. 512). There are few reports quantifying habitat loss in specific locations, but in 1984, it was estimated that fishers occupied over 4.3 million km^2 (1.6 million mi^2) in Canada and the United States, reduced from 6.4 million km^2 (2.5 million mi^2) of occupied range before the settlement of North American by Europeans (Douglas and Strickland 1987, p. 513). Land clearing and frequent fires had reduced the forested area in the northeastern United States by nearly 50 percent by the mid-1800s, and rangewide habitat loss increased as human settlement moved west (Powell and Zielinksi 1994, p. 41).

The fisher in the NRMs was considered extirpated by the 1930s (Powell and Zielinski 1994, p. 41). Presently, the fisher representation in Montana and Idaho includes a recently discovered remnant native population and descendants of fishers relocated from the Midwest and British Columbia in the 1960s and 1990s (Drew *et al.* 2003, p. 57; Vinkey 2003, pp. 9, 30; Schwartz 2007, p. 924). It is not clear from the limited information available to us during this 90–day review what role past land uses played in the near extirpation of the fisher in the NRMs by 1930. We do know that extensive forestry drastically reduced the amount of old-growth or late-successional forests in the NRMs, especially on private lands in the lower-elevation commercial timber zones (Habeck 1988, p. 202). National forest lands that comprise approximately 6 million ha (15 million ac) in the NRMs have retained more area of mature forest than private commercial lands but have experienced close to 1 million ha (2.5 million ac) of silviculture removal—nearly a third by clear-cutting methods—just in the past 65 years (Habeck 1988, p. 202; USDA 2008, entire).

The legacy of timber harvest, combined with continued commercial forestry and other factors, may limit the capacity of the NRM area to support fishers today. Fishers rely on large areas of primarily late-successional coniferous forest with fairly dense canopies and large trees, snags, and down logs for denning and resting; vegetated understory and large woody debris appear important for prey species (Powell and Zielinski 1994, p. 52). These mature forest characteristics may take at least 120 years or more to develop (Green *et al.* 1992, p. 6). Fishers evolved in forests where fire and windthrow were common, and small silviculture treatments or harvest may resemble the natural disturbances and the succession that follows (Powell and Zielinski 1994, p. 64). Therefore, the effects of present-day timber harvest and management of forests for harvest on the capacity of the NRMs to support fishers may be influenced by multiple factors, including the location, scale, and juxtaposition of treatments to previous disturbances, and the suitability of the location to provide fisher habitat under natural conditions.

In the NRMs, fishers forage in young to medium-age stands adjacent to larger patches of mature forest (Jones 1991, p. 92). However, large clear-cuts or numerous adjacent smaller cuts, and open areas such as roads, combined with the loss of large patches of late-successional conifer habitat, may alter suitability and fragment habitat and limit fisher population size (Powell and Zielinski 1994, pp. 42, 64). Where the key habitat elements are patchy or limited in distribution, fishers are forced to range over larger areas. Fishers in Montana and Idaho have the largest recorded home ranges of the United States' fishers, possibly influenced by the fragmentation or low quality of forest resources (Powell and Zielinski 1994, pp. 58, 60).

The effects of habitat loss and fragmentation may be emphasized by territorial exclusion between members of the same sex, which increases the space needed to support viable populations (Powell and Zielinski 1994, p. 59). In the NRMs, fishers may be more vulnerable to habitat changes caused by fire, drought, and insect infestation even within historical variability due to diminished mature late-seral forest structures at a landscape level.

The loss of older forest and increased fragmentation from human activities has likely reduced the capacity of the NRMs to support fishers. To our knowledge, there is no comprehensive mapping of fisher habitat for the NRMs. Consequently, it is not clear how current management of public and private forest lands is limiting further loss of habitat suitability on a landscape scale. However, we will seek additional information regarding forest management during the status review process.

From information in the petition and readily available in our files, private or State trust lands in Northern Montana and Idaho are managed for commercial wood production and timber harvest, which may prevent succession to the mature forest stages preferred by fishers (Idaho Department of Lands 2007, p. 22; Montana Department of Natural Resources 2008, entire; Plum Creek 2009, entire; Ridler 2008, entire). Timber harvest is expected to continue on commercial lands; future increases in harvest and reduction of the harvest rotation period are expected on Idaho State trust lands (Ridler 2008, p. 2). We expect timber harvest to continue on Federal lands in the future based on mandates of the Multiple-Use and Sustainable Yield Act (16 U.S.C. 528 *et seq.*) and the NFMA (16 U.S.C. 1600 *et seq.*). The U.S. Forest Service (USFS) has managed for old-growth forest under forest plan direction since the 1990s (Green *et al.* 1992, p. 1) and considers the fisher a sensitive status species (Macfarlane 1994, p. 177); however, no information is provided in the petition and we have no information available in our files indicating the effectiveness of this management in protecting or augmenting old-growth forest types for fisher habitat.

The real estate value of commercial timber lands is spurring a transition to

residential and commercial development in areas of western Montana (Stromnes 2002, entire; McQuillan 2007, entire). For example, Plum Creek Timber Company, whose holdings are concentrated in northwest and north-central Montana and coincide with areas of verified fisher distribution (Vinkey 2003, p. 54), expects to develop 8,000 to 16,000 ha (20,000 to 40,000 ac) over the next 10 to 15 years in addition to over 14,000 ha (35,000 ac) already sold (McQuillan 2007, entire). The company's own land development subsidiary describes the development of company lands, once held for timber production, as residential lots ranging in size from 2 to 4 ha (5 to 10 ac) (McQuillan 2007, entire). Development in forested environments may increase roads and remove additional forest vegetation structure or prey habitat in order to maintain defensible space around structures (wildlife-urban interface); however, although foraging and resting habitat may be removed by road construction, fishers do not appear to avoid the road itself (Lewis and Stinson 1998, p. 7; Schwartz *et al.* 2006, p. 6).

The economic recession starting in late 2008 may have an impact on commercial timber harvest and the conversion of timber lands to residential development; however, no information was included in the petition and we have no information in our files to evaluate the effects of the economic downturn on these activities at this time.

Silviculture timber removals on national forest lands in the NRMs have trended downward over the past decade; however, the forested areas affected by fire have increased to over 85,600 ha (214,000 ac) in the past decade compared to less than 4,000 ha (10,000 ac) affected between 1945 and 1997 (USDA 2008, entire). This increase could reflect an increase in environmental conditions that promote fire, such as drought and disease, or management of fire as a natural force in shaping forest composition and distribution.

The petitioners do not present specific information about how global climate change has affected or is likely to affect the fisher in the NRMs in a way that differs from past climate variability. Warming of the climate globally is considered unequivocal (Intergovernmental Panel on Climate Change 2007, p. 2); however, predicting local climate trends and determining how those trends will affect certain species is uncertain. Furthermore, we do not have information indicating how the fisher might behaviorally respond to any climate changes. Without additional information, the effect of long-term climate change on the fisher is unclear and could result in either a net positive or negative effect on the species. However, we will seek additional information regarding the potential effects of climate change during the status review process.

Summary of Factor A

In summary, based on our evaluation of the information presented in the petition and in our files, we determine that the petition presents substantial information indicating that listing the fisher in the NRMs may be warranted. This is due to the present and potential future modification and destruction of habitat from commercial timber harvest and commercial wood production by methods that may prevent succession to the mature forest stages preferred by fishers. This is also due to the transition of some commercial timber lands to residential and commercial development in areas of western Montana. Based on our evaluation of information in our files and the petition, we determine that the petition does not present substantial information indicating that listing the fisher in the NRMs may be warranted due to climate change. However, we will evaluate the effects of climate change on the fisher when we conduct our status review.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Information Provided in the Petition

The petitioners cite numerous sources indicating the susceptibility of fisher populations to excessive trapping and implicating trapping as a major factor in historic declines in fisher populations (Powell 1979, p. 153; Douglas and Strickland 1987, p. 524; Powell and Zielinski 1994, pp. 44–45; IDFG 1995, pp. 6, 13; Garant and Crete 1997, p. 363; Powell 1994, p. 101). The petitioners state that trapping is the second greatest threat to fishers in the NRMs. The petitioners indicate that fishers are impacted tremendously by both intentional and incidental trapping (i.e., capture in traps set for other species) (Powell and Zielinski 1994, pp. 44–45; IDFG 1995, p. 12; Lewis and Zielinski 1996, p. 294) in Montana and incidental trapping in other parts of the range. The petitioners state that fisher trapping in Montana is regulated and quotas are set by the State wildlife agency (Montana Department of Fish, Wildlife and Parks 2007, p. 7). The petitioners assert, without documentation, that because of the fisher's low population density, any trapping death is incompatible with their persistence. Trapping for fishers is not legal in the State of Idaho, but incidental capture of fishers does occur in traps set for other legally harvested species (IDFG 2007, p. 19). The petitioners speculate that the unreported incidental take of fishers is high in the NRM range.

Evaluation of Information Provided in the Petition and Available in Service Files

The fisher has been trapped for commercial purposes since the early 1800s. Over-trapping has contributed to the reduction in size and extirpation of fisher populations across the species' range (Douglas and Strickland 1987, p. 512). By the mid-1900s, heavy trapping pressure and the use of strychnine as a trapping and general predator control agent, in addition to habitat loss (discussed above under Factor A), eliminated or greatly reduced fisher numbers in low to mid-elevation coniferous forests and areas with year-round accessibility (Douglas and Strickland 1987, p. 512). The number of fishers trapped, an indicator of fisher population size, declined in Canada by 40 percent between 1920 and 1940, and the fisher in the NRMs was considered extirpated by the 1930s (Powell and Zielinski 1994, p. 41). Trapping was discontinued after 1929 in Minnesota because of population declines across the Great Lake States (Berg and Kuehn 1994, p. 262), and trapping was prohibited in Maine between 1937 and 1954 due to a severe constriction of the fisher range in the State (Krohn *et al.* 1994, p. 137). Over-trapping is implicated in the loss of fisher populations in the Pacific Northwest (Lewis and Zielinski 1996, p. 191; Aubry and Lewis 2003, pp. 81–82).

Prior to the 1920s, there were no regulations applicable to trapping fishers (Powell 1993, p. 77). The closure of trapping seasons in the 1920s and 1930s, reintroductions and augmentations, and land-use changes helped restore the fisher's presence in many parts of its range including the NRMs (Douglas and Strickland 1987, p. 512; Powell 1993, p. 80; Drew *et al.* 2003, p. 59; Vinkey 2003, p. 61). Trapping seasons were reopened in many northeastern and midwestern States between 1949 and 1985, with accompanying regulations intended to prevent overtrapping and population decline (Powell 1993, p. 80).

Trapping is considered one of the most important factors influencing fisher populations (Powell and Zielinski 1994, p. 44). Fishers are easily trapped (Douglas and Strickland 1987, p. 523),

and where trapping occurs, their populations could be negatively affected (Powell and Zielinski 1994, p. 64). Fisher populations are sensitive to the effects of trapping because of a slow reproductive rate and the sensitivity of population numbers to prey fluctuations (Powell and Zielinski 1994, p. 45). Small or isolated populations may be more intensely affected than more robust and widespread populations (Powell and Zielinski 1994, p. 45). Where fishers are scarce, populations may be seriously affected by trapping or incidental trapping for other species including other furbearers (Powell and Zielinski 1994, p. 45).

The abundance and trend of fisher populations in the NRMs are not clear. Although fisher presence has been confirmed in over a dozen areas, the fisher is one of the lowest density carnivores in the NRM region (Vinkey 2003, p. 61; IDFG 2006, entire). Montana is the only State in the NRM region where legal trapping for fishers occurs. Fishers have been trapped successfully every year since the mid-1980s in Montana, indicating that fisher populations in some areas are persisting at some level. Although the fisher is not a targeted species for harvesting in Idaho, 17 fishers were reported to authorities as taken incidentally to trapping of other legally harvested species between 1990 and 2006 (IDFG 2007, p. 19), and Jones (1991, p. 115) indicates that an estimated 163 fishers were trapped inadvertently in Idaho between 1978–1982. We expect that incidental killing of fishers occurs in Montana with similar frequency.

The impact of trapping mortality to fishers in the NRM region is not clear based on the limited information available on population status and trend; however, incidental trapping is difficult to control, and small increases in mortality due to trapping could lead to population instability and extirpation, especially in small or isolated populations (Powell 1979, p. 152; Powell and Zielinski 1994, p. 45). State wildlife agencies set trapping quotas based on some consideration of population status, although we have no information on what criteria are used to determine harvest quotas for fishers or how fishers are protected from incidental capture. We will seek additional information regarding the effects of trapping and incidental mortality of fishers during the status review process.

Summary of Factor B

Based on our evaluation of the information presented in the petition and in our files, we determine that the petition presents substantial information indicating that listing the fisher in the NRMs may be warranted due to overutilization for commercial or recreational purposes, specifically legal furbearer trapping and the loss of fishers in traps set for other species. Incidental trapping is difficult to control and small increases in mortality due to trapping could lead to population instability and extirpation.

C. Disease or Predation

Information Provided in the Petition

The petitioners present general information on possible disease risks to the family Mustelidae (69 FR 18770), but nothing specific to fishers or effects on fishers at a population level. The petitioners state the importance of research to investigate the possible effects of climate change on disease processes. The petitioners note that predation of fishers is reported (Roy 1991, pp. 29, 35) and could be significant in light of the small number and isolation of fisher populations.

Evaluation of Information Provided in the Petition and Available in Service Files

Fox, bear, great-horned owls, and bobcat prey on fishers, although there is little evidence to indicate adult fishers have many natural enemies except humans (Douglas and Strickland 1987, p. 516). Predation of translocated fishers in Montana has been reported (Roy 1991, pp. 29, 35), but this was attributed to the relocation techniques used and fitness of the individual animals (Powell and Zielinski 1994, p. 62; Vinkey 2003, p. 34).

Summary of Factor C

Based on our evaluation of the information presented in the petition and in our files, we determine that the petition does not present substantial information indicating that listing the fisher in the NRMs of the United States may be warranted due to disease or predation. No specific information is presented to indicate that disease or predation affects fishers at a population level or that climate change will exacerbate present conditions or create novel disease or predation processes. However, we will evaluate all factors, including threats from disease and predation, when we conduct our status review.

D. The Inadequacy of Existing Regulatory Mechanisms

Information Provided in the Petition

The petitioners state that existing regulatory mechanisms for public land management agencies have been inadequate in addressing the decline of fisher habitats from past and ongoing forest practices, roads and motorized access, and climate change, and addressing the threats to fisher populations from unsustainable legal trapping in Montana and incidental trapping throughout the range. The petition refers in general terms to the inadequacy of regulations relative to Federal, State, Tribal, and private lands in the NRM region and asserts that the lack of coordination across administrative boundaries has contributed to habitat fragmentation and population decline (Rosenberg and Raphael 1986, pp. 263, 267, 271; Freel 1991, p. 2; Heinemeyer 1993, pp. 108–109; Heinemeyer and Jones 1994, p. iv; Powell and Zielinski 1994, pp. 42, 45; IDFG 1995, pp. 8, 9, 12, 17; Carroll *et al.* 1999, p. 1357; Ruediger *et al.* 1999, pp. 5–6).

Specifically, the petition points to three inadequacies in the regulatory process for the management of USFS lands in the region: (1) The standards in national forest plans have not protected old-growth habitat; (2) the classification of fisher as a "sensitive" species has not prevented the decline of fisher habitat to its current extent; and (3) the 2008 modification of the NFMA regulations removed standards to maintain viable populations of native species. The petition asserts that the existing trapping regulations have resulted in the decline of fisher populations to the present low level by not preventing poaching, over-trapping, or incidental trapping.

Evaluation of Information Provided in the Petition and Available in Service Files

As stated in the discussion of Factor A, we determine that the petition and information in our files present substantial information that listing may be warranted due to the present and potential future destruction, modification, or curtailment of habitat from commercial timber harvest and commercial wood production that prevents succession to the mature forest stages utilized by fishers, and the transition of some commercial timber lands to residential and commercial development. Past forestry practices combined with continued commercial silviculture may limit the capacity of the NRMs to support fisher and call into question the effectiveness of current regulatory mechanisms to protect fishers on public and private lands. The impacts of roads and motorized access on fishers are not clear. As stated under Factor A, fishers do not appear to avoid

roads (Lewis and Stinson 1998, p. 7; Schwartz *et al.* 2006, p. 6). There is limited information available to us at this 90–day finding stage to make conclusions on the adequacy of specific regulatory mechanisms. We will evaluate the adequacy of existing specific regulatory mechanisms further during the status review.

Presently, the fisher is considered a sensitive species (Forest Service Manual 2670.22) in the USFS Regions 1 and 4, including the States of Wyoming, Idaho, and Montana, and a sensitive species by the Bureau of Land Management (Manual 6840) in Idaho and Montana (University of Wyoming 2003, entire; IDFG 2005, entire; Montana Natural Heritage Program 2009, entire). The USFS' Sensitive Species Policy (USFS Manual (2670.32)) calls upon national forests to assist and coordinate with States and other Federal agencies in conserving species with viability concerns. However, the petition presents no specific information, and we have no information readily available in our files, that would allow for even a cursory analysis of the adequacy of the USFS sensitive species designation in preventing the decline of fisher habitat.

The USFS has managed for old-growth forests under forest plan direction since the 1990s, but the petition presents no specific information, and we have no information available in our files, indicating the effectiveness of this management in protecting or augmenting old-growth forest types for fisher habitat. We have no information readily available in our files and the petitioners present no specific information or references of policy, projects, or activities that have resulted in a decline of fisher populations or habitat or intent to cause such effects based on the 2008 changes to the NFMA regulations (73 FR 21468, April 21, 2008). As the result of a Federal court decision (Citizens for Better Forestry, *et al.* v. U.S. Department of Agriculture, *et al.*, No. C08—1927 CW), the Forest Service reinstated the NFMA amended planning rule of 2000 and is reevaluating the 2008 amendment (74 FR 67059, December 18, 2009).

The States of Idaho, Montana, and Wyoming classify the fisher as a species of concern, and fisher habitat or viability may be addressed at some level when State programs or activities are reviewed. However, the petition presents no specific information, and we have no information readily available to us, that would allow for even a cursory analysis of the adequacy of the State species designations in preventing the decline of fisher or their habitat.

As stated in the discussion of Factor A, the petitioners do not present specific information about how global climate change has affected or is likely to affect the fisher in the NRMs in a way that differs from past climate variability. The petitioners present no information, nor do we have any information in our files, on the existence of any regulatory mechanism intended to address climate change in order to assess its adequacy.

The petitioners assert that the existing trapping regulations have failed to prevent the decline of fisher populations to their low level today. In the discussion under Factor B, we determine that the petition and information in our files presents substantial information that listing may be warranted due to overutilization for commercial or recreational purposes. Our determination is based upon the potential effects of incidental mortality associated with other legal trapping and the sensitivity of fisher populations to additional mortality. It is not clear whether the existing regulatory mechanisms for trapping fisher or other furbearers have failed to prevent the decline of fisher populations. On the one hand, unregulated over-trapping is implicated in the reduction in size and extirpation of fisher populations across the species' range in the past (Douglas and Strickland 1987, p. 512). However, habitat protection, and reintroductions and population augmentations, together with the establishment of trapping regulations that limit harvest, have helped restore and maintain fisher presence in many parts of the species' range (Douglas and Strickland 1987, p. 512), including the NRMs.

Summary of Factor D

Based on our evaluation of the information presented in the petition and in our files, we determine that the petition does not present substantial information indicating that listing the fisher in the NRMs may be warranted due to the inadequacy of regulations addressing climate change. The level of information that we have at this 90–day finding stage is unclear as to whether the regulatory mechanisms pertaining to forestry practices, roads and forest access, and trapping are inadequate. We will evaluate all factors, including the adequacy of existing regulatory mechanisms, more thoroughly during our status review of the species.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Information Provided in the Petition

The petitioners state that fishers in the NRMs are vulnerable to random environmental, demographic, and genetic events based on their low reproductive rates; tendency toward isolation; dependence on old-growth forests; and small, isolated populations (69 FR 18770; Jones 1991, p. 88; Roy 1991, pp. 42, 47, 60–61; Powell and Zielinski 1994, pp. 46–48; Weir 2003, p. 25; Wisely *et al.* 2004, p. 646). They assert that past and ongoing trapping, forest practices, and road construction (as cited in the discussions of Factors A and B), and the undocumented assertion of human-induced climate change and its resulting outbreaks of fire, insects, and disease, have contributed to the small size and isolation of fisher populations. The petitioners also state that isolation erodes genetic diversity, reduces the ability of populations to respond to changes in the environment, and could lead to a loss of the affected populations (Wisely *et al.* 2004, p. 646).

Evaluation of Information Provided in the Petition and Available in Service Files

The impacts of forest practices and trapping are discussed under Factors A and B. We determined under Factor A that the petition does not present substantial information, and information in our files is insufficient to indicate that listing the fisher in the NRMs may be warranted due to climate change. Predicting local climate trends and determining how those trends will affect species is uncertain. Without additional information, the effect of long-term climate change on the fisher in the NRMs is unclear, and the effect could be neutral, a net positive, or a net negative.

We find that the effects of small populations are not substantially supported by information in the petition or readily available in our files. We recognize that small populations may be vulnerable to genetic problems, demographic variability, and extreme or catastrophic environmental events. Fishers are considered one of the lowest-density carnivores in at least part of the NRMs (Vinkey 2003, p. 61); however, the petitioners do not present information and no information is available in our files to determine numbers, trends, or demographic characteristics of fisher populations in the NRM area.

Summary of Factor E

Based on our evaluation of the information presented in the petition and in our files, we conclude that the petition does not present substantial information indicating that listing the fisher may be warranted due to other natural or manmade factors. However, we will assess all factors, including this one, more thoroughly during our status review of the species.

Finding

On the basis of our determination under section 4(b)(3)(A) of the Act, we have determined that the petition presents substantial scientific or commercial information indicating that listing the fisher population in the NRMs as a DPS may be warranted. This finding is based on substantial information provided by the petitioners and in our files for Factors A and B. The information provided under Factors C, D, and E is not substantial. In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a threat it is. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species may warrant listing as threatened or endangered as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact a species negatively may not be sufficient to compel a finding that listing may be warranted. The information shall contain evidence sufficient to suggest that these factors may be operative threats that act on the species to the point that the species may meet the definition of threatened or endangered under the Act.

Because we have found that the petition presents substantial information indicating that listing the fisher in the NRMs under the Act may be warranted, we are initiating a status review to determine whether listing under the Act is warranted. As part of our status review we will examine available information on the threats to the species and make a final determination in a 12–month finding on whether the species is warranted for listing as endangered or threatened under the Act. To ensure that the status review is complete, we are requesting scientific and commercial information regarding the fisher in the NRMs (as described above under the **Information Requested section**). The petition also asks us to designate critical habitat for this species. If we determine in our 12–month finding that listing the fisher in its NRM range is warranted, we will address the designation of critical habitat in the subsequent proposed listing rule, if we conclude critical habitat is prudent and determinable.

The "substantial information" standard for a 90–day finding differs from the Act's "best scientific and commercial data" standard that applies to a status review to determine whether a petitioned action is warranted. A 90–day finding does not constitute a status review under the Act. In a 12–month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90–day finding. Because the Act's standards for 90–day and 12–month findings are different, as described above, a substantial 90–day finding does not mean that the 12–month finding will result in a warranted finding.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Montana Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** section above).

Author

The primary authors of this document are the staff members of the Montana Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** section above).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: April 6, 2010

Daniel M. Ashe

Deputy Director, U.S. Fish and Wildlife Service

[FR Doc. 2010–8795 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–55–S

Notices

Federal Register
Vol. 75, No. 73
Friday, April 16, 2010

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Medicine Bow-Routt National Forests, Brush Creek/Hayden Ranger District Saratoga, WY

Title: Savery.

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: Epidemic levels of mountain pine beetle continue to spread across National Forest System lands in northern Colorado and southern Wyoming. It is a priority to restore forest and watershed health to these affected areas. In areas managed to produce commercial wood products, it is necessary to salvage merchantable timber and regenerate these forests. At this large scale, deadfall in beetle-kill areas has the potential to slow or prevent forest regeneration; negatively impact grazing and recreation; increase fuel loading, fire hazard, and the potential for large, high-intensity fires, and create public safety hazards.

The Forest Service will prepare an Environmental Impact Statement (EIS) to analyze and disclose the environmental effects of implementing a variety of proposed actions within the Savery Analysis Area of the Brush Creek/Hayden Ranger District of the Medicine Bow-Routt National Forests within Carbon County, Wyoming. Proposed actions include prescribed burning to create conditions that promote regenerating forests and rangelands, and commercial timber sales to salvage merchantable timber, decrease potential fire hazards, and remove dead and dying trees that are posing a public safety hazard in high priority areas. The proposal also includes habitat improvement projects, recreation improvement proposals, and travel management.

DATES: The draft environmental impact statement is expected to be filed with the Environmental Protection Agency (EPA) and available for public review during July 2010. At that time, the EPA will publish a Notice of Availability (NOA) of the draft EIS in the **Federal Register**. The comment period on the draft EIS will be for a period of not less than 45 days from the date the EPA publishes the NOA in the **Federal Register**. It is important that those interested in the management of this area comment at that time.

The final EIS is expected to be available in September 2010. In the final EIS, the Forest Service will respond to any comments received during the public comment period that pertain to the environmental analysis. Those comments and the Forest Service responses will be disclosed and discussed in the final ElS and will be considered when the final decision about this proposal is made.

ADDRESSES: Send written comments to Brian Waugh, Brush Creek/Hayden Ranger District, PO Box 249, Saratoga, WY 82331. Comments may also be sent via electronic mail (e-mail) to *comments-rocky-mountain-medicine-bow-routt-brush-creek-haydenfs.fed.us* and FAX may be sent to (307) 326–5250. Please reference the Savery Analysis on the subject line. It is important that reviewers provide their comments at such times and in such a way that they are useful to the Agency's preparation of the EIS. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered, however.

FOR FURTHER INFORMATION CONTACT: Brian Waugh, Environmental Coordinator, (307) 326–2518, or M. Stephen Best, District Ranger, (307) 326–5250, Brush Creek/Hayden Ranger District, PO Box 249, Saratoga, WY 82331.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The purpose of the Savery Project is to restore forest health and productivity to the area to meet the needs of present and future generations by implementing forest management techniques that will salvage (beetle-killed) dead and dying trees; reduce hazardous fuels; provide forest products; promote forest regeneration; reduce hazard trees from high priority areas affecting public safety; improve recreational facilities and opportunities; improve wildlife habitat diversity; repair soil and water resource damaged areas; and decommission, relocate and/or maintain portions of the existing road and trail systems that are detrimentally contributing to watershed health.

There is a need to:

- Provide merchantable timber products for sale and to salvage and remove dead and dying trees from forested lands classified as being suitable in order to keep them in production and positively contributing to the Forest's future Allowable Sale Quantity.
- Remove dead and dying trees to promote and enhance regeneration opportunities.
- Treat overstocked timber stands to improve growth and vigor.
- Reduce the development of large continuous high hazard fuel conditions in high timber production areas.
- Maintain and improve aspen stand health and plant diversity to enhance wildlife habitat.
- Maintain or enhance Colorado River cutthroat trout.
- Decommission, relocate, maintain, and improve drainage along road segments within the analysis area that are contributing to degraded resource conditions.
- Restore hillslope hydrology and subsurface flow along roads.
- Reduce connected disturbed areas and channel network extensions throughout the analysis area to minimize increases in peak streamflow.
- Upgrade recreational facilities and improve recreation opportunities within the analysis area to meet increasing demand.

Proposed Action

The proposed action would salvage approximately 11,755 acres of dead and dying beetle-killed lodgepole pine and precommercial thinning would occur on approximately 2,528 acres of young overstocked lodgepole pine. Prescribed burning would occur on approximately 2,232 acres to improve age class diversity and reduce fuel hazards. Fuel breaks are planned on approximately 359 acres and are generally located along roads and in proposed cutting units. Treatments to improve Colorado River cutthroat trout habitat is proposed on approximately 116 acres to enhance aspen regeneration and enhance development of pooling habitat. Approximately 102 acres of this proposed treatment would occur in the Singer Peak Inventoried Roadless Area. The travel management proposal would identify the minimal road system needed to meet Forest management and recreation needs while addressing ongoing resource damage associated with roads and trails by decommissioning approximately 38 miles of road, constructing approximately one mile, reconstructing approximately 1.5 miles, rerouting approximately .75 miles, and converting approximately 4.5 miles of existing roads to All Terrain Vehicle (ATV) trails. Approximately 12 miles of user created roads are proposed to be added to the road system. Recreation proposals include development of approximately seven miles of nonmotorized trails along with a trailhead facility for the two trail loops near or adjacent to the Jack Creek Campground. Reconstruction or enlargement of the Jack Creek Campground is proposed to more readily accommodate RV's and provide additional campsites. Development of ATV loop trails on existing designated routes along with 3.4 miles of new trail construction with an emphasis on loops tying back into the Jack Creek campground/dispersed camping areas, the Hart Creek trailhead, and onto the existing ATV route on National Forest System Road 412 along the continental divide. This would add approximately 32.8 miles of designated trails to the Wyoming Off Highway Vehicle Trail System and would include a combination of open roads, newly proposed ATV trail segments, and road to trail conversions. Decommissioning of the Haskins Creek Campground would also be implemented with this project.

Responsible Official

M. Stephen Best, District Ranger, USDA Forest Service, Medicine Bow-Routt National Forests, Brush Creek/Hayden Ranger District, PO Box 249, Saratoga, Wyoming 82331, is the official responsible for making the decision on this action.

Nature of Decision To Be Made

The Responsible Official will consider the results of the analysis and its findings and then document one or more final decision(s) for each proposed action. More than one Record of Decision (ROD) will be issued based on this analysis. The decisions will include a determination whether or not to implement the proposed action or another alternative.

Preliminary Issues

Natural disturbances (fire, beetle) has resulted in a high percentage of many project area watersheds with dead or young trees. Measurable increases in water yield are expected in these watersheds, with either no action or implementation of the proposed action.

Scoping Process

This notice of intent initiates the scoping process, which guides the development of the Environmental Impact Statement (EIS). The Forest Service has listed the project in the Schedule of Proposed Actions that is posted on the Web. One meeting will be planned after the draft EIS is available. The Forest Service will also respond to information requests about the project and add additional public meetings and field trips as interest dictates. Comments from scoping efforts will be reviewed to identify potential issues for this analysis. While comments are welcome at any time, comments received within 30 days of the publication of this notice in the **Federal Register** will be most useful for the identification of issues and the analysis of alternatives.

It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Dated: April 2, 2010.

Mary H. Peterson,

Forest Supervisor, Medicine Bow-Routt National Forests.

[FR Doc. 2010–8618 Filed 4–15–10; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Northeast Region Dealer Purchase Reports.

OMB Control Number: 0648–0229.

Form Number(s): None.

Type of Request: Regular submission.

Number of Respondents: 726.

Average Hours per Response: 4 minutes.

Burden Hours: 2,517.

Needs and Uses: As part of Fishery Management Plan developed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act, federally-permitted dealers in specified fisheries are required to submit information weekly regarding their fish purchases. The collected information is used by economists, biologists, and managers in the management of the fisheries NOAA is seeking to renew Paperwork Reduction Act approval for these requirements.

Affected Public: Business or other for-profit organizations.

Frequency: Weekly.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: April 12, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–8664 Filed 4–15–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Fish and Seafood Promotion.

OMB Control Number: 0648–0556.

Form Number(s): NA.

Type of Request: Regular submission.

Number of Respondents: 3.

Average Hours per Response: 106 hours and 40 minutes.

Burden Hours: 320.

Needs and Uses: In response to renewed fishing industry support for marketing and promotion-related activities, NMFS enacted regulations to implement the Fish and Seafood Promotion Act (FSPA) of 1986 for the establishment, organization, and operation of Seafood Marketing Councils (Councils). Council marketing and promotion plans will be designed to increase the general demand for fish and fish products by encouraging, expanding, and improving the marketing and utilization of fish and fish products both in domestic or foreign markets, through consumer education, research, and other marketing and promotion activities.

Affected Public: Business or other for-profit organizations.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov.*

Dated: April 13, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–8743 Filed 4–15–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV59

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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 determination that an Exempted Fishing Permit (EFP) application contains all of the required information and warrants further consideration. The Assistant Regional Administrator has made a determination that the activities authorized under this EFP would be consistent with the goals and objectives of the Monkfish Fishery Management Plan (FMP). However, further review and consultation may be necessary before a final determination is made to issue an EFP. The EFP will allow commercial fishing vessels to conduct compensation fishing operations that are otherwise restricted by the regulations governing the fisheries of the Northeastern United States. This EFP, which would enable vessels to harvest monkfish in accordance with the provisions of the Monkfish Research Set-Aside (RSA) Program, would grant exemptions from the monkfish days-at-sea (DAS) possession limits in the Southern Fishery Management Area (SFMA).

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 May 3, 2010.

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

- Email: *NERO.EFP@noaa.gov*. Include in the subject line "Comments on Monkfish RSA Harvest EFP."
- Mail: Patricia A. Kurkul, Regional Administrator, NMFS, NE Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope "Comments on monkfish RSA harvest EFP, DA10–056."
- Fax: (978) 281–9135.

FOR FURTHER INFORMATION CONTACT: Anna Macan, Fishery Management Specialist, 978–281–9165.

SUPPLEMENTARY INFORMATION: An application for an EFP was submitted by the Gulf of Maine Research Institute on February 16, 2010, for a project selected under the New England and Mid-Atlantic Fishery Management Councils' Monkfish RSA Program. The final grant is pending a review by NOAA Grants. The project would involve tagging monkfish to investigate migratory patterns and mixing between management areas. This EFP would grant an exemption from monkfish possession limits to vessels for the purpose of harvesting RSA to fund this research project (i.e., compensation fishing).

Compensation fishing for this research would occur from May 2010 through April 2011. The fishing industry collaborators would have access to 313 monkfish DAS that would be awarded to the project through the Monkfish RSA Program. The applicant states that these vessels must be able to land at least 3,600 lb (1,633 kg) of whole monkfish (1,084 lb (492 kg) tail weight) per trip. This amount is based on the way the participating vessels typically fish, which is to land a "double limit" (6,652 lb (3,017 kg)) using 24 hours and 1 minute of DAS. In order to achieve this target catch, these fishing activities would require an exemption from the monkfish SFMA DAS possession limits at § 648.94(b)(2). This exemption would provide these vessels with the flexibility they need to generate sufficient income to meet projected costs of the research activity, while minimizing operating expenses. Based on the preliminary award of 313 DAS and the fishing practice described above, this would require a total catch of 1,126,800 lb (511,108 kg) of whole monkfish (339,398 lb (153,948 kg) tail weight). Operating under this total landings cap, compensation fishing would continue until the required goal of 1,126,800 lb (511,108 kg) of whole monkfish is met, or until the awarded DAS have been fully utilized, whichever occurs first. Aside from this exemption, fishing activity would be conducted under normal commercial fishing practices.

The participating vessels would be required to comply with all other applicable requirements and restrictions specified at 50 CFR part 648, unless specifically exempted in this EFP. Upon implementation of approved measures in Amendment 16 to the Northeast Multispecies FMP, all participating vessels would be required to comply with any other applicable requirements

in regulations implementing the amendment.

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. If the research project is terminated for any reason prior to completion, any unused funds collected from catch sold to pay for research expenses may be refunded to NOAA.

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

Dated: April 12, 2010.

Emily H. Menashes,

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

[FR Doc. 2010–8713 Filed 4–15–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV60

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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 determination that an Exempted Fishing Permit (EFP) application submitted by the Gulf of Maine Research Institute (GMRI) contains all of the required information and warrants further consideration. The Assistant Regional Administrator has made a determination that the activities authorized under this EFP would be consistent with the goals and objectives of the Monkfish Fishery Management Plan (FMP). However, further review and consultation may be necessary before a final determination is made to issue an EFP. The EFP would allow commercial fishing vessels to conduct research and compensation fishing operations that are otherwise restricted by the regulations governing the fisheries of the Northeastern United States. This EFP, which would enable vessels to harvest monkfish in accordance with the provisions of the Monkfish Research Set-Aside (RSA) Program, would grant exemptions from the monkfish days-at-sea (DAS) possession limits in the Southern Fishery Management Area (SFMA) and the monkfish minimum fish size limits for research purposes only.

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 May 3, 2010.

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

- Email: *NERO.EFP@noaa.gov*. Include in the subject line "Comments on Monkfish RSA Harvest EFP."
- Mail: Patricia A. Kurkul, Regional Administrator, NMFS, NE Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope "Comments on Monkfish RSA Harvest and Gillnet Study EFP, DA10–031."
- Fax: (978) 281–9135.

FOR FURTHER INFORMATION CONTACT: Anna Macan, Fishery Management Specialist, 978–281–9165.

SUPPLEMENTARY INFORMATION: A complete application for an EFP was submitted by GMRI on March 19, 2010, for a project selected under the New England and Mid-Atlantic Fishery Management Councils' Monkfish RSA Program. The final grant is pending a review by NOAA Grants. The project would involve testing tiedown lengths in gillnets and evaluating their effect on monkfish and bycatch retention. This EFP would grant an exemption from monkfish possession limits to vessels for the purpose of harvesting RSA to fund this research project (i.e., compensation fishing) and the monkfish minimum size restrictions for research purposes only.

Research and compensation fishing activities for this project would occur from May 2010 through April 2011. The fishing industry collaborators would have access to 162 monkfish RSA DAS. The applicant states that these vessels must be able to land at least 3,600 lb (1,633 kg) of whole monkfish (1,084 lb (492 kg) tail weight) per trip. This amount is based on the way the participating vessels typically fish, which is to land a "double limit" (6,652 lb (3,017 kg)) using 24 hours and 1 minute of DAS. In order to achieve this target catch, these fishing activities would require an exemption from monkfish SFMA DAS possession limits at § 648.94(b)(2). This exemption would provide these vessels with the flexibility they need to generate sufficient income to meet projected costs of the research activity, while minimizing operating expenses. Based on the preliminary award of 162 DAS and the fishing practice described above, this would require a total catch of 583,200 lb (264,535 kg) of whole monkfish (175,663 lb (79,679 kg) tail weight). Operating under this total landings cap, compensation fishing would continue until the required goal of 609,000 lb (276,238 kg) of whole monkfish is met, or until the awarded DAS have been fully utilized, whichever occurs first.

The research portion of this project would involve testing tiedown lengths in gillnets and evaluating their effect on monkfish and bycatch retention while under normal commercial fishing conditions. Monkfish gillnets would be configured according to standard commercial requirements with the only modification being the tiedown lengths. Tiedown lengths would consist of 6–inch (15.2 cm) increments of 12, 18, 24, 30, 36, and 42 inches (30.5, 45.7, 76.2, 91.4, and 106.7 cm). Upon haul back of the experimental gear, all catch would be separated and measured. All legal-sized monkfish would be retained and landed for sale. Any legal-sized monkfish landed above the possession limit would be retained and counted against the landings cap described above. Undersized monkfish would be carefully removed from the net, measured, and returned to the sea as quickly as possible. An exemption from the monkfish minimum size restriction is necessary because the participating vessels may retain fish on board longer than under normal sorting procedures in order to collect catch data. The total number of days fishing will not exceed 162. The total number of hauls per day will be four, with a total of 50 nets per vessel, and a soak time of 72 to 120 hr. The research and compensation fishing would occur May 2010 through April 2011.

The participating vessels would be required to comply with all other applicable requirements and restrictions specified at 50 CFR part 648, unless specifically exempted in this EFP. Upon implementation of approved measures in Amendment 16 to the Northeast Multispecies FMP, all participating vessels would be required to comply with any other applicable requirements in regulations implementing the amendment.

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. If the research project is terminated for any reason prior to completion, any unused funds collected from catch sold to pay for research expenses may be refunded to NOAA.

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

Dated: April 12, 2010.

Emily H. Menashes,

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

[FR Doc. 2010–8714 Filed 4–15–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–969]

Notice of Extension of the Deadline for Determining the Adequacy of the Antidumping Duty Petition: Glyphosate from the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: April 16, 2010.

FOR FURTHER INFORMATION CONTACT: Andrea Berton at (202) 482–4037, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

Extension of Initiation of Investigations

The Petition

On March 31, 2010, the Department of Commerce (Department) received an antidumping duty petition filed by Albaugh, Inc. (petitioner) on behalf of the domestic industry producing glyphosate. *See Antidumping Duty Petition on Glyphosate from the People's Republic of China* (March 31, 2010) (Petition).

Determination of Industry Support for the Petition

Section 732(b)(1) of the Tariff Act of 1930, as amended (the Act), requires that a petition be filed by or on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that the Department's industry support determination be based on whether a minimum percentage of the relevant industry supports the petition. A petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A), or (ii) if there is a large number of producers, determine industry support using a statistically valid sampling method to poll the industry.

Extension of Time

Section 732(c)(1)(A)(ii) of the Act provides that within 20 days of the filing of an antidumping duty petition, the Department will determine, inter alia, whether the petition has been filed by or on behalf of the U.S. industry producing the domestic like product. Section 732(c)(1)(B) of the Act provides that the deadline for the initiation determination, in exceptional circumstances, may be extended by 20 days in any case in which the Department must "poll or otherwise determine support for the petition by the industry." Because it is not clear from the Petition whether the industry support criteria have been met, nor does the Petition provide a usable figure for total production of the domestic like product, the Department has determined it should extend the time for initiating an investigation in order to poll the domestic industry.

The Department will need additional time to gather and analyze the domestic producers' responses to the Department's request for information. Therefore, it is necessary to extend the deadline determining the adequacy of the Petition for a period not to exceed 40 days from the filing of the Petition. As a result, the initiation determination will now be due no later than May 10, 2010.

International Trade Commission Notification

The Department will contact the International Trade Commission (ITC) and will make this extension notice available to the ITC.

Dated: April 12, 2010.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–8774 Filed 4–15–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV82

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council (Council) will convene a meeting of the Ecosystem Advisory Subpanel (EAS) which is open to the public.

DATES: The EAS will meet Tuesday, May 4, 2010 beginning at 8:30 a.m. and conclude at 5 p.m. or when business for the day is completed.

ADDRESSES: The EAS meeting will be held at the Pacific Fishery Management Council Office, Large Conference Room, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220; telephone: (503) 820–2280.

FOR FURTHER INFORMATION CONTACT: Mike Burner, Staff Officer; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The primary purpose of the meeting is to review and comment on a draft report to the Council on initial stages of developing an Ecosystem Fishery Management Plan (EFMP). The Council's Ecosystem Plan Development Team (EPDT) has taken the lead in preparing a Council requested report on developing an EFMP that includes a draft statement of purpose and need, a draft list of possible initial goals and objectives, and a draft range of options on the geographic range, managed species, and regulatory scope of the EFMP. Members of the EPDT will be in attendance to review the report and respond to EAS questions and comments. The final report is scheduled to be presented to the Council at its June 2010 meeting in Foster City, CA.

Although non-emergency issues not contained in the meeting agenda may come before the EAS for discussion, those issues may not be the subject of formal EAS action during this meeting.

EAS action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: April 13, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–8709 Filed 4–15–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV87

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene a public meeting of its Outreach and Education Advisory Panel (AP).

DATES: The Outreach and Education AP meeting is scheduled to begin at 1 p.m. on Tuesday, May 4, 2010 and end no later than 2 p.m. Thursday, May 6, 2010.

ADDRESSES: The meeting will be held at the Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: (813) 348–1630.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Charlene Ponce, Public Information Officer; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The Outreach and Education Advisory panel will convene to begin developing a five-year strategic plan. The panel will also receive a report on the recent Marine Resource Education Program Sessions held in York, Maine, as well as review the Council's new web site.

Although other non-emergency issues not on the agenda may come before the Outreach and Education Advisory Panel for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions of the Outreach and Education Advisory Panel will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Copies of the agenda can be obtained by calling (813) 348–1630.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Tina O'Hern at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: April 13, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–8712 Filed 4–15–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Manufacturing Extension Partnership Advisory Board

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice of open meeting.

SUMMARY: NIST announces that the Manufacturing Extension Partnership (MEP) Advisory Board, National Institute of Standards and Technology (NIST) will hold an open meeting on Sunday, May 2, 2010 from 8:30 a.m. to 4:30 p.m.

DATES: The meeting will convene May 2, 2010 at 8:30 a.m. and will adjourn at 4:30 p.m. on May 2, 2010.

ADDRESSES: The meeting will be held at Orlando World Center Marriott Resort & Convention Center, 8701 World Center Drive, Orlando, Florida 32821. Anyone wishing to attend this meeting should submit name, e-mail address and phone number to Susan Hayduk (*susan.hayduk@nist.gov* or 301–975–5614) no later than April 29, 2010.

FOR FURTHER INFORMATION CONTACT: Karen Lellock, Manufacturing Extension Partnership, National Institute of Standards and Technology, 100 Bureau Drive, Stop 4800, Gaithersburg, Maryland 20899–4800, telephone number (301) 975–4269.

SUPPLEMENTARY INFORMATION: This meeting is being held in conjunction with MEP's National Conference in Orlando, FL. The MEP Advisory Board is composed of 10 members, appointed by the Director of NIST, who were selected for their expertise in the area of industrial extension and their work on behalf of smaller manufacturers. MEP is a unique program consisting of centers across the United States and Puerto Rico, with partnerships at the State, Federal, and local levels. The Board works closely with MEP to provide input and advice on MEP's programs, plans, and policies. For this meeting, discussions will focus on an overview on (1) the current manufacturing climate and policy initiatives, (2) MEP center operating structures and service offerings, and (3) a discussion of a study outlining alternative business models for the MEP program. The agenda may change to accommodate other Board business.

Individuals and representatives of organizations who would like to offer comments and suggestions related to the MEP Advisory Board's business are invited to request a place on the agenda. Approximately fifteen minutes will be reserved for public comments at the beginning of the meeting. Speaking times will be assigned on a first-come, first-served basis. The amount of time per speaker will be determined by the number of requests received, but is likely to be no more than 3 to 5 minutes each. Questions from the public will not be considered during this period. Speakers who wish to expand upon their oral statements, those who had wished to speak but could not be accommodated on the agenda, and those who were unable to attend in person are invited to submit written statements to the MEP Advisory Board, National Institute of Standards and Technology, National Institute of Standards and Technology, 100 Bureau Drive, Stop 4800, Gaithersburg, Maryland 20899–4800, via fax at (301) 963–6556, or electronically by e-mail to *karen.lellock@nist.gov*.

Dated: April 13, 2010.

Marc G. Stanley,

Acting Deputy Director.

[FR Doc. 2010–8951 Filed 4–15–10; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

International Trade Administration

Information Privacy and Innovation in the Internet Economy

AGENCIES: National Telecommunications and Information Administration, U.S. Department of Commerce; and International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of Public Meeting.

SUMMARY: The National Telecommunications and Information Administration (NTIA) and the International Trade Administration (ITA), on behalf of the U.S. Department of Commerce (Department), will hold a public meeting on May 7, 2010, to discuss the nexus between privacy policy and innovation in the Internet economy.

DATES: The meeting will be held on May 7, 2010, from 9:00 a.m. to 3:00 p.m., Eastern Daylight Time. Registration will start at 8:30 a.m.

ADDRESSES: The meeting will be held in the Polaris Room of the Ronald Reagan International Trade Center, 1300 Pennsylvania Avenue, NW, Washington, DC 20001. Please enter at the main entrance on 14th Street. All of the major entrances to the building are accessible to people with disabilities.

FOR FURTHER INFORMATION CONTACT: For further information regarding the meeting, contact Manu Bhardwaj by email at mbhardwaj@ntia.doc.gov or by phone at (202) 482–1840.

SUPPLEMENTARY INFORMATION:

Recognizing the vital importance of the Internet to U.S. innovation, prosperity, education, and political and cultural life, the Department has made it a top priority to ensure that the Internet remains open for innovation. The Department has assembled a newly created Internet Policy Task Force (Task Force) whose mission is to identify leading public policy and operational challenges in the Internet environment. The Task Force leverages expertise across many bureaus, including those responsible for domestic and international information and communications technology policy, international trade, cybersecurity standards and best practices, intellectual property, business advocacy, and export control.

As part of the Task Force, NTIA and ITA are conducting a comprehensive review of the nexus between privacy policy and innovation in the Internet economy, which will include the issuance of a notice of inquiry. To facilitate the review, on May 7, 2010, NTIA will hold a public meeting to discuss stakeholder views and to facilitate further public discussion on privacy policy in the United States. The event will seek participation and comment from all Internet stakeholders, including the commercial, academic, and civil society sectors, on the impact of current privacy laws in the United States and around the world on the pace of innovation in the information economy. A discussion of whether current privacy laws serve consumer interests and fundamental democratic values is also anticipated.

The agenda for the public meeting will be posted on NTIA's website at least one week prior to the meeting. This meeting will be webcast. The agenda and webcast information will be available on NTIA's website at www.ntia.doc.gov. Secretary of Commerce Gary Locke is scheduled to deliver keynote remarks. Also participating with remarks will be NTIA's Administrator and Assistant Secretary Lawrence Strickling, the Department of Commerce's General Counsel Cameron Kerry, and other U.S. Government officials.

The meeting will be open to members of the public on a first-come, first-served basis. The meeting will be physically accessible to people with disabilities. Individuals requiring accommodation services, such as sign language interpretation or other ancillary aids, should communicate their needs to Manu Bhardwaj at least two (2) days prior to the meeting. Attendees should arrive at least one-half hour prior to the start of the meeting and must present a valid passport or other photo identification upon arrival. Members of the public will have an opportunity to ask questions at the meeting.

Dated: April 12, 2010.

Lawrence E. Strickling,

Assistant Secretary for Communications and Information.

Francisco J. Sanchez,

Under Secretary of Commerce for International Trade.

[FR Doc. 2010–8681 Filed 4–15–10; 8:45 am]

BILLING CODE 3510–60–S; 3510–D–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV86

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold a meeting of its Community Demonstration Project Program advisory panel (CDPP AP) to review and rank proposals submitted in response to solicitations for Marine Education and Training Program and Western Pacific Community Demonstration Project Program for Council review.

DATES: The CDPP AP will meet on May 4, 2010, from 9 a.m. to 5 p.m. and May 5, 2010, from 9 a.m. to 5 p.m.

ADDRESSES: The CDPP will meet at the Council Office Conference Room, Western Pacific Fishery Management Council, 1164 Bishop St., Suite 1400, Honolulu, HI 96813; telephone: (808) 522–8220.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director; telephone: (808) 522–8220.

SUPPLEMENTARY INFORMATION: The agenda for the Advisory Panel meetings will include the items listed below:

Tuesday, May 4, 2010, 9 a.m. - 5 p.m.

1. Introduction of attendees
2. Overview of Council and CDPP AP process
3. Overview of CDPP AP role and responsibilities
   a. Review Community Development Program criteria
   b. Review of Marine Education and Training (MET) program
   c. Review of Community Demonstration Project Program (CDPP)
4. Review MET solicitation
   a. Program criteria
   b. Eligibility criteria
   c. Selection criteria
5. Review and rank MET proposals
6. Discussion and wrap-up

Wednesday, May 5, 2010, 9 a.m. - 5 p.m.

7. Review CDPP solicitation
   a. Program criteria
   b. Eligibility criteria
   c. Selection criteria
8. Review and rank CDPP proposals
9. Discussion and wrap-up

10. Advisor Discussion and Recommendations

11. Other business

The order in which the agenda items are addressed may change. The AP will meet as late as necessary to complete scheduled business.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: April 13, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–8711 Filed 4–15–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV83

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Salmon Amendment Committee (SAC) will hold a meeting to develop draft alternatives and plan analyses for an amendment to the Pacific Coast Salmon Fishery Management Plan (FMP) to address the Magnuson-Stevens Act (MSA) requirements for annual catch limits (ACL) and accountability measures (AM). This meeting of the SAC is open to the public.

DATES: The meeting will be held Thursday, May 6, 2010, from 9 a.m. to 4:30 p.m. and Friday, May 7, 2010, from 8:30 a.m. to 3 p.m.

ADDRESSES: The meeting will be held at the Pacific Council Office, Large Conference Room, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384; telephone: (503) 820–2280.

FOR FURTHER INFORMATION CONTACT: Mr. Chuck Tracy, Salmon Management Staff Officer, Pacific Fishery Management Council; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The reauthorized MSA established new requirements to end and prevent overfishing through the use of ACLs and AMs. Federal FMPs must establish mechanisms for ACLs and AMs by 2010 for stocks subject to overfishing and by 2011 for all others, with the exceptions of stocks managed under an international agreement or stocks with a life cycle of approximately one year.

On January 16, 2009, NMFS published amended guidelines for National Standard 1 (NS1) of the MSA to provide guidance on how to comply with new ACL and AM requirements. The NS1 guidelines include recommendations for establishing several related reference points to ensure scientific and management uncertainty are accounted for when management measures are established.

The purpose of this meeting is to develop alternatives to address those issues, and to plan analyses that will be used to evaluate those alternatives in a National Environmental Policy Act (NEPA) analysis.

Although non-emergency issues not contained in the meeting agenda may come before the SAC for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: April 13, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–8710 Filed 4–15–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV67

Taking and Importing of Marine Mammals

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

ACTION: Notice; affirmative finding.

SUMMARY: The Assistant Administrator for Fisheries, NMFS, (Assistant Administrator) has granted a request for an affirmative finding to the Government of Ecuador under the Marine Mammal Protection Act (MMPA). This affirmative finding will allow yellowfin tuna harvested in the eastern tropical Pacific Ocean (ETP) in compliance with the International Dolphin Conservation Program (IDCP) by Ecuadorian-flag purse seine vessels or purse seine vessels operating under Ecuadorian jurisdiction to be imported into the United States. The affirmative finding was based on review of documentary evidence submitted by the Government of Ecuador and obtained from the Inter-American Tropical Tuna Commission (IATTC) and the U.S. Department of State.

DATES: The affirmative finding is effective from April 1, 2010, through March 31, 2015, subject to annual review by NMFS.

FOR FURTHER INFORMATION CONTACT: Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213; phone 562–980–4000; fax 562–980–4018.

SUPPLEMENTARY INFORMATION: The MMPA, 16 U.S.C. 1361 *et seq.*, allows the entry into the United States of yellowfin tuna harvested by purse seine vessels in the ETP under certain conditions. If requested by the harvesting nation, the Assistant Administrator will determine whether to make an affirmative finding based upon documentary evidence provided by the government of the harvesting nation, the IATTC, or the Department of State.

The affirmative finding process requires that the harvesting nation is meeting its obligations under the IDCP and obligations of membership in the IATTC. Every 5 years, the government of the harvesting nation must request an affirmative finding and submit the required documentary evidence directly to the Assistant Administrator. On an annual basis, NMFS will review the affirmative finding and determine whether the harvesting nation continues to meet the requirements. A nation may provide information related to compliance with IDCP and IATTC measures directly to NMFS on an annual basis or may authorize the IATTC to release the information to NMFS to annually renew an affirmative

finding determination without an application from the harvesting nation.

An affirmative finding will be terminated, in consultation with the Secretary of State, if the Assistant Administrator determines that the requirements of 50 CFR 216.24(f) are no longer being met or that a nation is consistently failing to take enforcement actions on violations, thereby diminishing the effectiveness of the IDCP.

As a part of the affirmative finding process set forth in 50 CFR 216.24(f), the Assistant Administrator considered documentary evidence submitted by the Government of Ecuador or obtained from the IATTC and the Department of State and has determined that Ecuador has met the MMPA's requirements to receive an affirmative finding.

After consultation with the Department of State, the Assistant Administrator issued Ecuador's affirmative finding, allowing the continued importation into the United States of yellowfin tuna and products derived from yellowfin tuna harvested in the ETP by Ecuadorian-flag purse seine vessels or purse seine vessels operating under El Salvadorian jurisdiction. Ecudaor's affirmative finding will remain valid through March 31, 2015, subject to subsequent annual reviews by NMFS.

Dated: April 12, 2010.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 2010–8776 Filed 4–15–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

International Code Council: The Update Process for the International Codes and Standards

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The International Code Council (ICC), promulgator of the International Codes and Standards, maintains a process for updating the entire family of International Codes based on receipt of proposals from interested individuals and organizations involved in the construction industry as well as the general public. The codes are updated every three years (2009—current edition, 2012, 2015 editions, *etc.*). In the past, the codes were updated on 2–18 month cycles, with an intervening supplement between cycles. Starting with the 2009/2010 Cycle, ICC is transitioning to a development cycle where there will only be a single cycle of code development with the codes split into two groups. For each group of codes, there are two hearings for each code development cycle; the first where a committee considers the proposals and recommends an action on each proposal and the second to consider comments submitted in response to the committee action on proposals.

The purpose of this notice is to increase public participation in the system used by ICC to develop and maintain its codes and standards. The publication of this notice by the National Institute of Standards and Technology (NIST) on behalf of ICC is being undertaken as a public service; NIST does not necessarily endorse, approve, or recommend any of the codes or standards referenced in the notice.

DATES: The date of the next final action hearing is May 14–22, 2010 in Dallas, Texas at the Sheraton Dallas Hotel.

Completion of this cycle results in the 2012 edition of the International Codes which are scheduled to be published by April 2011. For detailed information on the 2009/2010 Cycle, go to: *http://www.iccsafe.org/cs/codes/Pages/cycle.aspx*

FOR FURTHER INFORMATION CONTACT: Mike Pfeiffer, PE, Secretary, Code Development, 4051 West Flossmoor Road, Country Club Hills, Illinois 60478.

SUPPLEMENTARY INFORMATION:

Background

ICC produces the only family of Codes and Standards that are comprehensive, coordinated, and necessary to regulate the built environment. Federal agencies frequently use these codes and standards as the basis for developing Federal regulations concerning new and existing construction.

The Code Development Process is initiated when proposals from interested persons, supported by written data, views, or arguments are solicited and published in the Proposed Changes document. This document is posted a minimum of 30 days in advance of the first hearing and serves as the agenda.

At the first hearing (Code Development Hearing), the ICC Code Development Committee considers testimony on every proposal and acts on each one individually (Approval, Disapproval, or Approval as Modified). The results are published in a report entitled the Report of the Public Hearing, which identifies the disposition of each proposal and the reason for the committee's action. Anyone wishing to submit a comment on the committee's action, expressing support or opposition to the action, is provided the opportunity to do so. Comments received are published and distributed in a document called the Final Action Agenda which serves as the agenda for the second hearing (Final Action Hearing). As part of ICC's Governmental Consensus Process, at the Final Action Hearing, only ICC's Governmental Members are permitted to vote as they have no vested interest other than health, safety and welfare in the enforcement of the code. Proposals which are approved at the second hearing are incorporated in the subsequent Edition, with the next cycle starting with the submittal deadline for proposals.

ICC maintains a mailing list of interested parties who will be sent a complimentary CD, free of charge, of all code development documents from ICC's Chicago District Office:

International Code Council, 4051 W Flossmoor Road, Country Club Hills, Illinois 60478; or download a copy from the ICC Web site noted previously.

The International Codes and Standards consist of the following:

ICC Codes

International Building Code.
International Energy Conservation Code.
International Existing Building Code.
International Fire Code.
International Fuel Gas Code.
International Mechanical Code.
ICC Performance Code for Buildings and Facilities.
International Plumbing Code.
International Private Sewage Disposal Code.
International Property Maintenance Code.
International Residential Code.
International Wildland-Urban Interface Code.
International Zoning Code.

ICC Standards

ICC A 117.1: Accessible and Usable Buildings and Facilities.
ICC 300: Standard on Bleachers, Folding and Telescopic Seating and Grandstands.
ICC 400: Standard on the Design and Construction of Log Structures.
ICC 500: ICC/NSSA Standard on the Design and Construction of Storm Shelters.
ICC 600: Standard for Residential Construction in High Wind Areas.
ICC 700: National Green Building Standard.

The maintenance process for ICC Standards such as ICC A117.1 follows a

similar process of soliciting proposals, committee action, public comment and ultimately the update and publication of the standard. ICC's Standard development process meets ANSI requirements for standard's development.

ICC has recently completed the drafting phase in the development of the International Green Construction Code which will become part of the family of 2012 International Codes ("I-Codes"). For information on its development: *http://www.iccsafe.org/cs/SBTC/Pages/default.aspx.*

Dated: April 12, 2010.

Marc G. Stanley,

Acting Deputy Director.

[FR Doc. 2010–8781 Filed 4–15–10; 8:45 am]

BILLING CODE 3510–13–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from the Procurement List.

SUMMARY: This action adds to the Procurement List services to be provided by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes from the Procurement List services previously provided by such agencies.

DATES: *Effective Date:* 5/17/2010.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov*.

SUPPLEMENTARY INFORMATION:

Additions

On 2/12/2010 (75 FR 6869–6870) and 2/19/2010 (75 FR 7450–7451), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the services and impact of the additions on the current or most recent contractors, the Committee has determined that the services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will provide the services to the Government.

2. The action will result in authorizing small entities to provide the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following services are added to the Procurement List:

Services:

Service Type/Location: Mailroom Operation, Internal Revenue Services, 5100 River Road, Schiller Park, IL.
NPAs: ServiceSource, Inc., Alexandria, VA (PRIME Contractor), Jewish Vocational Service and Employment Center, Chicago, IL (Subcontractor).

Contracting Activity: DEPT OF TREAS, Internal Revenue Service, Washington, DC.
Service Type/Location: Document Management Services, Evans Army Community Hospital, 1650 Cochrane Circle, Fort Carson, CO.
NPA: Goodwill Industrial Services Corporation, Colorado Springs, CO.
Contracting Activity: DEPT OF THE ARMY, XR W6BA ACA, FORT CARSON, CO.

Deletions

On 2/12/2010 (75 FR 6869–6870 and 2/19/2010 (75 FR 7450–7451), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to provide the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services deleted from the Procurement List.

End of Certification

Accordingly, the following services are deleted from the Procurement List:

Services

Service Type/Location: Supply and Warehousing Service, Defense Contracting Management, District South, 805 Walker Street, Marietta, GA.
NPA: Tommy Nobis Enterprises, Inc., Marietta, GA.
Contracting Activity: Defense Logistics Agency, DLA Support Services—DSS, Fort Belvoir, VA.
Service Type/Location: Disposal Support Services, Pensacola Naval Air Station, Pensacola, FL.
NPA: Association for Retarded Citizens/Escambia, Inc., Pensacola, FL.
Contracting Activity: Defense Logistics Agency, DLA Support Services—DSS, Fort Belvoir, VA.
Service Type/Location: Janitorial/Custodial, Florida Air National Guard: Buildings 874 and 877, 14300 Fang Drive, Homestead ARB, FL.
NPA: Goodwill Industries of South Florida, Inc., Miami, FL.
Contracting Activity: DEPT OF THE ARMY, XRA W7M2 USPFO ACTIVITY FL ARNG, St Augustine, FL.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2010–8663 Filed 4–15–10; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed deletions from the Procurement List.

SUMMARY: The Committee is proposing to delete from the Procurement List services previously provided by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments Must Be Received On or Before: 5/17/2010.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Deletions

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. If approved, the action may result in authorizing small entities to provide the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for deletion from the Procurement List.

End of Certification

The following services are proposed for deletion from the Procurement List:

Services

Service Type/Location: Catering Service, San Antonio Detention Center, 8940 Fourwinds Dr., San Antonio, TX.
NPA: Goodwill Industries of San Antonio, San Antonio, TX.
Contracting Activity: Dept. of Homeland Security, Bureau of Immigration and Customs Enforcement, Detention Management—DC Office, Washington, DC.
Service Type/Location: Janitorial/Custodial, TSA Office Space: Newport News International Airport, 900A Bland Boulevard, Newport News, VA.
NPA: Portco, Inc., Portsmouth, VA.
Contracting Activity: GSA/PBS/R03 Richmond FO, Richmond, VA.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2010–8662 Filed 4–15–10; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, April 21, 2010; 2 p.m.–4 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Closed to the Public.

Matters To Be Considered

Compliance Status Report

The Commission staff will brief the Commission on the status of compliance matters.

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: April 13, 2010.

Todd A. Stevenson,

Secretary.

[FR Doc. 2010–8904 Filed 4–14–10; 11:15 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2010–OS–0049]

Privacy Act of 1974; System of Records

AGENCY: Defense Intelligence Agency, DoD.

ACTION: Notice to amend a system of records.

SUMMARY: The Defense Intelligence Agency is proposing to amend a system in its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on May 17, 2010 unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Theresa Lowery at (202) 231–1193.

SUPPLEMENTARY INFORMATION: The Defense Intelligence Agency 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 Defense Intelligence Agency, DAN 1–C, 600 MacDill Blvd., Washington, DC 20340–0001.

The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of new or altered systems reports.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

LDIA 06–0004

SYSTEM NAME:

Recall Rosters (September 5, 2006; 71 FR 52324).

CHANGES:

* * * * *

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "Civilian employees, military personnel, and contractors employed, assigned, or detailed to the Defense Intelligence Agency."

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "Individual's name, organizational and home address, work, home, cellular and pager numbers, home e-mail account, emergency contact information, contact listing files, organizational telephone directories, and listing of office personnel."

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "DoD Directive 3020.26 Department of Defense Continuity Programs; DIA(I) 2000.3 Antiterrorism (AT) Program; and DIA Chief of Staff Memo, U–1950/CS Emergency Notification System."

PURPOSE(S):

Delete entry and replace with "To enable the DIA to recall personnel to their place of duty, for use in emergency notifications, and to perform relevant functions, requirements, and actions consistent with managerial functions during an emergency."

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Delete entry and replace with "In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records 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' set forth at the beginning of DIA's compilation of systems of records notices apply to this system."

STORAGE:

Delete entry and replace with "Paper and electronic storage media."

RETRIEVABILITY:

Delete entry and replace with "By last name of the individual."

SAFEGUARDS:

Delete entry and replace with "Records are stored in office buildings protected by guards, controlled screenings, 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 User IDs 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 is limited to persons responsible for servicing and authorized to use the system. Removal of information beyond DoD control is authorized and must be safeguarded when not in use."

RETENTION AND DISPOSAL:

Delete entry and replace with "Records are temporary and destroyed when the individual is no longer with the agency. Electronic records are deleted from the system, paper records are destroyed by shredding, burning or pulping."

* * * * *

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 inquiries to the DIA Freedom of Information Act Office (DAN–1A), Defense Intelligence Agency, 200 MacDill Blvd, Washington, DC 20340–5100.

Request should contain the individual's full name, 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 DIA Freedom of Information Act Office, Defense Intelligence Agency (DAN–1A), 200 MacDill Blvd, Washington, DC 20340–5100."

Request should contain the individual's full name, current address, and telephone number."

CONTESTING RECORD PROCEDURES:

Delete entry and replace with "DIA's rules for accessing records, for contesting contents and appealing initial agency determinations are published in DIA Instruction 5400.001, 'Defense Intelligence Agency Privacy Program'; or may be obtained from the system manager."

RECORD SOURCE CATEGORIES:

Delete entry and replace with "The individual."

* * * * *

LDIA 06–0004

SYSTEM NAME:

Recall Rosters.

SYSTEM LOCATION:

DIA organizational elements and offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Civilian employees, military personnel, and contractors employed, assigned, or detailed to the Defense Intelligence Agency.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's name, organizational and home address, work, home, cellular and pager numbers, home e-mail account, emergency contact information, contact listing files, organizational telephone directories, and listing of office personnel.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

DoD Directive 3020.26 Department of Defense Continuity Programs; DIA(I) 2000.3 Antiterrorism (AT) Program; and DIA Chief of Staff Memo, U–1950/CS Emergency Notification System.

PURPOSE(S):

To enable the DIA to recall personnel to their place of duty, for use in emergency notifications, and to perform relevant functions, requirements, and actions consistent with managerial functions during an emergency.

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 of 1974, these records 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' set forth at the beginning of DIA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper and electronic storage media.

RETRIEVABILITY:

By last name of the individual.

SAFEGUARDS:

Records are stored in office buildings protected by guards, controlled screenings, 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 User IDs 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 is limited to persons responsible for servicing and authorized to use the system. Removal of information beyond DoD control is authorized and must be safeguarded when not in use.

RETENTION AND DISPOSAL:

Records are temporary and destroyed when the individual is no longer with the agency. Electronic records are deleted from the system, paper records are destroyed by shredding, burning or pulping.

SYSTEM MANAGER(S) AND ADDRESS:

DIA Privacy Official, Defense Intelligence Agency (DAN–1C), 200

MacDill Blvd, Washington, DC 20340–5100.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the DIA Freedom of Information Act Office (DAN–1A), Defense Intelligence Agency, 200 MacDill Blvd, Washington, DC 20340–5100.

Request should contain the individual's full name, 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 DIA Freedom of Information Act Office, Defense Intelligence Agency (DAN–1A), 200 MacDill Blvd, Washington, DC 20340–5100.

Request should contain the individual's full name, current address, and telephone number.

CONTESTING RECORD PROCEDURES:

DIA's rules for accessing records, for contesting contents and appealing initial agency determinations are published in DIA Instruction 5400.001 "Defense Intelligence Agency Privacy Program"; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

The individual.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–8740 Filed 4–15–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE, Formerly Known as the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Fiscal Year 2011 Continued Health Care Benefit Program (CHCBP) Premium Update Mental Health Rate Updates

AGENCY: Office of the Secretary, DoD.

ACTION: Notice of updated Continued Health Care Benefit Program premiums for Fiscal Year 2011.

SUMMARY: This notice provides the updated Continued Health Care Benefit Program (CHCBP) premiums for Fiscal Year 2011.

DATES: The Fiscal Year 2011 rates contained in this notice are effective for services on or after October 1, 2010.

ADDRESSES: TRICARE Management Activity (TMA), Policy and Benefits Branch, 5111 Leesburg Pike, Suite 810A, Falls Church, VA 22041.

FOR FURTHER INFORMATION CONTACT: Mark A. Ellis, telephone (703) 681–0039.

SUPPLEMENTARY INFORMATION: The final rule published in the **Federal Register** on September 30, 1994, (59 FR 49818) set forth rules to implement the Continued Health Care Benefit Program (CHCBP) required by 10 United States Code 1078a. Included in this final rule were provisions for updating the CHCBP premiums for each federal Fiscal Year. As stated in the final rule, the premiums are based on Federal Employee Health Benefit Program employee and agency contributions required for a comparable health benefits plan, plus an administrative fee. Premiums may be revised annually and shall be published annually for each Fiscal Year.

The TRICARE Management Activity has updated the quarterly premiums for Fiscal Year 2011 as shown below.

Quarterly CHCBP Premiums for Fiscal Year 2011

Individual—$988.

Family—$2,213.

The above premiums are effective for services rendered on or after October 1, 2010 for both existing and new enrollees.

Dated: April 13, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–8741 Filed 4–15–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Notice of Intent To Prepare an Environmental Impact Statement for the Missouri River Authorized Purposes Study, Missouri River Basin, United States

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: Pursuant to Division C, Title I, Section 108 of the Omnibus Appropriations Act of 2009 (Pub. L. 111–8), and the National Environmental Policy Act of 1969 (NEPA), as amended, the U.S Army Corps of Engineers (USACE) Omaha and Kansas City Districts intend to conduct the Missouri River Authorized Purposes Study (MRAPS). The study is anticipated to produce a comprehensive feasibility-type report with an integrated Environmental Impact Statement (EIS).

Public Law 111–8 authorizes the USACE to review the original project purposes within the Missouri River Basin based on the Flood Control Act of 1944, as amended, and other-subsequent relevant legislation and judicial rulings to determine if changes to the authorized project purposes and existing federal water resource infrastructure may be warranted. The authorized Missouri River project purposes are: fish and wildlife, flood control, irrigation, navigation, power, recreation, water quality, and water supply.

Public scoping for the MRAPS will begin in late May 2010. Future public notices will identify how written comments and suggestions concerning the study may be submitted. Please see *http://www.mraps.org* and the Scoping and Public Involvement section below for additional information.

FOR FURTHER INFORMATION CONTACT: For further information and/or questions about the MRAPS, please contact Mr. Mark Harberg, Project Manager, by telephone: (402) 995–2554, by mail: 1616 Capitol Avenue, Omaha, Nebraska 68102–4901, or by *e-mail: mark.c.harberg@usace.army.mil,* or Lamar McKissack, Project Manager, by telephone (816) 389–3115, by mail: 601 East 12th Street, Kansas City, Missouri 64106, or by e-mail: *grady.l.mckissack@usace.army.mil.* For inquiries from the media, please contact the USACE Omaha District Public Affairs Officer (PAO), Mr. Paul Johnston by telephone: (402) 995–2416, by mail: 1616 Capitol Avenue, Omaha, Nebraska 68102, or by e-mail: *paul.t.johnston@usace.army.mil.*

SUPPLEMENTARY INFORMATION:

1. *Description of Proposed Study.* Encompassing an area of approximately 530,000 square miles and a number of governing entities including ten states, two Canadian provinces, and 28 Native American tribes, the Missouri River Basin is the second largest river basin in the United States. From its source at Three Forks, Montana, the Missouri River flows east and southeast for a total of 2,341 miles before emptying into the Mississippi River, just north of St. Louis, Missouri, making it the longest river in the United States. The Missouri River passes through a variety of physiographic provinces, provides habitat to diverse populations of flora and fauna, contains important cultural resources, and supports a variety of human uses. Due to its geographic scale and diversity, the management of the

Missouri River falls under a variety of USACE authorities and programs as well as programs and authorities of other agencies.

Major human alterations to the Missouri River began as early as the late 1800s with the removal of snags to improve navigation. River alterations continued into the twentieth century. At the direction of Congress, the USACE enhanced navigation, built dams, and regulated river flows. Simultaneously, land use changes affecting the River's floodplain occurred creating a system very different from its pre-alteration condition. Managing today's altered Missouri River is a complex task due to competing demands from a variety of different uses. The past two decades have produced a great deal of debate among Basin stakeholders on how to best manage the River's resources.

The 1944 Flood Control Act, as amended, and subsequent legislation have directed the USACE to allocate the River's resources among the authorized Missouri River project purposes; which are: Fish and wildlife, flood control, irrigation, navigation, power, recreation, water quality, and water supply. Section 108 of the Energy and Water Development Section of the FY09 Omnibus Appropriations Act provides the USACE authorization to study the Missouri River projects located within the Missouri River Basin to review the original authorized project purposes to determine if changes to the project purposes and existing Federal water resource infrastructure may be warranted. The study authorized by Section 108 will be referred to as the Missouri River Authorized Purposes Study (MRAPS). The MRAPS is a broad-based multi-purpose study that is anticipated to culminate in a comprehensive feasibility-type report with an integrated EIS. The MRAPS will be conducted in accordance with NEPA and with the "Principles and Guidelines for Water and Related Land Resource Implementation Studies" (Water Resource Council, 1983).

The scope of the MRAPS will be limited to review of the original authorized project purposes within the Missouri River Basin and will include a review of other Federal water resource infrastructure related thereto, such as those projects that are dependent on USACE operations or are covered by an operational agreement with the USACE. The MRAPS will evaluate the study area as a comprehensive system of projects, infrastructure, and natural resources providing a detailed review of the existing project purposes and conditions, evaluation of the current needs and problems within the study area, and could lead to consideration of operational and/or infrastructure alternatives.

2. *Scoping and Public Involvement Process.* The MRAPS will include multiple phases of public, agency, and tribal government involvement. The first official phase of public scoping will be conducted throughout the Basin from late May 2010 through late August 2010, and will seek input on problems, opportunities, and constraints related to the existing authorized purposes and gather general concerns, issues, and needs related to the study. This scoping period plans for 29 public scoping meetings and 11 tribal focused public scoping meetings. Specific locations and dates of these meetings will be officially announced through electronic media, news releases, and mailings. Additional public meetings and involvement will take place throughout the study. For more information on scoping phases, dates, meeting locations, and general information, please visit *http://www.mraps.org.*

3. *Significant Issues.* Issues associated with the proposed study are likely to include, but will not be limited to: existing infrastructure and resource conditions; statutory and legal responsibilities including relevant court decisions; effects of potential alternatives on uses including, but not necessarily limited to: flood control, navigation, fish and wildlife, irrigation, power, recreation, water supply, and water quality control; defining the relationship with current USACE programs including the Missouri River Recovery Program (MRRP), Missouri River Ecosystem Restoration Plan (MRERP), and the Bank Stabilization and Navigation Project (BSNP); and analysis of effects to the Mississippi River from potential actions or alternatives that are examined in the Missouri River Basin.

4. *Additional Review and Consultation.* Additional public, scientific, and statutory review and consultation could include, but will not be limited to: The Clean Water Act, the Fish and Wildlife Coordination Act, the National Historic Preservation Act, the Endangered Species Act, and the Clean Air Act.

5. *Availability of the Draft Environmental Impact Statement.* Availability of the Draft EIS is contingent upon allocation of funding as the study progresses. Draft EIS availability will be announced to the public in the **Federal Register** in compliance with 40 CFR 1506.9 and 1506.10.

Dated: April 6, 2010.

Kayla Eckert Uptmor,

Chief Planning Branch, Omaha District.

Dated: April 7, 2010.

David L. Combs,

Chief Planning Branch, Kansas City District.

[FR Doc. 2010–8729 Filed 4–15–10; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2010–0011]

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 is proposing to amend a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on May 17, 2010 unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Ben Swilley at (703) 696–6172.

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 Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCPPF, 1800 Air Force Pentagon, Washington, DC 20330–1800.

The specific change to the records system being amended is set forth below. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: April 12, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F051 AF JA B

SYSTEM NAME:

Confidential Financial Disclosure Report. (December 15, 2008; 73 FR 76013).

CHANGE:

Delete the system ID number entry and replace it with "F051 AFJA F".

* * * * *

F051 AFJA F

SYSTEM NAME:

Confidential Financial Disclosure Report.

[FR Doc. 2010–8738 Filed 4–15–10; 8:45 am]

BILLING CODE 5001–06–P

DELAWARE RIVER BASIN COMMISSION

Notice of Commission Meeting and Public Hearing

Notice is hereby given that the Delaware River Basin Commission will hold an informal conference followed by a public hearing on Wednesday, May 5, 2010. The hearing will be part of the Commission's regular business meeting. The conference session and business meeting both are open to the public and will be held at the Commission's office building, located at 25 State Police Drive, West Trenton, New Jersey.

The conference among the commissioners and staff will begin at 10:30 a.m. and will consist of a presentation on the Commonwealth's Total Dissolved Solids (TDS) Strategy by a representative of the Pennsylvania Department of Environmental Protection and a presentation on the Delaware River Valley Early Warning System by a representative of the Philadelphia Water Department.

The subjects of the public hearing to be held during the 1:30 p.m. business meeting include the dockets listed below:

1. *Cabot Corporation, D–1970–072–4.* An application for the renewal of an existing 0.222 million gallons per day (mgd) discharge from Outfalls Nos. 001 (process wastewater and non-contact cooling water (NCCW)), 002 (stormwater, condensate and NCCW), and 003 (process water treatment system wastewater). The project is located on Swamp Creek at River Mile 92.47—32.3—12.9—12.6 (Delaware River—Schuylkill River—Perkiomen Creek—Swamp Creek), on the border of Douglass Township, Montgomery County, Pennsylvania and Colebrookdale Township, Berks County, Pennsylvania.

2. *Gilbertsville Golf Club, D–1999–047–2.* The purpose of this project is to continue to provide up to 12 million gallons per 30 days (mg/30 days) of water for golf course irrigation from existing Wells Nos. 2, 9, and 13, which were installed in the Brunswick Formation. The docket holder augments two ponds from the existing groundwater wells to satisfy the irrigation water demand for the docket holder's golf course. The project is located in the Minster Creek Watershed in the New Hanover Township, Montgomery County, PA and is located in the Southeastern Pennsylvania Ground Water Protected Area (GWPA).

3. *Womelsdorf Sewer Authority, D–1967–084 CP–2.* An application to approve an expansion of the existing Womelsdorf Sewer Authority Wastewater Treatment Plant (WWTP). The WWTP was expanded in 2000 from 0.3 million mgd to 0.475 mgd; however this expansion was never approved by the Commission. The WWTP will continue to discharge to the Tulpehocken Creek, a tributary to the Schuylkill River. The facility is located in Heidelberg Township, Berks County, Pennsylvania.

4. *Morysville, D–1973–060 CP–2.* An application for approval to increase the Morysville WWTP discharge from 0.25 mgd to 0.32 mgd. The hydraulic design capacity of 0.38 mgd will not be modified. The project will continue to discharge to Ironstone Creek at River Mile 92.47—54.15—4.0—4.1 (Delaware River—Schuylkill River—Manatawny Creek—Ironstone Creek), in Colebrookdale Township, Berks County, Pennsylvania.

5. *North Wales Water Authority, D–1986–020 CP–2.* An application for approval of a modification of the North Wales Water Authority WWTP. The applicant proposes to upgrade the existing 0.835 mgd WWTP to include the addition of an activated sludge unit and a chemical feed system. The project includes the transfer of ownership from North Wales Borough to the North Wales Water Authority. The WWTP's hydraulic design rate of 0.835 mgd will remain unchanged. The WWTP will continue to discharge to an unnamed tributary of the Wissahickon Creek, which is a tributary of the Schuylkill River. The facility is located in Upper Gwynedd Township, Montgomery County, Pennsylvania.

6. *Township of Spring, D–1988–077 CP–2.* An application for approval of the expansion of the Spring Township WWTP. A 1.0 mgd oxidation ditch treatment system utilizing a fixed film contact aeration (packed bed reactor) system is proposed to be added to the existing 1.28 mgd WWTP in order to expand the plant's hydraulic design capacity from 1.28 mgd to 2.28 mgd. The average annual flow of the expanded plant will be 2.0 mgd. The WWTP will continue to discharge to Cacoosing Creek, a tributary of Tulpehocken Creek, which is a tributary of the Schuylkill River. The facility is located in the Township of Spring, Berks County, Pennsylvania.

7. *Hilltown Township Water and Sewer Authority, D–1992–020 CP–3.* An application for the renewal of a groundwater withdrawal project to continue the withdrawal of 16.0 mg/30 days to supply the applicant's public water supply system from existing Wells Nos. 2 and 5 and new Well No. 1A. New Well No. 1A was drilled as a replacement well for Well No. 1, which was abandoned due to a casing failure. The applicant requests that the withdrawal from New Well No. 1A be limited to 9.60 mg/30 days. The project is located in the Brunswick and Lockatong Formations in the Pleasant Spring Creek Watershed in Hilltown Township, Bucks County, Pennsylvania, within the Southeastern Pennsylvania Ground Water Protected Area.

8. *Lyons Borough Municipal Authority, D–1994–080 CP–2.* An application for approval to expand and upgrade the Lyons Borough Municipal Authority WWTP. The hydraulic design flow will increase from 0.2 mgd to 0.3 mgd, and modifications will include the construction of two equalization tanks, a package aeration unit, three gravity filters, an ultra-violet (UV) light disinfection system, a post-aeration tank, a screw press for sludge dewatering, chemical feed systems and a filtration building. The project also includes a request for an increase from 1,000 milligrams per liter (mg/l) to 2,000 mg/l in the Total Dissolved Solids (TDS) effluent limit for the upgraded WWTP. The increase in flow and TDS is anticipated as a result of proposed acceptance of an additional 0.10 mgd of industrial process water from East Penn Manufacturing Company, an industrial wastewater discharger to the WWTP. The WWTP will continue to discharge

to Sacony Creek, a tributary of the Maiden Creek, which is a tributary of the Schuylkill River. The project is located in the Borough of Lyons Township, Berks County, Pennsylvania.

9. *Lower Providence Township Municipal Authority D–1999–021 CP–2.* An application for the renewal of a groundwater withdrawal project to supply up to 3.3 mg/30 days of water to the applicant's golf course from existing Wells Nos. 1 and 2 in the Stockton Formation. The total allocation of groundwater is based on actual metered data and is an increase from the existing allocation of 2.27 mg/30 days. The project is located in the Mine Run and Schuylkill River watersheds in Lower Providence Township, Montgomery County, PA in the Southeastern Pennsylvania Ground Water Protected Area.

10. *Maidencreek Township Authority, D–2000–028 CP–2.* An application for approval to increase the TDS effluent limit for the Maidencreek WWTP from 1,000 mg/l to 1,500 mg/l. The proposed increase in TDS is a result of additional industrial process water proposed to be discharged to the plant by James Hardie Building Products, an existing industrial wastewater discharger. The average annual flow of the existing WWTP will remain at 0.8 mgd. The plant is hydraulically designed for 1.0 mgd. The WWTP will continue to discharge to Willow Creek, a tributary of Maiden Creek, which is a tributary of the Schuylkill River. The project is located in Ontelaunee Township, Berks County, Pennsylvania.

11. *East Vincent Municipal Authority, D–2005–007 CP–1.* An application to rerate a 48,800 gallons per day (gpd) sewage treatment plant (STP) to process a maximum monthly flow of 52,800 gpd, while continuing to provide tertiary treatment. The project will continue to serve flows from the built-out residential development known as Bartons Meadows in East Vincent Township, Chester County, Pennsylvania. The additional 4,000 gpd is needed to handle wet weather related flows due to inflow and infiltration. Following ultraviolet light disinfection, STP effluent will continue to be discharged to subsurface seepage beds in the drainage area of French Creek. The project is located in the DRBC Southeastern Pennsylvania Ground Water Protected Area and the Schuylkill River Watershed, off of Sheeder Road just north of its intersection with Pughtown Road.

12. *Upper Makefield Township, D–2007–025 CP–2.* An application for approval of expansion of the Upper Makefield Township Gray Tract WWTP, which was previously approved but not constructed. The applicant seeks approval to expand the proposed plant from the previously approved 20,000 gallons per day (gpd) to 55,550 gpd in order to accommodate an additional service area consisting of the portions of the Melksy Farm and White Farm subdivisions located in Upper Makefield Township. The hydraulic design capacity of the proposed WWTP is to be 70,000 gpd. The WWTP is proposed to discharge to Houghs Creek rather than to the previously-approved location on an unnamed tributary of Houghs Creek. The project is to be located in the Houghs Creek Watershed in Upper Makefield Township, Bucks County, Pennsylvania, and is located within the drainage area of the section of the non-tidal Delaware River known as the Lower Delaware, which is classified as Special Protection Waters.

13. *Artesian Water Company, Inc. D–2007–042 CP–1.* An application for approval of a groundwater withdrawal project to supply up to 25.8 mg/30 days of water to the applicant's public water supply distribution system from new Wells Nos. PW–1 and PW–2 in the Weatherstone Crossing wellfield. The project is located in the Frederica Formation in the Murderkill River Watershed in Kent County, Delaware.

14. *Arcelor Mittal Plate, LLC, D–2008–036–1.* An application for approval of an existing surface water and spring water withdrawal of up to 105.8 mg/30 days. The Arcelor Mittal Plate industrial facility withdraws surface water from two intakes and one spring source (West Side Spring). Intake No. 1 is located on the West Branch Brandywine Creek and Intake No. 2 is located on Sucker Run, a tributary of the West Branch Brandywine Creek. The facility is located in the City of Coatesville in Chester County, Pennsylvania.

15. *Naval Surface Warfare Center, Carderock Division, Ship Systems Engineering Station, D–2009–003 CP–1.* An application for approval of an existing surface water withdrawal of 1,080 mg/30 days. The existing Naval Surface Warfare Center, Carderock Division, Ship Systems Engineering Station currently withdraws surface water from the Philadelphia Navy Reserve Basin, which is connected by a channel and tidally-linked to the Schuylkill River one-half mile upstream of the confluence of the Schuylkill River with the Delaware River. The surface water withdrawal is used for non-contact cooling water. The facility is located in the City of Philadelphia, Pennsylvania.

16. *Naval Surface Warfare Center, Carderock Division, Ship Systems Engineering Station, D–2009–004 CP–1.* An application to approve an existing non-contact cooling water (NCCW) discharge to the Navy Reserve Basin (Outfall 001) and an existing discharge of process water directly to the Delaware River within Water Quality Zone 4 (Outfall 005). The existing discharges have not been approved by the Commission. The discharge of NCCW from Outfall 001 will increase from 24.0 mgd (existing) to 36.0 mgd as a result of the proposed P–205 Electric Test Drive project and Outfall No. 005 will remain at 0.60 mgd. The Navy Reserve Basin is connected by a channel and tidally-linked to the Schuylkill River one-half mile upstream of the confluence of the Schuylkill River with the Delaware River. The facility is located in the Schuylkill River Watershed in the City of Philadelphia, Pennsylvania.

17. *Village of Fleischmanns, D–2009–008 CP–1.* An application for approval of a groundwater withdrawal project to supply up to 9.75 mg/30 days of water to the applicant's public water supply system from existing Wells Nos. 2 and 4, rehabilitated Well No. 3, new Well No. 5, and existing Springs Nos. 3, 4 & 5. The allocation is requested in order to meet existing and projected demands in the project service area. The project is located in the Lower Walter Formation in the Bush Kill Watershed in the Village of Fleischmanns, Delaware County, New York. The site is located within the drainage area of the section of the non-tidal Delaware River known as the Upper Delaware, which is designated as Special Protection Waters.

18. *Elwood P. Carey, D–2009–028–1.* An application for approval of an existing groundwater withdrawal project to supply a maximum of 10.8 mg/30 days of water for the applicant's irrigation of approximately 86 acres of corn, soybean, and wheat crops. The project well (Well No. 1) is located in the Cheswold Aquifer in the Leipsic River Watershed in Kent County, Delaware.

19. *State of Delaware Parks and Recreation, D–2009–034 CP–1.* An application to approve an existing surface and groundwater withdrawal of up to 14.0 million gallons per 30 days (mg/30 days) of water for the irrigation of the docket holder's golf course from one existing surface water intake (Intake No. 1) located on an irrigation pond and one existing groundwater production well (Well No. 1). The allocation limits the withdrawal to 7.0 mg/30 days, with a daily restriction of 403,000 gallons per day (gpd) for each source. The project well is located in the Cheswold Formation, and the surface water

withdrawal is from a pond located on an unnamed tributary of the Leipsic River in Kent County, Delaware.

20. *Deb-El Food Products, D–2009–036–1.* An application for approval to construct a 0.05 mgd industrial wastewater treatment plant (IWTP) that will discharge to the Neversink River at River Mile 253.64—28.7 (Delaware River—Neversink River) in the drainage area of the section of the non-tidal Delaware River known as the Middle Delaware, which is classified as Special Protection Waters. The IWTP is located in the Town of Thompson, Sullivan County, New York.

21. *Arcelor Mittal Plate, LLC—Conshohocken, D–2009–039–1.* An application for approval of a groundwater and surface water withdrawal project to supply up to 12.96 mg/30 days of groundwater and 45 mg/30 days of surface water to the applicant's industrial process from the existing Q&T Well and existing surface water intake, respectively. The surface water allocation is based on projected peak demands and is less than the requested allocation of surface water. Surface water will be withdrawn from the Schuylkill River in the Schuylkill-Crow Creek Watershed. The well is located in the Elbrook Formation in the Schuylkill-Crow Creek Watershed in Plymouth Township, Montgomery County, PA, within the Southeastern Pennsylvania Ground Water Protected Area.

22. *Village of Buckingham Springs, D–2009–040 CP–1.* An application for approval of an existing 0.1 mgd discharge from the Village of Buckingham Springs (VBS) WWTP. The VBS WWTP will continue to discharge to Mill Creek at River Mile 115.63—23.39—4.95 (Delaware River—Neshaminy Creek—Mill Creek). The VBS WWTP is located in Buckingham Township, Bucks County, Pennsylvania.

23. *Tobyhanna Army Depot, D–2009–041 CP–1.* An application for approval to modify the treatment process of the existing 0.802 mgd Tobyhanna Army Depot WWTP. The discharge is located at River Mile 183.66—83.5—26.4—1.82 (Delaware River—Lehigh River—Tobyhanna Creek—UNT) within the drainage area of the section of the non-tidal Delaware River known as the Lower Delaware, which is classified as Special Protection Waters. The WWTP is located in Coolbaugh Township, Monroe County, Pennsylvania.

24. *Cedar Glen Lakes Water Company, D–2009–046 CP.* An application for approval of a groundwater withdrawal project to supply up to 7.8 mg/30 days of water to the applicant's public supply distribution system from existing Well No. 2. The project is located in the Kirkwood-Cohansey Formation in the Rancocas Creek Watershed in Manchester Township, Ocean County, New Jersey.

25. *New Jersey American Water Company—New Egypt System, D–2009–050 CP–1.* An application for approval of an existing groundwater withdrawal project to supply up to 5.0 mg/30 days of water to the applicant's public water supply system from existing Wells Nos. 1A and 2, which were not previously reviewed by the Commission. The project wells are located in the Englishtown Aquifer in the Crosswicks Creek Watershed in Plumsted Township, Ocean County, New Jersey.

26. *Kinsley Group Family, LP—Kinsley Shopping Center, D–2010–005–1.* An application for approval to construct and operate the 20,000 gpd Kinsley Shopping Center (KSC) WWTP. Effluent limits for the KSC WWTP will be based upon a 17,770 gpd discharge, the expected 2015 year discharge flow. The WWTP will be located in the Lower SPW drainage area and will discharge to ten (five primary and five reserve) on-site seepage beds in the Weir Creek Watershed near River Mile 183.66—40.88—6.30—6.51—7.40—2.40 (Delaware River—Lehigh River—Pohopoco Creek—Beltzville Reservoir—Pohopoco Creek—Weir Creek) in Chestnuthill Township, Monroe County, Pennsylvania.

In addition to the standard business meeting items, including adoption of the Minutes of the Commission's March 3, 2010 business meeting; announcements of upcoming meetings and events of interest; a report on hydrologic conditions; a report by the Executive Director; and a report by the Commission's General Counsel, the business meeting will include public hearings and consideration by the Commission of resolutions approving: (a) The Commission's FY 2010–2015 Water Resources Program; and (b) election of the Commission Chair, Vice-Chair and Second-Vice Chair for FY 2011. In addition, the Commissioners will consider adoption of the DRBC Fiscal Year 2011 operating and capital budgets, on which a hearing was conducted during the December 9, 2009 business meeting. An opportunity for public dialogue will be provided at the end of the meeting.

Draft dockets scheduled for public hearing on May 5, 2010 can be accessed through the Notice of Commission Meeting and Public Hearing on the Commission's Web site, drbc.net, ten days prior to the meeting date. Additional public records relating to the dockets may be examined at the Commission's offices. Please contact William Muszynski at 609–883–9500, extension 221, with any docket-related questions.

Note that conference items are subject to change and items scheduled for hearing are occasionally postponed to allow more time for the Commission to consider them. Please check the Commission's Web site, drbc.net, closer to the meeting date for changes that may be made after the deadline for filing this notice.

Individuals in need of an accommodation as provided for in the Americans with Disabilities Act who wish to attend the informational meeting, conference session or hearings should contact the Commission Secretary directly at 609–883–9500 ext. 203 or through the Telecommunications Relay Services (TRS) at 711, to discuss how the Commission can accommodate your needs.

Dated: April 12, 2010.

Pamela M. Bush,

Commission Secretary.

[FR Doc. 2010–8726 Filed 4–15–10; 8:45 am]

BILLING CODE 6360–01–P

DEPARTMENT OF ENERGY

Proposed Agency Information Collection

AGENCY: U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE) invites public comment on a proposed collection of information that DOE is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995. 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, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before June 15, 2010.

If you anticipate difficulty in submitting comments within that period, contact the person listed in **ADDRESSES** as soon as possible.

ADDRESSES: Written comments may be sent to Faith Lambert, U.S. Department of Energy, EE–K/Forrestal Building, 1000 Independence Ave., SW., Washington, DC 20585 or by fax at 202–586–1233, or by e-mail at *faith.lambert@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Faith Lambert at *faith.lambert@ee.doe.gov.*

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) OMB No. 1910–5126; (2) *Information Collection Request Title:* State Energy Program; (3) *Type of Review:* New; (4) *Purpose:* To collect information on the status of grantee activities, expenditures, and results, to ensure that program funds are being used appropriately, effectively and expeditiously (especially important for Recovery Act funds); (5) *Annual Estimated Number of Respondents:* 56; (6) *Annual Estimated Number of Total Responses:* 672; (7) *Annual Estimated Number of Burden Hours:* 1,344; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* 0.

Authority: Title V, Subtitle E of the Energy Independence and Security Act (EISA), Pub. L. 110–140.

Issued in Washington, DC, on April 12, 2010.

Johanna Zetterberg,

Energy Technology Program Specialist, Office of Weatherization and Intergovernmental Program, Energy Efficiency and Renewable Energy.

[FR Doc. 2010–8667 Filed 4–15–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Proposed Agency Information Collection

AGENCY: U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE) invites public comment on a proposed collection of information that DOE is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995. 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, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before June 15, 2010. If you anticipate difficulty in submitting comments within that period, contact the person listed in **ADDRESSES** as soon as possible.

ADDRESSES: Written comments may be sent to Christine Askew, U.S. Department of Energy, EE–K/Forrestal Building, 1000 Independence Ave., SW., Washington, DC 20585 or by fax at 202–586–1233, or by e-mail at *christine.askew@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Christine Askew at *christine.askew@ee.doe.gov*.

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) OMB No. "1910–5127"; (2) *Information Collection Request Title:* "Weatherization Assistant Program (WAP)"; (3) *Type of Review:* New; (4) *Purpose:* To collect information on the status of grantee activities, expenditures, and results, to ensure that program funds are being used appropriately, effectively and expeditiously (especially important for Recovery Act funds); (5) *Annual Estimated Number of Respondents:* 58; (6) Annual Estimated Number of Total Responses: 696; (7) *Annual Estimated Number of Burden Hours:* 2,088; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* 0.

Authority: Title V, Subtitle E of the Energy Independence and Security Act (EISA), Pub. L. 110–140.

Issued in Washington, DC, on April 12, 2010.

Johanna Zetterberg,

Energy Technology Program Specialist, Weatherization and Intergovernmental Program, Energy Efficiency and Renewable Energy.

[FR Doc. 2010–8666 Filed 4–15–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[Docket No. EERE–2010–BT–CRT–0006]

Agency Information Collection: Energy Conservation Program for Consumer Products: Survey of Field Energy Consumption of Residential Refrigerators, Refrigerator-Freezers, and Freezers

AGENCY: U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE) invites public comment on a proposed collection of information that DOE is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995. 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, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before June 15, 2010.

ADDRESSES: Comments must identify the information collection for residential refrigerators or refrigerator-freezers and provide the docket number EERE–2010–BT–CRT–0006. Comments may be submitted to DOE using any of the following methods:

- Mr. Lucas Adin, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Ave., SW., Washington, DC 20585–0121 (submit one signed copy) or by fax at (202) 586–4617 or by e-mail at *lucas.adin@ee.doe.gov.*
- *E-mail: appliance.information@ee.doe.gov.* Include the docket number in the subject line of the message.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024–2123. Telephone: (202) 586–2945. Please submit one signed original paper copy.

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

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Ms. Brenda Edwards and Mr. Lucas Adin at the address listed above in **ADDRESSES**.

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) *OMB No.* New; (2) *Information Collection Request Title:* Field Metering of Electrical Appliances; (3) *Type of Request:* New; (4) *Purpose:* Metered field data from electrical appliances is necessary to support characterization of energy consumption for current and future DOE energy conservation standard rulemakings. The use of tested energy consumption data is not sufficient due to the potentially wide range of conditions found in households and businesses using these appliances, referred to here as "the field", that are not encountered under test conditions. Moreover, field metering will allow DOE to determine energy consumption of appliances that have not yet been regulated. Prior field energy consumption survey data do exist, but are difficult to obtain, do not necessarily share a consistent methodology or sample target, or are generally not representative of the entire U.S.; (5) *Annual Estimated Number of Respondents:* 1,000,000; (6) *Annual Estimated Number of Total Responses:* 10,000; (7) *Annual Estimated Number of Burden Hours:* 10,000; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* None.

Statutory Authority: 42 U.S.C. 6295(o)(2)(B)(i) and 42 U.S.C. 6292(b)(1)(B).

Issued in Washington, DC, on April 9, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 2010–8775 Filed 4–15–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[FE Docket No. 10–31–LNG]

Cheniere Marketing, LLC; Application for Blanket Authorization To Export Liquefied Natural Gas

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application, filed on March 23, 2010, by Cheniere Marketing, LLC (CMI), requesting blanket authorization to export liquefied natural gas (LNG) that previously had been imported into the United States from foreign sources in an amount up to the equivalent of 500 Billion cubic feet (Bcf) of natural gas on a short-term or spot market basis. The LNG would be exported from the Sabine Pass LNG terminal owned by CMI's affiliate, Sabine Pass LNG, L.P., in Cameron Parish, Louisiana to any country with the capacity to import LNG via ocean-going carrier and with which trade is not prohibited by U.S. law or policy, over a two year period commencing on the date of the authorization. In addition, CMI requests that FE vacate the blanket authorization issued in DOE/FE Order 2651 on June 8, 2009, requesting the export of previously imported LNG, as amended by Order 2651–A on July 31, 2009, (Orders 2651 and 2651–A) effective on the date of the proposed authorization. The proposed authorization will supersede CMI's current authorization.

The application was filed under section 3 of the Natural Gas Act (NGA) (15 U.S.C. 717b), as amended by section 201 of the Energy Policy Act of 1992 (Pub. L. 102–486) and part 590 of DOE's regulations, 10 CFR part 590 (2009). Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed at the address listed below no later than 4:30 p.m., eastern time, May 17, 2010.

ADDRESSES: U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Larine Moore or Beverly Howard, U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9478; (202) 586–9387.

Edward Myers, U.S. Department of Energy, Office of General Counsel, Fossil Energy and Energy Efficiency, Forrestal Building, Room 6B–159, 1000 Independence Ave., SW., Washington, DC 20585, (202) 586–3397.

SUPPLEMENTARY INFORMATION:

Background

CMI is a Delaware limited liability company with its principal place of business in Houston, Texas. CMI is a wholly-owned subsidiary of Cheniere Energy, Inc. (Cheniere Energy), which is also a Delaware corporation with its primary place of business in Houston, Texas. Cheniere Energy is a developer of LNG import terminals and natural gas pipelines on the U.S. Gulf Coast, including the Sabine Pass LNG terminal.

On June 8, 2009, FE granted CMI blanket authorization to export on its own behalf or as agent for others LNG that previously had been imported from foreign sources in an amount up to the equivalent of 64 Bcf of natural gas on a cumulative basis. The authorization permitted such exports on a short term or spot market basis from the Sabine Pass LNG terminal to the United Kingdom, Belgium, Spain, France, Italy, Portugal, Turkey, Brazil, Argentina, Chile, Mexico, the Dominican Republic, Japan, South Korea, India, China, and/or Taiwan over a two-year period commencing on the date of the authorization. On July 31, 2009, the authorization was amended to reflect a name change from Cheniere Marketing, Inc to Cheniere Marketing, LLC.[1]

On January 23, 2009, FE granted CMI blanket authorization to import LNG from various international sources for a two-year term beginning on January 29, 2009.[2] Under the terms of the blanket authorization the LNG may be imported at any LNG receiving facility in the United States and its territories.

Current Application

In the instant application, CMI is seeking blanket authorization to export from the Sabine Pass LNG terminal LNG that has been previously imported from foreign sources to any country with the capacity to import LNG via ocean-going carrier and with which trade is not prohibited by U.S. law or over a two-year period, on a short-term or spot market basis, in an amount up to the equivalent of 500 Bcf of natural gas. CMI is also concurrently seeking to vacate Order 2651, as amended by Order 2651–A since the proposed authorization will supersede its current authorization. CMI states that no additional physical modifications to the Sabine Pass LNG terminal are required to accommodate the export authorization requested.

[1] *Cheniere Marketing, LLC,* DOE/FE Order Nos. 2651 and 2651–A, issued June 8, 2009 and July 31, 2009 respectively.

[2] *Cheniere Marketing LLC,* DOE/FE Order No. 2606 issued January 23, 2009.

Public Interest Considerations

In support of its application, CMI states that pursuant to Section 3 of the NGA, FE is required to authorize exports to a foreign country unless there is a finding that such exports "will not be consistent with the public interest."[3] CMI states that section 3 thus creates a statutory presumption in favor of approval of this Amendment which opponents bear the burden of overcoming.[4] CMI states further, in evaluating an export application, FE applies the principles described in DOE Delegation Order No. 0204–111, which focuses primarily on domestic need for the gas to be exported, and the Secretary's natural gas policy guidelines.[5] Finally, as detailed below, CMI states that their proposal to export LNG to those countries with the capacity to import LNG via ocean-going carrier and with which trade is not prohibited by U.S. law or policy is consistent with Section 3 of the NGA and FE's policy.

CMI states that in DOE/FE Order No. 2651, which granted CMI blanket authorization to export up to 64 Bcf (cumulative) of previously imported foreign-sourced LNG, FE determined that there presently is no domestic reliance on the volumes of imported LNG that CMI would seek to export. CMI also states that in November 2009, FE made the same finding in granting ConocoPhillips Company (ConocoPhillips) blanket authority to export from the Freeport LNG Development, L.P. Quintana Island terminal up to 500 Bcf of previously imported LNG.[6] CMI points out that FE stated that "the record shows there is sufficient supply of natural gas to satisfy domestic demand from multiple other sources at competitive prices without drawing on the LNG which ConocoPhillips seeks to export.* * *"[7]

CMI is requesting authorization, for itself and as agent for third parties, to periodically export LNG imported under DOE/FE Order No. 2606, as well as LNG of third parties, to any other country with the capacity to import LNG via ocean-going vessel and with which trade is not prohibited by U.S. law or policy, should market conditions in the United States not support domestic sale of those supplies. CMI states that granting of CMI's short term blanket authorization as requested herein would provide CMI with the necessary flexibility it requires to respond to changes in domestic and global markets for natural gas and LNG. CMI states that the additional flexibility sought herein would further encourage CMI to obtain and store spot market LNG cargoes. Natural gas derived from imported LNG will be available to supply local markets when conditions support it, and will thereby serve to moderate U.S. gas price volatility. As such, CMI states the requested export authorization is consistent with the public interest.

DOE/FE Evaluation

This export application will be reviewed pursuant to section 3 of the NGA, as amended, and the authority contained in DOE Delegation Order No. 00–002.00I (Nov. 10, 2009) and DOE Redelegation Order No. 00–002.04D (Nov. 6, 2007). In reviewing this LNG export application, DOE will consider domestic need for the gas, as well as any other issues determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties that may oppose this application should comment in their responses on these issues.

CMI states that since no changes to the Sabine Pass LNG facilities would be required for CMI's proposed exportation of LNG. CMI asserts that consequently, granting this application will not be a Federal action significantly affecting the human environment within the meaning of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* CMI states therefore, an environmental impact statement or environmental assessment is not required.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its NEPA responsibilities.

Public Comment Procedures

In response to this notice, any person may file a protest, motion to intervene or notice of intervention and written comments, as provided in DOE's regulations at 10 CFR 590.301, *et seq.* Any person wishing to become a party to the proceeding and to have their written comments considered as a basis for any decision on the application must file a motion to intervene or notice of intervention, as applicable. The filing of a protest with respect to the application will not serve to make the protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the application. All protests, motions to intervene, notices of intervention, and written comments must meet the requirements specified by the regulations in 10 CFR part 590. Protests, motions to intervene, notices of intervention, requests for additional procedures, and written comments shall be filed with the Office of Oil and Gas Global Security and Supply at the address listed above.

A decisional record on the application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The application filed by CMI is available for inspection and copying in the Office of Oil and Gas Global Security and Supply docket room, 3E–042, at the above address. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The application is also available

[3] 15 U.S.C. 717b.

[4] In *Panhandle Producers and Royalty Owners Associations* v. *ERA*, 822 F.2d 1105, 1111 (D.D. Circ. 1987), the court found that Section 3 of the NGA "requires an affirmative showing of inconsistency with the public interest to deny an application" and that a "presumption favoring * * * authorization * * * is completely consistent with, if not mandated by, the statutory directive."

[5] See 49 FR 6684, February 22, 1984.

[6] *ConocoPhillips,* DOE/FE Order No. 2731, November 30, 2009.

[7] Id. at p. 11.

electronically by going to the following Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html.*

Issued in Washington, DC, on April 9, 2010.

John A. Anderson,

Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.

[FR Doc. 2010–8753 Filed 4–15–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3156–030]

Miller and Miller, Waterpower LLC; Notice of Application for Transfer of License and Soliciting Comments and Motions To Intervene

April 9, 2010.

On March 19, 2010, Miller and Miller (transferor) and Waterpower, LLC (transferee) filed an application for transfer of license of the Worthville Dam Project No. 3156, located on the Deep River in Randolph County, North Carolina.

Applicants seek Commission approval to transfer the license for the Worthville Dam Project from the transferor to the transferee.

On February 17, 2010, the Commission issued a Notice of Termination of License by Implied Surrender and Soliciting Comments, Protests, and Motions to Intervene for the Worthville Dam Project (P–3156–029). On March 19, 2010, Waterpower, LLC filed a motion to intervene and protest in the termination proceeding.

Applicants' Contact: Mr. Mark K. Seifert, Attorney at Law, 107 Saint Brides Court, Cary, NC; (919) 961–0095.

FERC Contact: Robert Bell, (202) 502–6062.

Deadline for filing comments and motions to intervene: 30 days from the issuance of this notice. Comments and motions to intervene may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii)(2008) and the instructions on the Commission's Web site under the "e-Filing" link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the eLibrary link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–3156–030) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–8704 Filed 4–15–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 553–136]

Seattle City Light; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

April 9, 2010.

a. *Type of Application:* Amendment for Temporary Variance from Recreation Plan.

b. *Project Number:* 553–136.

c. *Date Filed:* March 25, 2010.

d. *Applicant:* Seattle City Light.

e. *Name of Project:* Skagit River Hydroelectric Project.

f. *Location:* The project is located on the Skagit River in Snohomish, Skagit, and Whatcom Counties, Washington.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a) 825(r).

h. *Applicant Contact:* Ms. Lynn Best, Director, Environmental Affairs Division, Seattle City Light, 700 Fifth Avenue, P.O. Box 34023, Seattle, WA 98124. Telephone: (206) 386–4586.

i. *FERC Contact:* Any questions on this notice should be addressed to Christopher Yeakel at (202) 502–8132, or e-mail address: *christopher.yeakel@ferc.gov.*

j. *Deadline for filing comments and or motions:* May 10, 2010.

Comments, Motions to Intervene, and Protests may be filed electronically via the Internet. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the "e-Filing" link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: 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.* Please include the project number (P–553–136) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all interveners 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 intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* Seattle City Light requests authorization to suspend guided tours of the Ross and Diablo hydroelectric facilities for the 2010 recreation season due to lower than normal seasonal snowpack, predicted low flow conditions, and revenue shortages. As proposed, the tours would be suspended for one year only and all other recreation facilities described in article 412 of the project license, including ferry service on Diablo Lake, would remain open. Seattle City Light consulted with the National Park Service prior to filing the application. The National Park Service supports the request.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field (P–553) to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3372 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214.

In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments*—Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the "e-Filing" link.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–8706 Filed 4–15–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP10–100–000]

New York State Electric & Gas Corporation; Notice of Application

April 9, 2010.

Take notice that on March 24, 2010, New York State Electric & Gas Corporation (NYSEG), filed with the Commission an application under section 7(b) of the Natural Gas Act (NGA) for authorization to abandon the limited jurisdiction blanket certificate to provide storage services in interstate commerce issued in Docket No. CP97–192–000. NYSEG states that is the owner of the Seneca Lake Storage Project in Schuyler County, New York.

NYSEG states that it has entered into an asset purchase agreement with Inergy Midstream, LLC (Inergy), whereby affiliates of Inergy will acquire all of the surface and subsurface facilities of the Seneca Lake Storage Project. Inergy intends to transfer the storage cavern and West Lateral to its affiliate, Arlington Storage Company, LLC (ASC), and the East Pipeline to another affiliate, Inergy Pipeline East, LLC. In addition, NYSEG intends to, to the extent required, abandon by assignment to ASC the Operational Balancing Agreement entered into by NYSEG in support of its Seneca Lake Storage Project services. Separately, ASC is submitting an application to the Commission for a certificate of public convenience and necessity and related authorizations that would allow it to operate the acquired facilities under its existing FERC tariff to provide interstate storage services at market-based rates.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: April 20, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–8700 Filed 4–15–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP10–129–000]

B–R Pipeline Company; Notice of Application

April 9, 2010.

Take notice that on April 8, 2010, B–R Pipeline Company (B–R), Department 153–61, 550 West Adams Street, Chicago, Illinois 60661–3676, filed with the Commission an application in Docket No. CP10–129–000, pursuant to section 7 of the Natural Gas Act (NGA) and subpart F of part 157 of the Commission's Regulations, for a blanket certificate to perform certain activities under section 157.203 of the Commission's Regulations, as more fully set forth in the application which is open to public inspection. This filing may be also viewed on the Web at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERCOnline Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions regarding this application should be directed to Counsel for B–R Pipeline Company, William H. Penniman or Michael Brooks, Sutherland Asbill & Brennan LLP, 1275 Pennsylvania Avenue, Washington, DC 20004–2415, or via telephone at (202) 383–0100, facsimile number (202) 637–3593, and e-mail: *William.penniman@sutherland.com* or *Michael.brooks@sutherland.com.*

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal

Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

The Commission strongly encourages electronic filings of comments, protests and interventions via the Internet in lieu of paper. *See,* 18 CFR 385.2001(a) (1) (iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-Filing" link.

Comment Date: April 19, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–8701 Filed 4–15–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

April 9, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER00–1803–007; ER01–457–008; ER02–1485–010; ER03–1108–010; ER03–1109–010; ER04–733–006; ER08–1432–004; ER94–1384–037; ER99–2329–008.

Applicants: Morgan Stanley Capitol Group Inc., MS Solar Solutions Corp., Naniwa Energy LLC, Power Contract Finance, LLC, Power Contract Financing II, Inc., Power Contract Financing II, LLC, South Eastern Generating Corporation.

Description: Morgan Stanley Capital Group, Inc. Notice of Non-material Change in Status.

Filed Date: 04/08/2010.

Accession Number: 20100408–5155.

Comment Date: 5 p.m. Eastern Time on Thursday, April 29, 2010.

Docket Numbers: ER07–1171–007.

Applicants: Arizona Public Service Company.

Description: Arizona Public Service Company submits its Annual Compliance Report on Penalty Assessments and Distributions.

Filed Date: 04/08/2010.

Accession Number: 20100408–5156.

Comment Date: 5 p.m. Eastern Time on Thursday, April 29, 2010.

Docket Numbers: ER10–970–000.

Applicants: FirstEnergy Solutions Corp.

Description: FirstEnergy Solutions Corp submits Second Revised Sheet No. 34, Modification of Charges for Reactive Power Service.

Filed Date: 03/31/2010.

Accession Number: 20100401–0208.

Comment Date: 5 p.m. Eastern Time on Wednesday, April 21, 2010.

Docket Numbers: ER10–1032–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits an executed interconnection service agreement.

Filed Date: 04/08/2010.

Accession Number: 20100408–0201.

Comment Date: 5 p.m. Eastern Time on Thursday, April 29, 2010.

Docket Numbers: ER10–1035–000.

Applicants: Florida Power & Light Company.

Description: Florida Power and Light Company submits Original Sheet 1 *et al* to its First Revised Rate Schedule FERC No 108, Joint Ownership Party Allocation with JEA to be effective 6/7/10.

Filed Date: 04/08/2010.

Accession Number: 20100409–0201.

Comment Date: 5 p.m. Eastern Time on Thursday, April 29, 2010.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA07–19–006; OA07–43–007.

Applicants: Arizona Public Service Company.

Description: Arizona Public Service Company submits its Annual Compliance Report on Penalty Assessments and Distributions.

Filed Date: 04/08/2010.

Accession Number: 20100408–5156.

Comment Date: 5 p.m. Eastern Time on Thursday, April 29, 2010.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH10–13–000.

Applicants: Morgan Stanley.

Description: Morgan Stanley Exemption Notification.

Filed Date: 04/08/2010.

Accession Number: 20100408–5133.

Comment Date: 5 p.m. Eastern Time on Thursday, April 29, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance

with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–8708 Filed 4–15–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EG10–17–000]

Uilk Wind Farm, LLC; Notice of Effectiveness of Exempt Wholesale Generator Status

April 9, 2010.

Take notice that during the month March, 2010, the status of the above-captioned entities as Exempt Wholesale Generators became effective by operation of the Commission's regulations 18 CFR 366.7(a).

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–8702 Filed 4–15–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. RF–014]

Energy Conservation Program for Consumer Products: Notice of Petition for Waiver of Samsung Electronics America, Inc. From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedure, and Grant of Interim Waiver

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of petition for waiver, notice of grant of interim waiver, and request for comments.

SUMMARY: This notice announces receipt of and publishes the Samsung Electronics America, Inc. (Samsung) petition for waiver (hereafter, "petition") from specified portions of the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of electric refrigerators and refrigerator-freezers. Today's notice also grants an interim waiver of the test procedures applicable to residential refrigerator-freezers to additional Samsung basic models. Through this document, DOE also solicits comments with respect to the Samsung petition.

DATES: DOE will accept comments, data, and information with respect to the Samsung petition until, but no later than May 17, 2010.

ADDRESSES: You may submit comments, identified by case number RF–014, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: AS_Waiver_Requests@ee.doe.gov*. Include either the case number [Case No. RF–014], and/or "Samsung Petition" in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J/1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Instructions: All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

Any person submitting written comments must also send a copy of such comments to the petitioner, pursuant to 10 CFR 431.401(d). The contact information for the petitioner is: Mr. Michael Moss, Samsung Electronics America, Inc., 18600 Broadwick St., Rancho Dominguez, CA 90220, Phone: (310) 900–5245, E-mail: *mikem@sea.samsung.com*.

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies to DOE: one copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza, SW., (Resource Room of the Building Technologies Program), Washington, DC 20024; (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE waivers and rulemakings regarding similar central air conditioning and heat pump equipment. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9611. E-mail: *Michael.Raymond@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0103. Telephone: (202) 586–7796. E-mail: *Elizabeth.Kohl@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III of the Energy Policy and Conservation Act ("EPCA") sets forth a variety of provisions concerning energy efficiency. Part A of Title III provides for the "Energy Conservation Program for Consumer Products Other Than Automobiles." (42 U.S.C. 6291–6309) Part A includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part A authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for residential refrigerators and refrigerator-freezers is contained in 10 CFR part 430, subpart B, appendix A1.

The regulations set forth in 10 CFR 430.27 contain provisions that enable a person to seek a waiver from the test procedure requirements for covered consumer products. A waiver will be granted by the Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) if it is determined that the basic model for

which the petition for waiver was submitted contains one or more design characteristics that prevents testing of the basic model according to the prescribed test procedures, or if the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(l). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 430.27(b)(1)(iii). The Assistant Secretary may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

The waiver process also allows the Assistant Secretary to grant an interim waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. (10 CFR 430.27(a)(2)) An interim waiver remains in effect for a period of 180 days or until DOE issues its determination on the petition for waiver, whichever is sooner, and may be extended for an additionally 180 days, if necessary. (10 CFR 430.27(h))

On September 9, 2009, Samsung filed a petition for waiver and application for interim waiver from the test procedure applicable to residential electric refrigerators and refrigerator-freezers set forth in 10 CFR part 430, subpart B, appendix A1. The products covered by the petition employ adaptive anti-sweat heaters, which detect and respond to temperature and humidity conditions, and then activate adaptive heaters as needed to evaporate excess moisture. DOE published Samsung's petition for waiver for residential refrigerator-freezers with adaptive anti-sweat heaters, as well as its grant of interim waiver to Samsung for these products, in the **Federal Register** on December 15, 2009. 74 FR 66340. DOE granted Samsung's petition for waiver on March 18, 2010 (75 FR 13120).

II. Petition for Waiver

On February 1, 2010, Samsung informed DOE in a petition dated January 20, 2010, that after it filed its petition for waiver in September 2009 it developed additional basic models with adaptive anti-sweat heater technology. Samsung asserted that these new products function and operate the same way as the basic models listed in Samsung's September 2009 petition with respect to the properties that made those products eligible for a waiver. Therefore, Samsung requested that DOE add these models to the list of basic models for which the interim waiver was granted. In addition, Samsung requested that DOE grant a new waiver for these additional basic models. The following additional products are covered by the January 2010 waiver request:

RB***H***, RF***H***, RF#***H***, RS***H***, RS#***H***.

The additional basic models of refrigerators and refrigerator-freezers contain variable anti-sweat heater controls that detect a broad range of temperature and humidity conditions, and respond by activating adaptive heaters, as needed, to evaporate excess moisture. Samsung's technology is similar to that used by General Electric Company (GE), Whirlpool Corporation (Whirlpool), and Electrolux for refrigerator-freezers which were the subject of petitions for waiver published April 17, 2007 (72 FR 19189), July 10, 2008 (73 FR 39684), and January 28, 2010 (75 FR 4539), respectively. GE's waiver was granted on February 27, 2008 (73 FR 10425); Whirlpool's waiver was granted on May 5, 2009 (74 FR 20695); and Electrolux's waiver was granted on March 11, 2010 (75 FR 11530). Samsung seeks a waiver from the existing DOE test procedure applicable to refrigerators and refrigerator-freezers under 10 CFR Part 430 because it takes neither ambient humidity nor adaptive technology into account. Therefore, Samsung stated that the test procedure does not accurately measure the energy consumption of Samsung's new refrigerators and refrigerator-freezers that feature variable anti-sweat heater controls and adaptive heaters.

DOE notes that Samsung's January 2010 petition to extend its interim waiver and petition for waiver also includes an alternate test procedure for testing products equipped with adaptive anti-sweat heaters. The alternate test procedure submitted in the January 2010 petition is identical to the one contained in Samsung's September 9, 2009 petition. The alternate test procedure is the same in all relevant particulars as that prescribed for GE, Whirlpool, and Electrolux refrigerators and refrigerator-freezers that are equipped with the same type of technology. The alternate test procedure applicable to the GE, Whirlpool, and Electrolux products simulates the energy used by the adaptive heaters in a typical consumer household, as explained in the GE Decision and Order that DOE published in the **Federal Register** on February 27, 2008. 73 FR 10425. DOE believes that it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis.

III. Application for Interim Waiver

Samsung also requests an interim waiver for these additional basic models. An interim waiver may be granted if it is determined that the applicant will experience economic hardship if the Application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. (10 CFR 430.27(g))

DOE determined that Samsung's application for interim waiver does not provide sufficient market, equipment price, shipments, and other manufacturer impact information to permit DOE to evaluate the economic hardship Samsung might experience absent a favorable determination on its application for interim waiver. DOE understands that absent an Interim Waiver, however, Samsung's products would not be tested and rated for energy consumption on a comparable basis with equivalent GE, Whirlpool, and Electrolux products where DOE previously granted waivers, and would be required to represent a higher energy consumption for essentially the same product. DOE also determined that it appears likely that Samsung's petition for waiver will be granted and that it is desirable for public policy reasons to grant Samsung immediate relief pending a determination on the petition for waiver. As stated above, DOE has already granted similar waivers to GE, Whirlpool, and Electrolux because the test procedure does not accurately represent the energy consumption of refrigerator-freezers containing relative humidity sensors and adaptive control anti-sweat heaters. The rationale for granting these waivers is equally applicable to Samsung, which has products containing similar relative humidity sensors and anti-sweat heaters. DOE has also concluded that it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis. In sum, Samsung seeks a waiver that is very similar to the ones DOE granted to GE, Whirlpool, and Electrolux for the same sensors and controls and alternate test procedure.

For the reasons stated above, DOE grants Samsung's application for interim waiver from testing of the additional

basic models of refrigerators and refrigerator-freezers containing relative humidity sensors and adaptive control anti-sweat heaters. Therefore, *it is ordered that:*

The Application for interim waiver filed by Samsung is hereby granted for Samsung's additional basic models of refrigerators and refrigerator-freezers containing relative humidity sensors and adaptive control anti-sweat heaters, subject to the specifications and conditions below.

1. Samsung shall not be required to test or rate the additional basic models of refrigerators and refrigerator-freezers containing relative humidity sensors and adaptive control anti-sweat heaters on the basis of the test procedure under 10 CFR part 430 subpart B, appendix A1.

2. Samsung shall be required to test and rate the additional basic models of refrigerators and refrigerator-freezers containing relative humidity sensors and adaptive control anti-sweat heaters according to the alternate test procedure as set forth in section IV, "Alternate test procedure."

The interim waiver applies to the following basic model groups:

RB***H***, RF***H***, RF#***H***, RS***H***, RS#***H***.

This interim waiver is conditioned upon the presumed validity of statements, representations, and documents provided by the petitioner. DOE may revoke or modify this interim waiver at any time upon a determination that the factual basis underlying the petition for waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

III. Alternate Test Procedure

For the duration of the interim waiver, Samsung shall be required to use the test procedures for electric refrigerator-freezers prescribed by DOE at 10 CFR Part 430, Appendix A1, except that, for the Samsung products listed above only:

(A) The following definition is added at the end of Section 1:

1.13 "Variable anti-sweat heater control" means an anti-sweat heater where power supplied to the device is determined by an operating condition variable(s) and/or ambient condition variable(s).

(B) Section 2.2 is revised to read as follows:

2.2 Operational conditions. The electric refrigerator or electric refrigerator-freezer shall be installed and its operating conditions maintained in accordance with HRF–1–1979, section 7.2 through section 7.4.3.3. except that the vertical ambient temperature gradient at locations 10 inches (25.4 cm) out from the centers of the two sides of the unit being tested is to be maintained during the test. Unless shields or baffles obstruct the area, the gradient is to be maintained from 2 inches (5.1 cm) above the floor or supporting platform to a height one foot (30.5 cm) above the unit under test. Defrost controls are to be operative. The anti-sweat heater switch is to be "off" during one test and "on" during the second test. In the case of an electric refrigerator-freezer equipped with variable anti-sweat heater control, the result of the second test will be derived from the calculation described in 6.2.3. Other exceptions are noted in 2.3, 2.4, and 5.1 below.

(C) New section 6.2.3 is inserted after section 6.2.2.2.

6.2.3 Variable anti-sweat heater control test. The energy consumption of an electric refrigerator-freezer with a variable anti-sweat heater control in the "on" position (E_{on}), expressed in kilowatt-hours per day, shall be calculated equivalent to:

E_{ON} = E + (Correction Factor)

Where E is determined by 6.2.1.1, 6.2.1.2, 6.2.2.1, or 6.2.2.2, whichever is appropriate, with the anti-sweat heater switch in the "off" position.

Correction Factor = (Anti-sweat Heater Power × System-loss Factor) × (24 hrs/1 day) × (1 kW/1000 W)

Where:

Anti-sweat Heater Power =
A1 * (Heater Watts at 5%RH)
+ A2 * (Heater Watts at 15%RH)
+ A3 * (Heater Watts at 25%RH)
+ A4 * (Heater Watts at 35%RH)
+ A5 * (Heater Watts at 45%RH)
+ A6 * (Heater Watts at 55%RH)
+ A7 * (Heater Watts at 65%RH)
+ A8 * (Heater Watts at 75%RH)
+ A9 * (Heater Watts at 85%RH)
+ A10 * (Heater Watts at 95%RH)

Where A1–A10 are from the following table:

A1 = 0.034	A6 = 0.119
A2 = 0.211	A7 = 0.069
A3 = 0.204	A8 = 0.047
A4 = 0.166	A9 = 0.008
A5 = 0.126	A10 = 0.015

Heater Watts at a specific relative humidity = the nominal watts used by all heaters at that specific relative humidity, 72 °F ambient, and DOE reference temperatures of fresh food (FF) average temperature of 45 °F and freezer (FZ) average temperature of 5 °F.

System-loss Factor = 1.3

IV. Summary and Request for Comments

The Department has reviewed Samsung's petition and its request to extend its interim waiver to additional models. The additional models contain the same anti-sweat heater controls and relative humidity sensors as the models listed in Samsung's September 2009 petition. The alternate test procedure is also valid for these additional models. Given that the basis for granting an interim waiver to the additional basic models is the same as the basis for granting the interim waiver for the models listed in Samsung's September 2009 petition, DOE finds that it is appropriate to grant an interim waiver for the additional models listed in this petition. Accordingly, DOE extends the prior grant of interim waiver to the models listed in this petition.

Through today's notice, DOE announces receipt of Samsung's petition for waiver from certain parts of the test procedure that apply to additional basic models of refrigerators and refrigerator-freezers with variable anti-sweat heater controls and adaptive heaters manufactured by Samsung. DOE is publishing Samsung's petition for waiver in its entirety pursuant to 10 CFR 430.27(b)(1)(iv). The petition contains no confidential information. The petition includes a suggested alternate test procedure and calculation methodology to determine the energy consumption of Samsung's specified refrigerators and refrigerator-freezers with adaptive anti-sweat heaters. DOE is interested in receiving comments from interested parties on all aspects of the petition, including the suggested alternate test procedure and calculation methodology. Pursuant to 10 CFR 430.27(b)(1)(iv), any person submitting written comments to DOE must also send a copy of such comments to the petitioner, whose contact information is included in the **ADDRESSES** section above.

Issued in Washington, DC, on April 9, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

January 20, 2010

Catherine Zoi, Energy Efficiency and Renewable Energy, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585

Subject: Petition for Waiver and Application for Interim Waiver, Samsung Refrigerator-Freezers with Adaptive Anti-Sweat Heaters

Dear Assistant Secretary Zoi:

Samsung Electronics America, Inc., a subsidiary of Samsung Electronics Co., Ltd. (Samsung), respectfully submits this Petition for Waiver and Application for Interim Waiver to the Department of Energy (DOE) for refrigerator-freezer

models incorporating adaptive anti-sweat heater technologies, pursuant to 10 CFR Part 430.27.

The 10 CFR Part 430.27(a)(1) allows a person to submit a petition to waive for a particular basic model any requirements of § 430.23 upon the grounds that the basic model contains one or more design characteristics which either prevent testing of the basic model according to the prescribed test procedures, or the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. Additionally, 10 CFR Part 430.27(b)(2) allows an applicant to request an Interim Waiver if economic hardship and/or competitive disadvantage is likely to result absent a favorable determination on the Application for Interim Waiver.

Reasoning

Samsung designed refrigerator-freezers with anti-sweat heater technologies that react according to different ambient conditions such as humidity and temperature. This anti-sweat technology allows the heater to variably activate depending on relative ambient humidity levels. Samsung believes that the current test procedure, Appendix A1 to Subpart B of Part 430, prevents Samsung from accurately evaluating its refrigerator-freezers that feature this adaptive anti-sweat heater technology. The models requested in this Application and Petition have the same anti-sweat designs as other Samsung models which the Department had granted an Interim Waiver [1] for.

Samsung's adaptive anti-sweat heater technology is similar to that used by General Electric Company (GE) and Whirlpool Corporation (Whirlpool) for refrigerator-freezers which were the subject of Petitions for Waiver published April 17, 2007 and July 10, 2008, respectively. 72 FR 19189; 73 FR 39684. GE's waiver was granted on February 27, 2008. 73 FR 10425. Whirlpool's waiver was granted on May 5, 2009. 74 FR 20695.

The current testing method prescribes that the refrigerator-freezer be tested without any prescription for humidity levels. Lacking the prescription of a humidity level, current refrigerator-freezers employ an anti-sweat technology that engages at predetermined intervals to prevent moisture build-up according to an assumed, fixed algorithm. Lacking the proper sensors to effectively detect and engage the heater at specific dew points, a general assumption is made for the scheduled activation of anti-sweat heaters. General assumptions and timed action sequences are inefficient methods to control condensation; the adaptive anti-sweat heater technology will take the guesswork out of anti-sweat heater activation and will base activation on real-time environment conditions for the purpose of energy efficiency.

Since adaptive anti-sweat heater technology was not available during the development stage of the current DOE requirements, and since the existing requirements do not fairly represent energy consumption for refrigerator-freezers containing this technology, an exception relief is warranted.

Test Method

In a manner similar to GE in their Petition [2], Samsung proposes to run the energy-consumption test with the anti-sweat heater switch in the "off" position and then, because the test chamber is not humidity-controlled, to add to that result the kilowatt hours per day derived by calculating the energy used when the anti-sweat heater is in the "on" position.

"[GE] in an effort to establish a national average of energy used by a variably controlled anti-sweat heater, the population-weighted humidity values were grouped into 10 bands, each with a range of 10% relative humidity. The table below sets out the percent probability that any U.S. household will experience the listed average humidity conditions during any month of the year." Those 10 bands are as follows:

% RH	Probability (%)	Constant designation
1. 0–10	3.4	A1
2. 10–20	21.1	A2
3. 20–30	20.4	A3
4. 30–40	16.6	A4
5. 40–50	12.6	A5
6. 50–60	11.9	A6
7. 60–70	6.9	A7
8. 70–80	4.7	A8
9. 80–90	0.8	A9
10. 90–100	1.5	A10

Similar to GE, Samsung determined that additional energy required to operate the anti-sweat heater control and related components, and the additional energy required to increase compressor run time to remove heat introduced into the refrigerator compartments by the anti-sweat heater have a "system-loss factor". Samsung has also determined that this "system-loss factor" is 1.3. Therefore, Samsung proposes that the energy consumption results should be calculated with the anti-sweat heater switch in the "off" position and with the correction factor taken into account. The correction factor should be as follows:

Correction Factor = (Anti-sweat Heater Power × System-loss Factor) × (24 hours/1 day) × (1 kW/1000 W)

The national average power in watts used by the anti-sweat heaters is then calculated by totaling the product of constants A1–A10 multiplied by the respective heater watts used by a refrigerator operating in the median percent relative humidity for that band and standard refrigerator conditions: ambient temperature of 72 °F, fresh food (FF) average temperature of 45 °F, and freezer (FZ) average temperature of 5 °F.

Anti-sweat Heater Power = A1 * (Heater Watts at 5% RH) + A2 * (Heater Watts at 15% RH) + A3 * (Heater Watts at 25% RH) + A4 * (Heater Watts at 35% RH) + A5 * (Heater Watts at 45% RH) + A6 * (Heater Watts at 55% RH) + A7 * (Heater Watts at 65% RH) + A8 * (Heater Watts at 75% RH) + A9 * (Heater Watts at 85% RH) + A10 * (Heater Watts at 95% RH)

[1] 74 FR 66340.

[2] 72 FR 19189.

Samsung requests that DOE prescribe an alternate test procedure, whereby the test procedure were modified to calculate the energy of the unit by testing the unit with the anti-sweat heaters in the "on" position as equal to the energy of the unit tested with the anti-sweat heaters in the "off" position plus the Anti-Sweat Heater Power times 1.3, similar to those prescribed within waivers granted to GE [3] and Whirlpool,[4] to allow Samsung to accurately evaluate the energy consumption for the following Samsung refrigerator-freezer models:

RB***H***
RF***H***
RF#***H***
RS***H***
RS#***H***

Conclusion

On the grounds that current test methods for refrigerator-freezers will result in inaccurate evaluation of energy consumption, Samsung requests that, until a final rule prescribing a test method for adaptive anti-sweat heater technologies, a waiver is granted for Samsung refrigerator-freezer models which utilize adaptive anti-sweat heater technologies.

By granting Samsung the requested waiver and interim waiver, DOE will ensure that advancements in technologies are not hindered by regulations, and that similar products are tested and rated for energy consumption on a comparable basis.

Affected Persons

Primarily affected persons in the refrigerator-freezer category include BSH Home Appliances Corp. (Bosch-Siemens Hausgerate GmbH), Electrolux Home Products, Equator, Fisher & Paykel Appliances Inc., GE Appliances, Haier America Trading, L.L.C., Heartland Appliances, Inc., Kelon Electrical Holdings Co., Ltd., Liebherr Hausgerate, LG Electronics Inc., Northland-Marvel, Sanyo Fisher Company, Sears, Sub-Zero Freezer Company, U-Line, Viking Range, W. C. Wood Company, and Whirlpool Corporation.

The Association of Home Appliance Manufacturers is also generally interested in energy efficiency requirements for appliances, including refrigerator-freezers. Samsung will notify all these entities as required by the Department's rules and provide them with a version of this Petition.

Sincerely,

Michael Moss,

Senior Manager.

[FR Doc. 2010–8772 Filed 4–15–10; 8:45 am]

BILLING CODE 6450–01–P

[3] 73 FR 10425.

[4] 74 FR 20695.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–455–000; Docket No. CP09–456–000]

Florida Gas Transmission Company, LLC; Transcontinental Gas Pipe Line Company, LLC; Florida Gas Transmission Company, LLC; Notice of Availability of the Environmental Assessment for the Proposed Mobile Bay Lateral Extension Project and the Pascagoula Expansion Project

April 9, 2010.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) of the Mobile Bay Lateral Extension Project (Mobile Bay Project) proposed by Florida Gas Transmission Company, LLC (FGT) and the Pascagoula Expansion Project proposed by FGT and Transcontinental Gas Pipe Line Company, LLC (Transco) in the above referenced dockets.

The EA assesses the potential environmental effects of the construction and operation of the proposed Mobile Bay Project and the Pascagoula Expansion Project in accordance with the requirements of the National Environmental Policy Act. The FERC staff concludes that approval of the proposed projects, with appropriate mitigating measures, would not constitute a major Federal action significantly affecting the quality of the human environment.

This EA was prepared in cooperation with the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service (USFWS); and the Mississippi Department of Wildlife, Fisheries, and Parks.

The proposed Mobile Bay Project includes the following proposed facilities:

- Approximately 8.8 miles of 24-inch-diameter mainline pipeline, from near Grand Bay in Mobile County, Alabama to the existing FGT Compressor Station (CS) 44 in Mobile County, Alabama, (milepost [MP] 0.0);
- One new Meter and Regulation (M&R) (Grand Bay M&R Station) with pig launcher in Grand Bay, Alabama (MP 8.8);
- One new Over Pressure Protection Regulator Station with pig receiver in Citronelle, Alabama); and
- Modifications to the existing FGT CS 44.

The Pascagoula Expansion Project would consist of the following facilities:

- A receipt meter station near Pascagoula in Jackson County, Mississippi;
- Approximately 15.5 miles of 26-inch-diameter jointly owned pipeline from Jackson County, Mississippi to Grand Bay, Mobile County, Alabama;
- Modifications to FGT/Transco's existing Compressor Station 82 in Mobile County, Alabama; and
- Minor above-ground facilities.

The EA has been placed in the public files of the FERC. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street, NE., Room 2A, Washington, DC 20426. (202) 502–8371.

Copies of the EA have been mailed to Federal, State, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; potentially affected landowners and other interested individuals and groups; newspapers and libraries in the project area; and parties to this proceeding. Any person wishing to comment on the EA may do so. To ensure consideration prior to a Commission decision on the proposal, it is important that we receive your comments before the date specified below.

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 May 10, 2010.

For your convenience, there are three methods in which you can use to submit your comments to the Commission. In all instances please reference the project docket numbers (CP09–455–000 and CP09–456–000) with your submission. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

(1) You may file your comments electronically by using the *Quick Comment* feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings*. A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the *eFiling* feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings.* eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. New eFiling users must first create an account by clicking on *Sign up* or *eRegister.* You will be asked to select the type of filing you are making. A comment on a particular project is considered a "Comment on a Filing"; or

(3) You may file a paper copy of your comments at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.

Although your comments will be considered by the Commission, simply filing comments will not serve to make the commentor a party to the proceeding. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 Code of Federal Regulations (CFR) 385.214).[1] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your comments considered.

Additional information about the project is available from the Commission's Office of External Affairs, at (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 (*i.e.* CP09–455 or CP09–456). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (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.

[1] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

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.*

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–8707 Filed 4–15–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 516–459]

South Carolina Electric & Gas Company, South Carolina; Notice of Public Meeting on Environmental Assessment

April 9, 2010.

The Federal Energy Regulatory Commission (Commission) hereby gives notice that members of its staff will conduct a public meeting on the draft environmental assessment (Draft EA) for the Saluda Hydroelectric Project (FERC Project No. 516–459). In addition to or in lieu of sending written comments on the Draft EA, you are invited to attend a public meeting that will be held to receive comments on the Draft EA. The time and location of this meeting is as follows:

Saluda Project Meeting

Date: April 29, 2010.

Time: 7 to 9:30 p.m. (EST).

Place: Saluda Shoals Park, River Center Conference Center.

Address: 5605 Bush River Road, Columbia, SC 29211–2611.

The purpose of this meeting is to solicit comments on the Draft EA prepared as part of processing the relicensing application for the Saluda Project. The Draft EA was issued and publicly noticed on March 24, 2010, and is available for review on the Commission's Web site at *http://www.ferc.gov,* under the "eLibrary" link. Enter the docket number (e.g., P–516) 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.

The Saluda Project is located on the Saluda River in Richland, Lexington, Saluda, and Newberry Counties, South Carolina. There are no federal lands affected by these projects.

This meeting is open to the public. At this meeting, State and Federal resource agency personnel, Indian tribes, non-governmental organizations, and other interested persons will have the opportunity to provide oral and/or written comments regarding the Draft EA. The meeting will be recorded by a court reporter, and all statements (verbal and written) will become part of the Commission's public record for the project. This meeting is posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

The deadline for filing comments on the Draft EA is May 10, 2010. Comments should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE.,Washington, DC, 20426. Comments should reference Project No. 516–459 (Saluda Project). Comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and instructions on the Commission's Web site at *http://www.ferc.gov* under the eLibrary link.

For further information, contact Lee Emery at (202) 502–8379 or at *lee.emery@ferc.gov*.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–8705 Filed 4–15–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Staff Attendance at Southwest Power Pool Regional State Committee Meeting and Southwest Power Pool Board of Directors Meeting

April 9, 2010.

The Federal Energy Regulatory Commission hereby gives notice that members of its staff may attend the meetings of the Southwest Power Pool, Inc. (SPP) Regional State Committee, and SPP Board of Directors, as noted below. Their attendance is part of the Commission's ongoing outreach efforts.

SPP Regional State Committee Meeting

April 26, 2010 (1 p.m.–5 p.m.), Skirvin Hilton Hotel, 1 Park Avenue, Oklahoma City, OK 73102, 405–272–3040.

SPP Board of Directors Meeting

April 27, 2010 (8 a.m.–3 p.m.), Skirvin Hilton Hotel, 1 Park Avenue Oklahoma City, OK 73102, 405–272–3040.

The discussions may address matters at issue in the following proceedings:

Docket No. EL09–40, *Southwest Power Pool, Inc.*
Docket No. ER06–451, *Southwest Power Pool, Inc.*
Docket No. ER08–923, *Xcel Energy Services, Inc.*
Docket No. ER08–1307, *Southwest Power Pool, Inc.*
Docket No. ER08–1308, *Southwest Power Pool, Inc.*
Docket No. ER08–1357, *Southwest Power Pool, Inc.*
Docket No. ER08–1358, *Southwest Power Pool, Inc.*
Docket No. ER08–1359, *Southwest Power Pool, Inc.*
Docket No. ER08–1419, *Southwest Power Pool, Inc.*
Docket No. ER09–35, *Tallgrass Transmission LLC.*
Docket No. ER09–36, *Prairie Wind Transmission LLC.*
Docket No. ER09–659, *Southwest Power Pool, Inc.*
Docket No. ER09–1050, *Southwest Power Pool, Inc.*
Docket No. ER09–1254, *Southwest Power Pool, Inc.*
Docket No. ER09–1255, *Southwest Power Pool, Inc.*
Docket No. ER09–1397, *Southwest Power Pool, Inc.*
Docket No. ER09–1716, *Southwest Power Pool, Inc.*
Docket No. ER10–352, *Southwest Power Pool, Inc.*
Docket No. OA08–5, *Southwest Power Pool, Inc.*
Docket No. OA08–60, *Southwest Power Pool, Inc.*
Docket No. OA08–61, *Southwest Power Pool, Inc.*
Docket No. OA08–104, *Southwest Power Pool, Inc.*
Docket No. ER10–664, *Southwest Power Pool, Inc.*
Docket No. ER10–678, *Southwest Power Pool, Inc.*
Docket No. ER10–680, *Southwest Power Pool, Inc.*
Docket No. ER10–681, *Southwest Power Pool, Inc.*
Docket No. ER10–692, *Southwest Power Pool, Inc.*
Docket No. ER10–693, *Southwest Power Pool, Inc.*
Docket No. ER10–694, *Southwest Power Pool, Inc.*
Docket No. ER10–696, *Southwest Power Pool, Inc.*
Docket No. ER10–697, *Southwest Power Pool, Inc.*
Docket No. ER10–698, *Southwest Power Pool, Inc.*
Docket No. ER10–700, *Southwest Power Pool, Inc.*
Docket No. ER10–738, *Southwest Power Pool, Inc.*
Docket No. ER10–739, *Southwest Power Pool, Inc.*
Docket No. ER10–754, *Southwest Power Pool, Inc.*
Docket No. ER10–760, *Southwest Power Pool, Inc.*
Docket No. ER10–761, *Southwest Power Pool, Inc.*
Docket No. ER10–762, *Southwest Power Pool, Inc.*
Docket No. ER10–773, *Southwest Power Pool, Inc.*
Docket No. ER10–795, *Southwest Power Pool, Inc.*
Docket No. ER10–798, *Southwest Power Pool, Inc.*
Docket No. ER10–813, *Southwest Power Pool, Inc.*
Docket No. ER10–824, *Southwest Power Pool, Inc.*
Docket No. ER10–830, *Southwest Power Pool, Inc.*
Docket No. ER10–831, *Southwest Power Pool, Inc.*
Docket No. ER10–833, *Southwest Power Pool, Inc.*
Docket No. ER10–888, *Southwest Power Pool, Inc.*
Docket No. ER10–897, *Southwest Power Pool, Inc.*
Docket No. ER10–925, *Southwest Power Pool, Inc.*
Docket No. ER10–941, *Southwest Power Pool, Inc.*

These meetings are open to the public.

For more information, contact John Rogers, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–8564 or *john.rogers@ferc.gov*.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–8703 Filed 4–15–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–12–000]

Arkansas Western Gas Company; Notice of Petition for Rate Approval

April 5, 2010.

Take notice that on March 31, 2010, Arkansas Western Gas Company (AWG) filed a petition for rate approval pursuant to sections 284.123(b)(2) and 284.224(e)(1) of the Commission's regulations. AWG proposes to decrease its maximum rate for interruptible transportation service on its northwest Arkansas system south of Drake Compressor Station from $0.1322 per MMBtu to $0.1146 per MMBtu and to increase the rate for compressor fuel and lost and unaccounted for gas from 3.50 percent to 3.60 percent.

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before 5 p.m. Eastern time on the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Friday, April 16, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–8699 Filed 4–15–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Boulder Canyon Project—Post-2017 Application of the Energy Planning and Management Program Power Marketing Initiative

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of extension of comment period.

SUMMARY: The Western Area Power Administration (Western), Desert Southwest Region, a Federal power marketing agency of the Department of Energy (DOE), is extending the comment period regarding the application of the Energy Planning and Management Program (Program) Power Marketing Initiative (PMI) (10 CFR part 905) to the Boulder Canyon Project (BCP).

This **Federal Register** notice extends the comment period for the proposed application of the PMI to the BCP and all other proposals contained in Western's November 20, 2009, **Federal Register** notice.

DATES: The consultation and comment period for the application of the PMI to BCP has been extended from January 29, 2010, to September 30, 2010.

ADDRESSES: Comments may be submitted to: Mr. Darrick Moe, Western Area Power Administration, Desert Southwest Regional Manager, P.O. Box 6457, Phoenix, AZ 85005–6457. Comments may also be faxed to (602) 605–2490 or e-mailed to *Post2017BCP@wapa.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Mike Simonton, Remarketing Specialist, Desert Southwest Region, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005, telephone (602) 605–2675, e-mail *Post2017BCP@wapa.gov.* Further information regarding this effort can be found at *http://www.wapa.gov/dsw/pwrmkt.*

SUPPLEMENTARY INFORMATION: On November 20, 2009, Western published a notice in the **Federal Register** (74 FR 60256) announcing its Post-2017 remarketing effort for the BCP. This **Federal Register** notice included a proposal to apply the PMI to the BCP as well as other aspects related to the remarketing of BCP generation capacity and energy after the current long-term contracts expire on September 30, 2017.

Western subsequently held public information forums from December 1–3, 2009, and public comment forums from January 19–21, 2010. As a result of these forums, several requests were made to extend the comment period to allow for further study of the proposals and external developments.

This extension of the January 29 deadline to September 30 provides Western additional time to examine the issues raised in the comments received on the proposed application of the PMI to the BCP and the other Western proposals, and provides all interested parties additional opportunity to consult with Western and comment on the proposals.

Dated: April 8, 2010.

Timothy J. Meeks,

Administrator.

[FR Doc. 2010–8752 Filed 4–15–10; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2009–0394; FRL–9138–1]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Flexible Polyurethane Foam Product (Renewal), EPA ICR Number 1783.05, OMB Control Number 2060–0357

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (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 collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before May 17, 2010.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2009–0394, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: 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: Robert C. Marshall, Jr., Office of Compliance, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–7021; fax number: (202) 564–0050; e-mail address: *marshall.robert@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 July 8, 2009 (74 FR 32581), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2009–0394, which is available for public viewing online at *http://www.regulations.gov,* in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center 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 Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://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 *http://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 *http://www.regulations.gov.*

Title: NESHAP for Flexible Polyurethane Foam Product (Renewal).

ICR Numbers: EPA ICR Number 1783.05, OMB Control Number 2060–0357.

ICR Status: This ICR is scheduled to expire on June 30, 2010. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is

pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and 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 Maximum Achievable Control Technology (MACT) standards for Flexible Polyurethane Foam Product (40 CFR part 63, subpart III) were proposed on December 27, 1996, and promulgated on October 7, 1998.

Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 43 hours per response. 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: Flexible polyurethane foam product facilities.

Estimated Number of Respondents: 132.

Frequency of Response: Initially, occasionally, semiannually, and annually.

Estimated Total Annual Hour Burden: 9,047.

Estimated Total Annual Cost: $850,851, which is comprised exclusively of labor costs. There are neither annualized capital/startup costs nor operation and maintenance (O&M) costs.

Changes in the Estimates: There is no change in the labor hours of the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This is due to two considerations: (1) The regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the industry is very low, negative or non-existent. Therefore, labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR.

The increases in labor costs to the respondents and the Agency are due to labor rate adjustments that reflect the rates for fiscal year 2009. The increases are not due to any program changes. Labor rates in the previous ICR were based on fiscal year 2003.

Dated: April 9, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–8767 Filed 4–15–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0778; FRL–8822–2]

Maneb; Cancellation Order for a Certain Pesticide Registration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's order for the cancellation, voluntarily requested by the registrant and accepted by the Agency, of a product containing maneb, pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. This cancellation order follows a March 4, 2010, **Federal Register** Notice of Receipt of Request from the registrant listed in Table 2 in Unit II. of this document, to voluntarily cancel this product registration. This is the last product containing this pesticide registered for use in the United States. In the March 4, 2010 Notice, EPA indicated that it would issue an order implementing the cancellation, unless the Agency received substantive comments within the 30 day comment period that would merit its further review of these requests, or unless the registrant withdrew their request. The Agency did not receive any comments on the notice. Further, the registrant did not withdraw their request. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellation. Any distribution, sale, or use of the product subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

DATES: The cancellation is effective April 16, 2010.

FOR FURTHER INFORMATION CONTACT: Barbara Briscoe, Pesticide Re-evaluation Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8177; fax number: (703) 308–8090; e-mail address: *briscoe.barbara@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this 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. How Can I Get Copies of this Document and Other Related Information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0778. 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.

II. What Action is the Agency Taking?

This notice announces the cancellation, as requested by registrant,

of a product registered under section 3 of FIFRA. This registration is listed in Table 1 of this unit.

TABLE 1.—MANEB PRODUCT CANCELLATIONS

EPA Registration Number	Product Name
000352-00655	DuPont (TM) Manex

Table 2 of this unit includes the name and address of record for the registrant of the product in Table 1.

TABLE 2.—REGISTRANT OF CANCELLED PRODUCT

EPA Company Number	Company Name and Address
000352	Dupont Crop Protection Stine-Haskell Research Center P.O. Box 30 Newark, DE 19714-0030

III. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided, EPA received no comments in response to the March 4, 2010, **Federal Register** notice (75 FR 9896; FRL–8813–5) announcing the Agency's receipt of request for voluntary cancellation of the product listed in Table 1.

IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested cancellation of the maneb registration identified in Table 1. Accordingly, the Agency hereby orders that the product registration identified in Table 1 is canceled. The effective date of the cancellation that is the subject of this notice is April 16, 2010. Any distribution, sale, or use of existing stocks of the product identified in Table 1 in a manner inconsistent with any of the Provisions for Disposition of Existing Stocks set forth in Unit VI. will be a violation of FIFRA.

V. What is the Agency's Authority for Taking this Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the Administrator may approve such a request. The notice of receipt for this action was published for comment on March 4, 2010. The comment period closed on April 5, 2010.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the action. The existing stocks provision for the product subject to this order is as follows:

1. The registrant may continue to sell or distribute existing stocks of the maneb end-use product identified in Table 1 until such stocks are exhausted.

2. Persons other than the registrant may continue to sell or distribute existing stocks of maneb products identified in Table 1 with previously approved labeling until such stocks are exhausted.

3. Persons other than the registrant may use the maneb end use products identified in Table 1 until exhausted. Any use of existing stocks must be in a manner consistent with the previously approved labeling for that product.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: April 9, 2010.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2010–8631 Filed 4–15–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9138–4]

Clean Air Act Operating Permit Program; Petition for Objection to State Operating Permit for Public Service Company of Colorado—Hayden Station

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final action.

SUMMARY: This document announces that the EPA Administrator has responded to a citizen petition asking EPA to object to an operating permit issued by the Colorado Department of Public Health and Environment (CDPHE). Specifically, the Administrator has partially granted and partially denied the March 10, 2009 Petition, submitted by WildEarth Guardians (Petitioner), to object to CDPHE's April 1, 2009 title V permit issued to Public Service Company of Colorado dba Xcel Energy (Xcel)—Hayden Power Station.

Pursuant to section 505(b)(2) of the Clean Air Act (Act), Petitioners may seek judicial review of those portions of the petitions, which EPA denied in the United States Court of Appeals for the appropriate circuit. Any petition for review shall be filed within 60 days from the date this notice appears in the **Federal Register**, pursuant to section 307 of the Act.

ADDRESSES: You may review copies of the final order, the petition, and other supporting information at the EPA Region 8 Office, 1595 Wynkoop Street, Denver, Colorado, 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the copies of the final order, the petition, and other supporting information. You may view the hard copies Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays. If you wish to examine these documents, you should make an appointment at least 24 hours before visiting day. Additionally, the final order for Public Service Company of Colorado—Hayden Power Station, is available electronically at:

http://www.epa.gov/region07/air/title5/petitiondb/petitions/xcel_hayden_decision2009.pdf.

FOR FURTHER INFORMATION CONTACT: Donald Law, Office of Partnerships and Regulatory Assistance, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado, 80202–1129, (303) 312–7015, *law.donald@epa.gov.*

SUPPLEMENTARY INFORMATION: The Act affords EPA a 45-day period to review and object to, as appropriate, a title V operating permit proposed by State permitting authorities. Section 505(b)(2) of the Act authorizes any person to petition the EPA Administrator, within 60 days after the expiration of this review period, to object to a title V operating permit if EPA has not done so. Petitions must be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the State, unless the petitioner demonstrates that it was impracticable to raise these issues during the comment period or the grounds for the issues arose after this period.

EPA received a petition from WildEarth Guardians dated March 10, 2009, requesting that EPA object to the issuance of the title V operating permit to Public Service Company of Colorado for the operation of the Hayden Power Station. The Petitioner alleges that the

Hayden Power Station permit does not comply with 40 CFR part 70 in that: (I) the title V permit fails to require compliance with particulate matter limits; and (II) the title V permit fails to ensure compliance with Prevention of Significant Deterioration (PSD) requirements in regard to carbon dioxide emissions.

On March 24, 2010, the Administrator issued an order partially granting and partially denying the petition. The order explains the reasons behind EPA's conclusions.

Dated: April 7, 2010.

Carol L. Campbell,

Acting Regional Administrator, Region 8.

[FR Doc. 2010–8773 Filed 4–15–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8989–8]

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 04/05/2010 Through 04/09/2010 Pursuant to 40 CFR 1506.9.

Notice

In accordance with Section 309(a) of the Clean Air Act, EPA is required to make its comments on EISs issued by other Federal agencies public. Historically, EPA has met this mandate by publishing weekly notices of availability of EPA comments, which includes a brief summary of EPA's comment letters, in the **Federal Register**. Since February 2008, EPA has been including its comment letters on EISs on its Web site at: *http://www.epa.gov/compliance/nepa/eisdata.html.* Including the entire EIS comment letters on the Web site satisfies the Section 309(a) requirement to make EPA's comments on EISs available to the public. Accordingly, after March 31, 2010, EPA will discontinue the publication of this notice of availability of EPA comments in the **Federal Register**.

EIS No. 20100121, Draft EIS, DOI, CA, Stanford University Habitat Conservation Plan, Authorization for Incidental Take and Implementation, San Mateo and Santa Clara Counties, CA, Comment Period Ends: 07/15/2010, Contact: Gary Stern, 707–575–6060.

EIS No. 20100122, Final EIS, USFS, 00, Black Hills National Forest Travel Management Plan, Proposes to Designate Certain Roads and Trails Open to Motorized Travel, Custer, Fall River, Lawrence, Meade, Pennington Counties, SD and Crook and Weston Counties, WY, Wait Period Ends: 05/17/2010, Contact: Thomas Willems, 605–673–9217.

EIS No. 20100123, Final EIS, FHWA, TX, US 290 Corridor, Propose to Construct Roadway Improvements from Farm-to-Market (FM) 2920 to Interstate Highway (IH) 610, Funding and Right-of-Way Grant, Harris County, TX, Wait Period Ends: 05/17/2010, Contact: Daniel Mott, 512–536–5964.

EIS No. 20100124, Final EIS, NPS, CA, Prisoners Harbor Coastal Wetland Restoration Project, Proposes to Restore a Functional, Self-Sustaining Ecosystem at a Coastal Wetland Site, Channel Islands National Park, Santa Cruz Island, Santa Barbara County, CA, Wait Period Ends: 05/17/2010, Contact: Paula Power, 805–658–5784.

EIS No. 20100125, Final EIS, BLM, 00, UNEV Pipeline Project, Construction of a 399-mile Long Main Petroleum Products Pipeline, Salt Lake, Tooele, Juab, Millard, Iron, and Washington Counties, UT and Lincoln and Clark Counties, NV, Wait Period Ends: 05/17/2010, Contact: Joe Incardine, 801–524–3833.

EIS No. 20100126, Draft EIS, DOS, 00, Keystone XL Oil Pipeline Project, Presidential Permit for the Proposed Construction, Connection, Operation, and Maintenance of a Pipeline and Associated Facilities at United State border for Importation of Crude Oil from Canada, Comment Period Ends: 06/01/2010, Contact: Elizabeth Orlando, 202–647–4284.

EIS No. 20100127, Final EIS, BIA, MT, Kerr Hydroelectric Project, Proposed Drought Management Plan, Implementation, Flathead Lake, MT, Wait Period Ends: 05/17/2010, Contact: Bob Dach, 503–231–6711.

EIS No. 20100128, Final EIS, USFS, SD, Norbeck Wildlife Project, Proposing to Manage Vegetation to Benefit Game Animals and Birds, Black Hills National Forest, Custer and Pennington Counties, SD, Wait Period Ends: 05/17/2010, Contact: Kelly Honors, 605–673–4853.

EIS No. 20100129, Draft EIS, BLM, NV, Silver State Solar Energy Project, Construct and Operate a 400-megawatt Photovoltaic Solar Plant and Associated Facilities on Public Lands, Application Right-of-Way Grant, Primm, Clark County, NV, Comment Period Ends: 06/01/2010, Contact: Gregory Helseth, 702–515–5173.

EIS No. 20100130, Final EIS, DOT, CA, Silicon Valley Rapid Transit Corridor Project, Proposes to Construct an Extension of the Bay Area Rapid Transit (BART) Rail System from Warm Spring Station in Fremont to Santa Clara County, CA, Wait Period Ends: 05/17/2010, Contact: Eric Eidlin, 415–744–2502.

EIS No. 20100131, Final EIS, EPA, GU, Apra Harbor, Guam, Proposed Site Designation of an Ocean Dredged Material Disposal Site Offshore of Guam, Wait Period Ends: 05/17/2010, Contact: Allan Ota, 415–972–3476.

EIS No. 20100132, Draft Supplement, BLM, CA, Ivanpah Solar Electric Generating System (07–AFC–5) Project, Proposal to Construct a 400-Megawatts Concentrated Solar Power Tower, Thermal-Electric Power Plant, San Bernardino County, CA, Comment Period Ends: 06/01/2010, Contact: Tom Hurshman, 970–240–5345.

Dated: April 13, 2010.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2010–8762 Filed 4–15–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9138–2]

Science Advisory Board Staff Office; Notification of a Public Meeting of the Advisory Council on Clean Air Compliance Analysis (Council)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces a public meeting of the Advisory Council on Clean Air Compliance Analysis (Council). The Council will conduct quality reviews of three subcommittee reports and review draft chapters of the EPA Office of Air and Radiation's Second Section 812 Prospective Analysis of the benefits and costs of the Clean Air Act.

DATES: The meeting will be held on Tuesday, May 4, 2010 and Wednesday, May 5, 2010, beginning at 8:30 a.m. and ending no later than 5 p.m. (Eastern Time), each day.

ADDRESSES: The public meeting will be held in the Science Advisory Board

Conference Center, 1025 F Street, NW., Suite 3705, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain further information about this meeting may contact Ms. Stephanie Sanzone, Designated Federal Officer (DFO), EPA Science Advisory Board Staff Office (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; by telephone/voice mail: (202) 343–9697 or at *sanzone.stephanie@epa.gov.* General information about the Council may be found on the Council Web site at *http://www.epa.gov/advisorycouncilcaa.*

SUPPLEMENTARY INFORMATION:

Background: Pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2, notice is hereby given that the Advisory Council on Clean Air Compliance Analysis (Council) will hold a public meeting to review Council subcommittee draft reports and to review draft EPA documents prepared for the Second Section 812 Prospective Benefit-Cost Analysis of the Clean Air Act. The Council was established in 1991 pursuant to the Clean Air Act (CAA) Amendments of 1990 (see 42 U.S.C. 7612) to provide advice, information and recommendations on technical and economic aspects of analyses and reports EPA prepares on the impacts of the CAA on the public health, economy, and environment of the United States. The Council is a Federal Advisory Committee chartered under FACA. The Council, its subcommittees (Air Quality Modeling Subcommittee, Health Effects Subcommittee, and Ecological Effects Subcommittee) comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Pursuant to Section 812 of the 1990 Clean Air Act Amendments (CAAA), EPA conducts periodic studies to assess benefits and costs of the EPA's regulatory actions under the Clean Air Act. The Council has provided advice on an EPA retrospective study published in 1997 and an EPA prospective study completed in 1999. EPA initiated a second prospective study to evaluate the benefits and costs of EPA Clean Air programs for years 1990–2020. The Council has previously provided advice on the analytical blueprint for this study. EPA's Office of Air and Radiation (OAR) is now nearing completion of the analytical work for the second prospective study, and has requested the Council's review of the draft study.

Quality Review: The Council will conduct quality review of three Council Subcommittee reports prepared in support of the Office of Air and Radiation's Second Section 812 Prospective Study: (1) Air Quality Modeling Subcommittee (AQMS) draft report, *Review of Air Quality Modeling for the Second Section 812 Prospective Study of Benefits and Costs of the Clean Air Act.* The AQMS held meetings on February 19 and March 15, 2010 to review technical documents pertaining to modeling of air quality for seven emissions scenarios: a 1990 baseline simulation; and simulations for 2000, 2010 and 2020 with and without the CAAA. The analyses use the Community Multiscale Air Quality (CMAQ) model to simulate national and regional-scale (western U.S. and eastern U.S.) concentrations of ozone and fine particulates ($PM_{2.5}$). The CMAQ outputs are adjusted using the Modeled Attainment Test Software (MATS), and projected differences in ambient concentrations are inputs to the analysis of benefits of the CAAA to human health, welfare, and the environment. Background information on this advisory activity is available on the Council Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/2nd%20Prospective%20812%20-%20AQMS?OpenDocument;* (2) Health Effects Subcommittee (HES) draft report, *Review of EPA's DRAFT Health Benefits of the Second Section 812 Prospective Study of the Clean Air Act.* The Subcommittee held meetings on December 15–16, 2009 and March 2, 2010 to review technical assessments of health benefits and uncertainty analyses associated with air quality scenarios, including decreases in ambient ozone and particulate matter (PM) concentrations. Background information on this advisory activity is available on the Council Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/812%20-%202nd%20Prospective%20-%20Health?OpenDocument;* and (3) Ecological Effects Subcommittee (EES) draft report, *Review of Ecological Effects of Air Pollutants for the Second Section 812 Prospective Study of Benefits and Costs of the Clean Air Act.* The Subcommittee met on March 9–10, 2010 to review draft materials that characterize ecological effects associated with decreases in air pollutants, primarily acidic deposition and tropospheric ozone. The materials included a review of scientific literature on the ecological effects of air pollutants regulated by the CAAA, case studies on benefits of the CAAA for recreational fishing and the timber industry in the Adirondack Region of New York State, and an estimation of physical benefits of the air quality scenarios for ozone on agriculture and commercial forestry productivity. Background information on this advisory activity is available on the Council Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/2nd%20Prospective%20812%20-%20EES?OpenDocument.*

Council Review of Draft Section 812 Study. The Council will review draft chapters from the integrated report, *Second Section 812 Prospective Study of the Benefits and Costs of the Clean Air Act*. OAR is requesting that the Council review (1) the data choices; (2) methodological choices for analyzing the data; and (3) the overall validity and utility of the estimated direct costs and benefits of changes in air quality conditions between the with-CAAA90 and without-CAAA90 scenarios. Background information on this advisory activity is available on the Council Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/2nd%20Prospective%20812%20Study?OpenDocument.*

Technical Contacts: The Office of Air and Radiation technical contact for the Second Section 812 Benefit-Cost Analysis of the Clean Air Act is Mr. Jim DeMocker at (202) 564–1673 or *democker.jim@epa.gov.*

Availability of Meeting Materials: Draft EPA documents provided to the Council are available at *http://www.epa.gov/oar/sect812/prospective2.html.* The meeting agenda for May 4–5, 2010 and any background materials, including the draft subcommittee reports, will be posted on the Council Web site (*http://www.epa.gov/advisorycouncilcaa*) prior to the meeting.

Procedures for Providing Public Input: Interested members of the public may submit relevant written information on the group conducting the activity or written or oral information for the Council to consider on the topics of this advisory activity. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public meeting will be limited to five minutes per speaker, with no more than one hour for all speakers. Interested parties should contact Ms. Sanzone at the contact information provided above by April 27, 2010, to be placed on the public speaker list for the May 4–5, 2010 meeting. *Written Statements:* Written statements should be received in the SAB Staff Office by April 27, 2010, so that the information may be made available to the Council for their consideration prior to the meeting. Written statements should be supplied

to Ms. Sanzone in the following formats: one hard copy with original signature and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, MS Word, WordPerfect, MS PowerPoint, or Rich Text files). Submitters are asked to provide electronic versions of each document submitted with *and* without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

Accessibility: For information on access or services for individuals with disabilities, please contact Ms. Sanzone at (202) 343–9697, or via e-mail at *sanzone.stephanie@epa.gov,* preferably at least ten (10) days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: April 9, 2010.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2010–8761 Filed 4–15–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9138–3]

Science Advisory Board Staff Office; Notification of a Public Teleconference of the Clean Air Scientific Advisory Committee (CASAC) Particulate Matter Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office announces a public teleconference on May 7, 2010 of the Clean Air Scientific Advisory Particulate Matter Review Panel to discuss its draft letter on the review of EPA's *Policy Assessment for the Review of Particulate Matter National Ambient Air Quality Standards*—First External Review Draft (March 2010).

DATES: The teleconference will be held on May 7, 2010 from 10 a.m. to 1 p.m., (Eastern Time).

ADDRESSES: The May 7, 2010 teleconference will be conducted by telephone only.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wants further information concerning the public meeting or public teleconference may contact Dr. Holly Stallworth, Designated Federal Officer (DFO), EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; via telephone/voice mail (202) 343–9867; fax (202) 233–0643; or e-mail at *stallworth.holly@epa.gov*. General information concerning the CASAC can be found on the EPA Web site at *http://www.epa.gov/casac*.

SUPPLEMENTARY INFORMATION:

Background: The Clean Air Scientific Advisory Committee (CASAC) was established under section 109(d)(2) of the Clean Air Act (CAA or Act) (42 U.S.C. 7409) as an independent scientific advisory committee. CASAC provides advice, information and recommendations on the scientific and technical aspects of air quality criteria and national ambient air quality standards (NAAQS) under sections 108 and 109 of the Act. The CASAC is a Federal advisory committee chartered under the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App 2. The Panel will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Section 109(d)(1) of the CAA requires that the Agency periodically review and revise, as appropriate, the air quality criteria and the National Ambient Air Quality Standard (NAAQS) for the six "criteria" air pollutants, including particulate matter (PM). EPA conducts scientific and policy assessments related to both primary (health-based) and secondary (welfare-based) standards for each of these pollutants. As part of that process, the CASAC Particulate Matter Review Panel reviews a series of EPA's assessments that provide the basis for EPA rulemaking.

The purpose of the May 7, 2010 teleconference is to discuss a draft CASAC letter on EPA's *Policy Assessment for the Review of the Particulate Matter National Ambient Air Quality Standards* (March 2010). EPA's Office of Air and Radiation's Office of Air Quality Planning and Standards requested CASAC's review of the draft *Policy Assessment for the Review of the Particulate Matter National Ambient Air Quality Standards (Policy Assessment,* March 2010) as part of its review of the National Ambient Air Quality Standard (NAAQS) for particulate matter. The *Policy Assessment* serves to "bridge the gap" between the scientific information and the judgments required of the Administrator in determining whether it is appropriate to retain or revise the standards. The first draft *Policy Assessment* builds upon the key scientific and technical information contained in the Agency's *Integrated Science Assessment for Particulate Matter* (Final Report) (ISA, December 2009) as well as the two draft assessment documents titled *Particulate Matter Urban-Focused Visibility Assessment: Second External Review Draft* (January 2010) and *Quantitative Health Risk Assessment for Particulate Matter: Second External Review Draft* (March 2010).

Background information about the formation of the CASAC Particulate Matter Review Panel was published in the **Federal Register** on March 8, 2007 (72 FR 10527–10528). The Panel previously held a public teleconference on November 30, 2007 (announced in 72 FR 63177–63178) to provide consultative advice on EPA's draft *Integrated Review Plan for the National Ambient Air Quality Standards for Particulate Matter* (October 2007), the first document in this review of the PM NAAQS. On April 1–2, 2009, CASAC reviewed the *Integrated Science Assessment for Particulate Matter—First External Review Draft* (December 2008), and provided consultative advice on *Particulate Matter National Ambient Air Quality Standards: Scope and Methods Plan for Health Risk and Exposure Assessment* (February 2009) and *Particulate Matter National Ambient Air Quality Standards: Scope and Methods Plan for Urban Visibility Impact Assessment* (February 2009). The April 1–2, 2009 meeting was announced February 19, 2009 in 74 FR 7688–7689. As announced in 74 FR 46586–46587, on October 5–6, 2009, CASAC reviewed the *Integrated Science Assessment for Particulate Matter—Second External Review Draft* (July 2009) and *Particulate Matter Urban Focused Visibility Assessment-External Review Draft* (September 2009) and *Risk Assessment to Support the Review of the PM Primary National Ambient Air Quality Standards-External Review Draft* (September 2009). As announced in 75 FR 8062–8063, the Panel reviewed second drafts of these two documents on March 10–11, 2010. The Panel also held teleconferences (announced in 75 FR 8062–8063) on April 8, 2010 and April 9, 2010 to discuss preliminary responses to charge questions on the Policy Assessment.

Technical Contacts: Any questions concerning *Policy Assessment for the Review of Particulate Matter National Ambient Air Quality Standards—First External Review Draft* (February 2010) should be directed to Ms. Beth Hassett-Sipple, OAR, at *hassett-sipple.beth@epa.gov* or 919–541–4605.

Availability of Meeting Materials: All meeting materials (agenda, charge questions, preliminary comments and other materials) for the May 7, 2010 teleconference will be placed on the CASAC Web site on the Web pages for

those public meetings, accessible through the calendar link on the blue navigational bar at *http://www.epa.gov/casac*. The *Policy Assessment for the Review of Particulate Matter National Ambient Air Quality Standards: First External Review Draft* (February 2010) is available at *http://www.epa.gov/ttn/naaqs/standards/pm/s_pm_2007_pa.html.*

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for consideration on the topics included in this advisory activity. *Oral Statements:* To be placed on the public speaker list for the May 7, 2010 teleconference, interested parties should notify Dr. Holly Stallworth, DFO, by e-mail no later than May 1, 2010. Individuals making oral statements on the teleconference will be limited to three minutes per speaker. *Written Statements:* Written statements for the May 7, 2010 meeting should be received in the SAB Staff Office by May 1, 2010, so that the information may be made available to the CASAC Panel for its consideration prior to this meeting. Written statements for the May 7, 2010 teleconference should be received in the SAB Staff Office by May 1, 2010. Written statements should be supplied to the DFO in the following formats: One hard copy with original signature and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, MS Word, WordPerfect, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format). Submitters are asked to provide versions of each document submitted with *and* without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Stallworth at the phone number or e-mail address noted above, preferably at least ten days prior to the teleconference, to give EPA as much time as possible to process your request.

Dated: April 9, 2010.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2010–8769 Filed 4–15–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collections Approved by the Office of Management and Budget

April 9, 2010.

SUMMARY: The Federal Communications Commission has received Office of Management and Budget (OMB) approval for the following public information collection(s) pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number, and no person is required to respond to a collection of information unless it displays a currently valid OMB control number. Comments concerning the accuracy of the burden estimate(s) and any suggestions for reducing the burden should be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

DATES: Persons wishing to comment on this information collection should submit comments by June 15, 2010. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicolas A. Fraser, Office of Management and Budget (OMB), Room 10236 NEOB, Washington, DC 20503, (202) 395–5887, or via fax at 202–395–5167, or via the Internet at *nfraser@omb.eop.gov,* and to *Judith-B.Herman@fcc.gov,* Federal Communications Commission (FCC), Room 1–B441, 445 12th Street, SW., Washington, DC 20554. To submit your comments by e-mail send them to: *PRA@fcc.gov.* If you would like to obtain or view a copy of this information collection after the 60 day comment period, you may do so by visiting the FCC PRA Web page at: *http://www.fcc.gov/omd/pra.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an e-mail to *PRA@fcc.gov* or contact Judith B. Herman at 202–418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1136.

OMB Approval Date: 03/29/2010.

Expiration Date: 09/30/2010.

Title: Spectrum Dashboard Customer Feedback.

Form No.: N/A.

Estimated Annual Burden: 22,000 responses; .05 hours per response; 1,100 hours total per year.

Obligation To Respond: Voluntary.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission will use the Spectrum Dashboard Customer Feedback to obtain voluntary feedback from the wide range of stakeholders who will use the Spectrum Dashboard (*e.g.,* individuals, licensees, manufacturers, entrepreneurs, industry analysts, regulators, and policy makers). In this regard, the Commission plans to keep the public engaged in an open and transparent dialogue regarding the utility of the software.

The Commission will use the information collected to help determine future improvements and enhancements to the Spectrum Dashboard.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2010–8768 Filed 4–15–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meetings

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 10:39 a.m. on Tuesday, April 13, 2010, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters related to the Corporation's supervision and resolution activities.

In calling the meeting, the Board determined, on motion of Vice Chairman Martin J. Gruenberg, seconded by Director John E. Bowman (Acting Director, Office of Thrift Supervision), concurred in by Director Thomas J. Curry (Appointive), Director John C. Dugan (Comptroller of the Currency), and Chairman Sheila C. Bair, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street, NW., Washington, DC.

Dated: April 13, 2010.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2010–8833 Filed 4–14–10; 11:15 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

SUMMARY: *Background.* Notice is hereby given of the final approval of proposed information collections by the Board of Governors of the Federal Reserve System (Board) under OMB delegated authority, as per 5 CFR 1320.16 (OMB Regulations on Controlling Paperwork Burdens on the Public). Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instrument(s) are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Michelle Shore—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202–452–3829).

OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

Final approval under OMB delegated authority of the extension for three years, without revision, of the following reports:

1. *Report title:* Written Security Program for State Member Banks.

Agency form number: FR 4004.

OMB Control number: 7100–0112.

Frequency: On occasion.

Reporters: State member banks.

Estimated annual reporting hours: 22 hours.

Estimated average hours per response: 0.5 hours.

Number of respondents: 43.

General description of report: This recordkeeping requirement is mandatory pursuant to section 3 of the Bank Protection Act [12 U.S.C. 1882(a)] and Regulation H [12 CFR 208.61]. Because written security programs are maintained at state member banks, no issue of confidentiality under the Freedom of Information Act normally arises. However, copies of such documents included in examination work papers would, in such form, be confidential pursuant to exemption 8 of the Freedom of Information Act [5 U.S.C. 552(b)(8)].

Abstract: Each state member bank must develop and implement a written security program and maintain it in the bank's records. This program should include a requirement to install security devices and should establish procedures that satisfy minimum standards in the regulation, with the security officer determining the need for additional security devices and procedures based on the location of the banking office. There is no formal reporting form and the information is not submitted to the Federal Reserve.

Current Actions: On February 2, 2010, the Federal Reserve published a notice in the **Federal Register** (75 FR 5320) requesting public comment for 60 days on the extension, without revision, of the FR 4004. The comment period for this notice expired on April 5, 2010. No comments were received.

2. *Report title:* Uniform Application for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer; Uniform Termination Notice for Municipal Securities Principal or Municipal Securities Representative Associated with a Bank Municipal Securities Dealer.

Agency form number: FR MSD–4 and FR MSD–5.

OMB control number: 7100–0100 and 7100–0101.

Frequency: On occasion.

Reporters: State member banks and foreign dealer banks engaging in activities as municipal securities dealers.

Estimated annual reporting hours: FR MSD–4, 48 hours; and FR MSD–5, 36 hours.

Estimated average hours per response: FR MSD–4, 1 hour; and FR MSD–5, 0.25 hours.

Number of respondents: FR MSD–4, 48; and FR MSD–5, 144.

General description of report: These information collections are mandatory pursuant to the Federal Reserve Act (12 U.S.C. 248(a)(1)) for state member banks and (12 U.S.C. 3105(c)(2)) for foreign bank branches and agencies and are given confidential treatment (5 U.S.C. 552(b)(6)).

Abstract: The FR MSD–4 collects information, such as personal history and professional qualifications, on an employee whom the bank wishes to assume the duties of a municipal securities principal or representative. The FR MSD–5 collects the date of, and reason for, termination of such an employee.

Current Actions: On February 2, 2010, the Federal Reserve published a notice in the **Federal Register** (75 FR 5320) requesting public comment for 60 days on the extension, without revision, of the FR MSD–4 and FR MSD–5. The comment period for this notice expired on April 5, 2010. No comments were received.

3. *Report title:* Notice By Financial Institutions of Government Securities Broker or Government Securities Dealer Activities; Notice By Financial Institutions of Termination of Activities as a Government Securities Broker or Government Securities Dealer.

Agency form number: FR G–FIN and FR G–FINW.

OMB control number: 7100–0224.

Frequency: On occasion.

Reporters: State member banks, foreign banks, uninsured state branches or state agencies of foreign banks, commercial lending companies owned or controlled by foreign banks, and Edge corporations.

Estimated annual reporting hours: FR G–FIN, 10 hours; and FR G–FINW, 2 hours.

Estimated average hours per response: FR G–FIN, 1 hour; and FR G–FINW, 0.25 hours.

Number of respondents: FR G–FIN, 10; and FR G–FINW, 8.

General description of report: These information collections are mandatory pursuant to the Securities and Exchange Act of 1934 (15 U.S.C. 78o–5(a)(1)(B)) and are not given confidential treatment.

Abstract: The Government Securities Act of 1986 (the Act) requires financial institutions to notify their appropriate regulatory authority of their intent to engage in government securities broker or dealer activity, to amend information submitted previously, and to record their termination of such activity. The Federal Reserve Board uses the information in its supervisory capacity to measure compliance with the Act.

Current Actions: On February 2, 2010, the Federal Reserve published a notice in the **Federal Register** (75 FR 5320) requesting public comment for 60 days on the extension, without revision, of the FR G–FIN and FR G–FINW. The comment period for this notice expired on April 5, 2010. No comments were received.

Board of Governors of the Federal Reserve System, April 12, 2010.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2010–8675 Filed 4–15–10; 8:45 am]

BILLING CODE 6210–01–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 May 3, 2010.

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. Friedman Fleischer & Lowe Capital Partners III, LP; Friedman Fleischer & Lowe Parallel Fund III, LP; FFL Individual Partners III, LP; FFL Executive Partners III, LP; Friedman Fleischer & Lowe GP III, LP; Friedman Fleischer & Lowe GP III, LLC; and Tully M. Friedman; Spencer C. Fleischer, all of San Francisco, California; David L. Lowe, Danville, California; and Christopher A. Masto, San Francisco, California; as the managing members, to acquire voting shares of Green Bancorp, Inc., and thereby indirectly acquire voting shares of Green Bank, N.A., both of Houston, Texas.

2. Harvest Partners, LP; Harvest Partners V, LP; Harvest Strategic Associates V, LP; Harvest Associates V, LP; Harvest Associates V, LLC; IST Associates, LLC; Harvest Advisors V, LLC; IST Advisors, LLC; and Ira Kleinman, all of New York, New York; Thomas Arenz, Greenwich, Connecticut; Stephen Eisenstein, Larchmont, New York; and Andrew M. Schoenthal, New York, New York; as managing members, to acquire voting shares of Green Bancorp, Inc., and thereby indirectly acquire voting shares of Green Bank, N.A., both of Houston, Texas.

3. PBRA, LLC; Pine Brook Road Associates, L. P.; Pine Brook Capital Partners, L. P., all of New York, New York; Pine Brook Capital Partners (Cayman), L. P.; George Town, Cayman Islands; Pine Brook Capital Partners (SSP), L. P., New York, New York; and Howard Newman, Bedford, New York; Eric W. Leathers; and William L. Spiegel, both of New York, New York; as the managing members, to acquire voting shares of Green Bancorp, Inc., and thereby indirectly acquire voting shares of Green Bank, N.A., both of Houston, Texas.

Board of Governors of the Federal Reserve System, April 13, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–8783 Filed 4–15–10; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL MARITIME COMMISSION

Sunshine Act Meeting

TIME AND DATE: April 21, 2010–10 a.m.

PLACE: 800 North Capitol Street, NW., First Floor Hearing Room, Washington, DC.

STATUS: Part of the meeting will be in Open Session, the remainder of the meeting will be in Closed Session.

Matters To Be Considered

Open Session

1. FY 2010 Budget Status Update.
2. FMC EU Study Status Update.

Closed Session

1. Staff Briefing on China Shipping Issues.
2. Staff Briefing Regarding Global Economic Conditions and Impact on Stakeholders.

CONTACT PERSON FOR MORE INFORMATION: Karen V. Gregory, Secretary, (202) 523–5725.

Karen V. Gregory,

Secretary.

[FR Doc. 2010–8952 Filed 4–14–10; 4:15 pm]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–New]

Agency Information Collection Request. 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden. To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above e-mail address within 60 days.

Proposed Project: Comprehensive Communication Campaign for HITECH Act—OMB No. 0990–NEW–Office National Coordinator for Health Information Technology (ONC).

Abstract: As part of the Health Information Technology for Economic and Clinical Health Act (HITECH Act) of 2009, ONC is proposing to conduct a nationwide communication campaign to meet the Congressional mandate to educate the public about privacy and security of electronically exchanged personal health information. ONC requires formative and process information about different segments of the public to conduct the campaign effectively. Data collection will occur continuously through the 24 months of the campaign. The data will be used to inform campaign strategies, messages, materials and Web sites.

ONC is collaborating with the HHS Office of Civil Rights to oversee the education and communication activities. The purpose of the campaign is to reach consumers, patients and health care providers to:

- Build approval for HIT adoption and meaningful use.
- Increase patient and provider participation in electronic health information exchange.

• Educate the public about the uses of personal health information and privacy and security protections available to them.

• Generate participation in HITECH programs (e.g. loans, grants, and contracts). Electronic health information exchange promises an array of potential benefits for individuals and the U.S. health care system through improved health care quality, safety, and efficiency. At the same time, this environment also poses new challenges and opportunities for protecting health information. Health information technology and electronic health information exchange may also provide individuals with new, more effective methods to engage with their health care providers and affect how their health information may be exchanged.

ESTIMATED ANNUALIZED BURDEN HOUR TABLE

Form	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
In-depth interview screening	500	1	10/60	83
In-depth interview main interview	360	1	1	360
Focus group screening	800	1	10/60	133
Focus group main interview	400	1	2	800
Web-based message testing main interview	660	1	1	660
Omnibus survey questions main interview	4,000	1	10/60	667
Card sorting screening	400	1	10/60	67
Card sorting main interview	100	1	1.5	150
Total				2,920

Seleda Perryman,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 2010–8733 Filed 4–15–10; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0220]

Agency Information Collection Request; 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden. To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above e-mail address within 60 days.

Proposed Project: Voluntary Academic and Industry DHHS Partner Surveys—OMB No. 0990–0220—Extension–OS—Office of Grants and Acquisition Policy and Accountability.

Abstract: To comply with E.O. 12862 and 5 U.S.C. 305, the Department of Health and Human Services plans to continue surveying its grant recipients and contractors over a three year period to compile and evaluate their opinions about the Department's grants and acquisition processes, ultimately to improve our business processes. The survey is voluntary. This is an extension, without change, of a currently approved collection. The respondents are vendors and grant recipients. The purpose of the information collection is for program evaluation and program planning or management. The frequency of collection is every three years (36-month cycle). The questionnaire takes 10 to 15 minutes to complete.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Vendors	1,000	1	12	200
Grant Recipients	1,667	1	10	279
Total				479

Seleda Perryman,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 2010–8715 Filed 4–15–10; 8:45 am]

BILLING CODE 4150–24–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0308; 30-day notice]

Agency Information Collection Request; 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov*, or call the Reports Clearance Office on (202) 690–5683. Send written comments and recommendations for the proposed information collections within 30 days of this notice directly to the OS OMB Desk Officer; faxed to OMB at 202–395–5806.

Proposed Project: The Effect of Reducing Falls on Acute and Long-Term Care Expenses OMB No. 0990–0308—Extension—Assistant Secretary Planning Evaluation (ASPE).

Abstract: ASPE is conducting a demonstration and evaluation of a multi-factorial fall prevention program to measure its impact on health outcomes for the elderly as well as acute and long-term care use and cost. The study is being conducted among a sample of individuals with private long-term care insurance who are age 75 and over using a multi-tiered random experimental research design to evaluate the effectiveness of the proposed fall prevention intervention program. The project will provide information to advance Departmental goals of reducing injury and improving the use of preventive services to positively impact Medicare use and spending. The project began in spring 2008 and is expected to be completed in spring 2013.

ESTIMATED ANNUALIZED BURDEN TABLE

Form name	Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Initial Telephone Screen	Experimental Group	240	1	20/60	80
In-person interview		240	1	80/60	320
Jump start phone call		240	1	30/60	120
Quarterly phone calls		240	4	10/60	160
Final Telephone Screen		177	1	20/60	59
Final In-person interview		177	1	80/60	236
Initial Telephone Screen	Active Control Group	240	1	20/60	80
Quarterly phone calls		240	4	10/60	160
Final Telephone Screen		177	1	20/60	59
Total Burden Hours					1,274

Seleda Perryman,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 2010–8716 Filed 4–15–10; 8:45 am]

BILLING CODE 4150–39–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Centers for Medicare & Medicaid Services; Delegation of Authority

Notice is hereby given that I have delegated to the Administrator, Centers for Medicare & Medicaid Services (CMS), or his or her successor, the authorities currently vested in the Secretary under section 1142(c)(6) [42 U.S.C. 1320b–12(c)(6)] of Title XI of the Social Security Act (the Act), as amended, to conduct and support supplementation and redesign of existing CMS data sets and databases, including the collection of new information, to enhance databases for research purposes, and the design and development of new databases that would be used in outcomes and effectiveness research as set out in section 1142(a) [42 U.S.C. 1320b–12(a)] of Title XI of the Act.

Limitations

The delegation of authority granted herein under section 1142(c)(6) [42 U.S.C. 1320b–12] of the Act does not supersede previous delegations of this authority to the Director, Agency for Healthcare Research and Quality.

The delegation of authority granted herein under section 1142(c)(6) [42 U.S.C. 1320b–12(c)(6)] of the Act, as amended, is limited to the collection and maintenance of data related to CMS' programs.

The authority under section 1142(c)(6) [42 U.S.C. 1320b–12] of the Act shall be exercised under the Department's policy on regulations and the existing delegation of authority to approve and issue regulations.

This delegation of authority may be re-delegated.

This delegation of authority is effective immediately.

I hereby affirm and ratify any actions taken by the Administrator, CMS, or his or her subordinates, which involved the exercise of the authority under section 1142(c)(6) [42 U.S.C. 1320b–12(c)(6)] of Title XI of the Act, as amended, delegated herein prior to the effective date of this delegation of authority.

Authority: 44 U.S.C. 3101.

Dated: April 8, 2010.

Kathleen Sebelius,

Secretary.

[FR Doc. 2010–8679 Filed 4–15–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of the Assistant Secretary for Planning and Evaluation; Statement of Organization, Functions and Delegations of Authority

Part A (Office of the Secretary), Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (HHS), is being amended at Chapter AE, Office of the Assistant Secretary for Planning and Evaluation (ASPE) as last amended at 67 FR 61341 on September 30, 2002. This reorganization is to realign the functions of ASPE's Office of Science and Data Policy to reflect the current structure. The changes are as follows:

I. Under Section AE.20 Functions, delete "E. The Office of Science and Data Policy (AEJ)," in its entirety and replace with the following:

E. The Office of Science and Data Policy (AEJ)

The Office of Science and Data Policy (SDP) is responsible for policy development, analysis and coordination and for the conduct and coordination of research, evaluation, analyses and data development on matters relating to science policy and data and statistical policy within HHS. Functions include policy, strategic and long-range planning; policy research, analysis and evaluation, economic, statistical, program and budget analysis; review of regulations; and development of legislative proposals in science policy and data policy. SDP provides advice and analysis on science policy and data policy issues, coordinates science policy and data policy issues of inter-agency scope within HHS, and manages inter-agency initiatives in science policy and data policy. SDP also conducts a program of policy research, analysis and evaluation in science policy and data policy, provides leadership and staff to several White House, departmental and external advisory committees, and maintains liaison with other federal offices and HHS partners in the science policy and data policy communities.

1. The *Division of Data Policy* (AEJ1) is responsible for data policy development and coordination within the Department and serves as the focal point for Department-wide data and statistical policy. It provides leadership and staff support to the Department's Data Council, the principal internal forum and advisory body to the Secretary on data policy issues, and provides oversight for and serves as the Executive Director for the National Committee on Vital and Health Statistics, the statutory public advisory body to the Secretary on health data, statistics, privacy and health information policy. The Division also provides analytical support to the ASPE on a variety of Department-wide data policy issues and initiatives, including statistical policy, privacy, data planning, HHS data quality and peer review initiatives, HIPAA and HHS data collection strategy. It also carries out a program of policy research, evaluation and analysis in these areas and provides several cross-cutting data policy services across ASPE.

2. The *Division of Science Policy* (AEJ2) is responsible for functions of the office related to science policy, programs and issues and initiatives that are heavily science-oriented, including public health issues that involve complex or rapidly evolving science and technology issues. Areas include public health emergency preparedness, biomedical research policy, drug safety, food safety, pandemic preparedness, emerging infectious diseases, prescription drug issues, personalized health care advances and related topics. It works closely with and is responsible for analytical responsibilities relating to the HHS science agencies (National Institutes of Health (NIH), Food and Drug Administration (FDA), and Centers for Disease Control and Prevention (CDC)) and for cross-cutting issue areas. The Division fosters efforts across HHS toward ensuring that the science components of proposed regulations, legislation, plans, budgets and other policy initiatives are coordinated and meet high standards of science quality and integrity. It also conducts policy research, evaluation and analysis in these areas and maintains liaison with the White House Office of Science and Technology Policy and with other inter-agency science policy activities.

II. *Delegations of Authority.* All delegations and redelegations of authority made to officials and employees of affected organizational components will continue in them or their successors pending further redelegation, provided they are consistent with this reorganization.

Dated: April 9, 2010.

E.J. Holland, Jr.,

Assistant Secretary for Administration.

[FR Doc. 2010–8678 Filed 4–15–10; 8:45 am]

BILLING CODE 4150–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects:

Title: Case Plan Requirement, Title IV–E of the Social Security Act.

OMB No.: 0980–0140.

Description: Under section 471(a)(16) of title IV–E of the Social Security Act (the Act), to be eligible for payments, states must have an approved title IV–E plan that provides for the development of a case plan for each child for whom the State receives foster care maintenance payments and that provides a case review system that meets the requirements in section 475(5) and 475(6) of the Act. The Fostering Connections to Success and Increasing Adoptions Act of 2008 (Pub. L. 110–351) added a new section 479B to the Act providing authority at 479B(b) for an Indian Tribe, tribal organization or tribal consortia (hereafter "Tribe") to elect to operate a title IV–E program with an approved title IV–E plan. Tribes are to operate a program in the same manner as states and must provide for a case plan for each child and for a case review system.

The case review system assures that each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family-like) setting available and in close proximity to the child's parental home, consistent with the best interest and special needs of the child. Through these requirements, States and Tribes also comply, in part, with title IV–B section 422(b) of the Act, which assures certain protections for children in foster care.

The case plan is a written document that provides a narrative description of the child-specific program of care. Federal regulations at 45 CFR 1356.21(g) and section 475(1) of the Act delineate the specific information that should be addressed in the case plan. The Administration for Children and Families (ACF) does not specify a recordkeeping format for the case plan nor does ACF require submission of the document to the Federal government. Case plan information is recorded in a

format developed and maintained by the State or Tribal child welfare agency.

Respondents: State and Tribe title IV–B and title IV–E agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Case Plan	603,453	1	3.98	2,401,74, 2.94

Estimated Total Annual Burden Hours: 2,401,74, 2.94.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, *Attn:* ACF Reports Clearance Officer. *E-mail address: infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments 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) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: April 13, 2010.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2010–8718 Filed 4–15–10; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; Web Based Training for Pain Management Providers

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institute on Drug Abuse, the National Institutes of Health has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** in Vol. 75, No. 25 on Monday, February 8 and allowed 60 days for public comment. No public comments were received on the planned study or any of the specific topics outlined in the 60 day notice. Three comments were received requesting information on the educational program rather than the study. We responded to requests for additional information from interested parties. The purpose of this notice is to allow an additional 30 days for public comment.

5 CFR 1320.5 (General requirements) Reporting and Recordkeeping Requirements: Final Rule requires that the agency inform the 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.

Proposed Collection

Title: Web Based Training for Pain Management Providers.

Type of Information Collection Request: New.

Need and Use of Information Collection: This research will evaluate the effectiveness of the Web Based Training for Pain Management Providers, via the Web site *PainAndAddictionTreatment.com,* to positively impact the knowledge, attitudes, intended behaviors and clinical skills of health care providers in the U.S. who treat pain. The Web Based Training for Pain Management Providers is a new program developed with funding from the National Institute on Drug Abuse. The primary goal is to assess the impact of the training program on knowledge, attitude, intended behavior, and clinical skills. A secondary goal is to assess learner satisfaction with the program. If the program is a success, there will be a new, proven resource available to health care providers to improve their ability to treat pain and addiction co-occurring in the provider's patients. In order to evaluate the effectives of the program, information will be collected from health care providers before exposure to the Web based materials (pre-test), after exposure to the web based materials (post-test), and 4–6 weeks after the program has been completed (follow-up).

Frequency of Response: On occasion.

Affected Public: Volunteer health care providers who treat patients with pain.

Type of Respondents: Physicians, nurse practitioners, and physician assistants.

The annual reporting burden is as follows:

Estimated Number of Respondents: 80.

Estimated Number of Responses per Respondent: 3.

Average Burden Hours per Response: 0.75.

Estimated Total Annual Burden Hours Requested: 180.

The annualized cost to respondents is estimated at: $11,925. There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated annual burden hours requested
Physicians	60	3	0.75	135

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated annual burden hours requested
Other primary care providers (*e.g.,* nurse practitioners, physician assistants)	20	3	0.75	45

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) 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) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

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: Scudder Quandra, Project Officer, NIH/NIDA/CCTN, Room 3105, MSC 9557, 6001 Executive Boulevard, Bethesda, MD 20892–9557 or e-mail your request, including your address to *scudderq@nida.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: April 8, 2010.

Mary Affeldt,

Executive Officer (OM Director), NIDA, National Institutes of Health.

[FR Doc. 2010–8800 Filed 4–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary and Alternative Medicine Announcement of Workshop on the Deconstruction of Back Pain

ACTION: Notice.

SUMMARY: The National Center for Complementary and Alternative Medicine (NCCAM) invites the public to observe at a Workshop on the Deconstruction of Back Pain. The purpose of this workshop is to identify what types of studies are needed to better understand chronic back pain, to assess new interventions and management strategies for back pain as a chronic condition, to evaluate the utility of existing datasets and ongoing cohort studies for future studies of chronic back pain, and to determine what study designs should be utilized to look at the natural history of back pain. This information will help inform future research directions for NIH and the biomedical scientific field. This workshop will be divided into five sessions that will feature presentations and discussions focusing on the current understanding and complexity of chronic back pain, characterization of research, and the epidemiology and psychological components of chronic back pain.

The Workshop will take place on May 10–11, 2010. Those interested are encouraged to participate via Videocast.

Background: The National Center for Complementary and Alternative Medicine (NCCAM) was established in 1999 with the mission of exploring complementary and alternative healing practices in the context of rigorous science, training CAM researchers, and disseminating authoritative information to the public and professionals. NCCAM funds research grants that explore the science of CAM. For more information, see *http://nccam.nih.gov/research/nccamfunds.htm.*

Participating: The Workshop will be broadcast on the Internet and archived on *http://www.videocast.nih.gov/.* Viewers may submit questions for the presenters and panelists by e-mailing *nccambkpnwkshp@mail.nih.gov* with questions or comments.

FOR FURTHER INFORMATION CONTACT: To request more information, call Edward Culhane at 301–594–3391 or e-mail *culhanee@mail.nih.gov.*

Dated: April 7, 2010.

Partap S. Khalsa,

Program Officer, Division of Extramural Research, National Center for Complementary and Alternative Medicine, National Institutes of Health.

[FR Doc. 2010–8804 Filed 4–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Loan Repayment Program.

Date: April 30, 2010.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: JoAnn McConnell, PhD, Scientific Review Administrator, Scientific Review Branch, NIH/NINDS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–5324, *mcconnej@ninds.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research

Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: April 8, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–8810 Filed 4–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; Gene Therapy for Urea Cycle Disorders.

Date: April 30, 2010.

Time: 1:30 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Norman Chang, PhD, Scientific Review Administrator, Division Of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, (301) 496–1485, *changn@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.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: April 7, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–8807 Filed 4–15–10; 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 Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Developmental Issues of Adolescence.

Date: April 30, 2010.

Time: 3 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: National Institutes of Health, Michael Micklin, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3136, MSC 7759, Bethesda, MD 20892, (301) 435–1258, *micklinm@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: April 8, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–8820 Filed 4–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Mental Health Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Mental Health Council.

Date: May 13–14, 2010.

Closed: May 13, 2010, 10 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications and review the activities of the NIMH Division of Intramural Research Programs.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Conference Room C/D/E, Rockville, MD 20852.

Open: May 14, 2010, 8:30 a.m. to 1 p.m.

Agenda: Presentation of NIMH Director's report and discussion on NIMH program and policy issues.

Place: National Institutes of Health, Building 31, C Wing, 31 Center Drive, 6th Floor, Conference Room 6, Bethesda, MD 20892.

Contact Person: Jane A. Steinberg, PhD, Director, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6154, MSC 9609, Bethesda, MD 20892–9609, 301–443–5047.

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if

accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their 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.nimh.nih.gov/about/advisory-boards-and-groups/namhc/index.shtml,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: April 8, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–8822 Filed 4–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Environmental Health Sciences Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Environmental Health Sciences Council.

Date: May 12–13, 2010.

Open: May 12, 2010, 8:30 a.m. to 5 p.m.

Agenda: Discussion of program policies and issues.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Open: May 13, 2010, 8:30 a.m. to 10:30 a.m.

Agenda: Discussion of program policies and issues.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Closed: May 13, 2010, 10:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Contact Person: Gwen W Collman, PhD, Interim Director, Division of Extramural Research & Training, National Institutes of Health, Nat. Inst. of Environmental Health Sciences, 615 Davis Dr., KEY615/3112, Research Triangle Park, NC 27709, (919) 541–4980, *collman@niehs.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. Information is also available on the Institute's/Center's home page: *http://www.niehs.nih.gov/dert/c-agenda.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: April 9, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–8827 Filed 4–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 of Allergy and Infectious Diseases Special Emphasis Panel.

Date: May 10–12, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call)

Contact Person: Ellen S. Buczko, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–451–2676, *ebuczko1@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: April 12, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–8814 Filed 4–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of The Director, National Institutes of Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 application, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center on Minority Health and Health Disparities Special Emphasis Panel Loan Repayment Program for Health Disparities Research—Panel 4.

Date: May 5, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Plaza, Suite 800, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Prabha L. Atreya, PhD, Chief, Office of Scientific Review, National Center on Minority Health, and Health Disparities, 6707 Democracy Boulevard, Suite 800, Bethesda, MD 20892, (301) 594–8696, *atreyapr@mail.nih.gov.*

Dated: April 12, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–8813 Filed 4–15–1 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 of Allergy and Infectious Diseases Special Emphasis Panel; Radiation/Nuclear Medical Countermeasure Product Development Support Services.

Date: May 6, 2010.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call)

Contact Person: Roberta Binder, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Room 3130, Bethesda, MD 20892, 301–496–7966, *rbinder@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: April 12, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–8812 Filed 4–15–10; 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. App.), 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: Social Sciences and Population Studies.

Date: May 7, 2010.

Time: 1:30 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Valerie Durrant, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3148, MSC 7770, Bethesda, MD 20892, (301) 408–9882, *durrantv@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cancer Prevention.

Date: May 10, 2010.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Lawrence Ka-Yun Ng, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6152, MSC 7804, Bethesda, MD 20892, 301–435–1719, *ngkl@csr.nih.gov.*

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Basic Mechanisms of Cancer Therapeutics Study Section.

Date: May 24–25, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites, 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.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict Applications: HBPP.

Date: May 25, 2010.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Najma Begum, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2186, MSC 7818, Bethesda, MD 20892, 301–435–1243, *begumn@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Gene and Drug Delivery Systems Study Section.

Date: May 26–27, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Amy L. Rubinstein, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5152, MSC 7844, Bethesda, MD 20892, 301–435–1159, *rubinsteinal@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group; Hypersensitivity, Autoimmune, and Immune-mediated Diseases Study Section.

Date: May 27–28, 2010.

Time: 8 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Crystal City, 2399 Jefferson Davis Hwy, Arlington, VA 22202.

Contact Person: Bahiru Gametchu, DVM, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4204, MSC 7812, Bethesda, MD 20892, 301–408–9329, *gametchb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Immunology Mechanism.

Date: May 27, 2010.

Time: 9:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Patrick K. Lai, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2215, MSC 7812, Bethesda, MD 20892, 301–435–1052, *laip@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: April 12, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–8811 Filed 4–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 Heart, Lung, and Blood Institute Special Emphasis Panel, National Registry of Genetically Triggered Thoracic Aortic Aneurysms and Cardiovascular Conditions (GenTAC).

Date: May 12, 2010.

Time: 10 a.m. to 1 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Chang Sook Kim, PhD, scientific Review Officer, Review Branch, DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Room 7190, Bethesda, MD 20892, 301–435–0314, *carolko@mail.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Interagency Registry for Mechanically Assisted Circulatory Support (INTERMACS).

Date: May 13, 2010.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Holly K Krull, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7188, Bethesda, MD 20892–7924, 301–435–0280, *krullh@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, NHLBI Cardiovascular Outcomes Research Coordinating Unit.

Date: May 25, 2010.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriot Suites, 6711 Democracy Boulevatd, Bethesda, MD 20817.

Contact Person: Charles Joyce, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892–7924, 301–435–0288, *cjoyce@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, NHLBI Centers for Cardiovascular Outcomes Research.

Date: May 25, 2010.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriot Suites, 6711 Democracy Boulevatd, Bethesda, MD 20817.

Contact Person: Charles Joyce, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892–7924, 301–435–0288, *cjoyce@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Functional Modeling of Pediatric Upper Airway Disorders.

Date: May 27, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Chang Sook Kim, PhD, Scientific Review Officer, Review Branch, DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7190, Bethesda, MD 20892, 301–435–0287, *carolko@mail.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute, Special Emphasis Panel, Short Term Research Training Grants.

Date: May 27, 2010.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Charles Joyce, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892–7924, 301–435–0288, *cjoyce@nhlbi.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: April 12, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–8806 Filed 4–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Center for Injury Prevention and Control Initial Review Group

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC), announces the following meeting of the aforementioned review group:

Times and Date:

1 p.m.–1:10 p.m., May 3, 2010 (Open).

1:10 p.m.–2:30 p.m., May 3, 2010 (Closed).

Place: Teleconference.

Toll Free: 877–468–4185 Passcode: 2371296.

Status: A portion of this meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5, U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Section 10(d) of Public Law 92–463.

Purpose: This group is charged with providing advice and guidance to the Secretary, Department of Health and Human Services, and the Director, CDC, concerning the scientific and technical merit of grant and cooperative agreement applications received from academic institutions and other public and private profit and nonprofit organizations, including State and local government agencies, to conduct specific injury research that focuses on prevention and control.

Matters To Be Discussed: The meeting will include the reporting and voting of the peer reviews conducted in response to Fiscal Year 2010 Requests for Applications related to the following individual research announcements: (1)

CE 10 001 Preventing Unintentional Childhood Injuries (R21); (2) CE 10 002 Unintentional Poisoning from Prescription Drug Overdoses in Adults (R21); (3) CE 10 003 Research Priorities in Acute Injury Care (R01); (4) CE 10 005 Research Grants for Preventing Violence and Violence-Related Injury (R01) Agenda items are subject to change as priorities dictate.

FOR FURTHER INFORMATION CONTACT: Adele Childress, PhD, Acting Director, Extramural Research Program Office, National Center for Injury Prevention & Control and Executive Secretary, NCIPC IRG, CDC, 4770 Buford Highway, NE, M/S F–63, Atlanta, Georgia 30341, telephone 770–488–4233.

The Director, Management Analysis and Services Office has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: April 12, 2010.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2010–8731 Filed 4–15–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cellular Neurosciences.

Date: April 23, 2010.

Time: 2 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Peter B. Guthrie, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4142, MSC 7850, Bethesda, MD 20892, (301) 435–1239, *guthriep@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: April 9, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–8826 Filed 4–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 Inherited Disease Research Access Committee.

Date: April 30, 2010.

Time: 11:30 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Suite 4076, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Camilla E. Day, PhD, Scientific Review Officer, CIDR, National Human Genome Research Institute, National Institutes of Health, 5635 Fishers Lane, Suite 4075, Bethesda, MD 20892, 301–402–8837, *camilla.day@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 Inherited Disease Research Access Committee.

Date: April 30, 2010.

Time: 2:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Suite 4069, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Ken D Nakamura, PhD, Scientific Review Officer, Scientific Review Branch, National Human Genome Research Institute, National Institutes of Health, 5635 Fishers Lane, Suite 4076, MSC 9306, Rockville, MD 20852, 301–402–0838.

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. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: April 8, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–8821 Filed 4–15–10; 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. App.), 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: Immunology Integrated Review Group; Cellular and Molecular Immunology—B Study Section.

Date: May 27–28, 2010.

Time: 8:30 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Betty Hayden, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4206, MSC 7812, Bethesda, MD 20892, 301–435–1223, *haydenb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Pathogenic Eukaryotes and their Vectors.

Date: May 27–28, 2010.

Time: 8:30 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: Richard G. Kostriken, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3192, MSC 7808, Bethesda, MD 20892, 301–402–4454, *kostrikr@csr.nih.gov.*

(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: April 8, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–8815 Filed 4–15–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2010–0007]

Fee for Services To Support FEMA's Offsite Radiological Emergency Preparedness Program

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) has established a fiscal year (FY) 2010 hourly rate of $53.72 for assessing and collecting fees from Nuclear Regulatory Commission (NRC) licensees for services provided by FEMA personnel for FEMA's Radiological Emergency Preparedness (REP) Program.

DATES: This hourly rate is effective for FY 2010 (October 1, 2009, to September 30, 2010).

FOR FURTHER INFORMATION CONTACT: James R. Kish, Director, Technological Hazards Division, Department of Homeland Security/FEMA, 1800 S. Bell Street—CC845, Mail Stop 3025, Arlington, VA 20598–3025; (202) 212–2205 (phone); or *james.kish@dhs.gov* (e-mail).

SUPPLEMENTARY INFORMATION: As authorized in 42 U.S.C. 5196e, FEMA will be charging an hourly user fee rate of $53.72 to NRC licensees of commercial nuclear power plants for all REP Program exercise-specific related services provided by FEMA personnel as described in 44 CFR part 354. FEMA will deposit these funds in the REP Program Fund to offset the actual costs by FEMA for its REP Program.

FEMA established the hourly rate on the basis of the methodology set forth in 44 CFR 354.4(b), "Determination of site-specific biennial exercise related component for [FEMA] personnel." FEMA will use the rate to assess and collect fees for site-specific biennial exercise related services rendered by FEMA personnel. This hourly rate only addresses charges to NRC licensees for services that FEMA personnel provide under the site-specific biennial exercise component, not charges for services FEMA personnel provide under the flat fee component referenced at 44 CFR 354.4(d), and not for services that FEMA contractors provide.

Authority: 42 U.S.C. 5196(e), 44 CFR part 354.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2010–8816 Filed 4–15–10; 8:45 am]

BILLING CODE 9110–21–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1875–DR; Docket ID FEMA–2010–0002]

Maryland; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Maryland (FEMA–1875–DR), dated February 19, 2010, and related determinations.

DATES: *Effective Date:* April 9, 2010.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Recovery Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Maryland is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of February 19, 2010.

Anne Arundel, Charles, and Talbot Counties and the Independent City of Baltimore for emergency protective measures (Category B), including snow assistance, under the Public Assistance program for any continuous 48-hour period during or proximate to the incident period.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2010–8748 Filed 4–15–10; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1894–DR; Docket ID FEMA–2010–0002]

Rhode Island; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Rhode Island (FEMA–1894–DR), dated March 29, 2010, and related determinations.

DATES: *Effective Date:* April 8, 2010.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Recovery Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Rhode Island is hereby amended to include the Public Assistance program for the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of March 29, 2010.

Bristol, Kent, Newport, Providence, and Washington Counties for Public Assistance (already designated for Individual Assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used

for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2010–8749 Filed 4–15–10; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5375–N–14]

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: April 16, 2010.*

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: April 8, 2010.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

[FR Doc. 2010–8427 Filed 4–15–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Revision of Agency Information Collection for Financial Assistance and Social Services

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of request for comments.

SUMMARY: The Bureau of Indian Affairs (BIA) is proposing to revise and submit to the Office of Management and Budget the information collection, titled "Financial Assistance & Social Services, 25 CFR 20." The information collection is currently authorized by OMB Control Number 1076–0017, which expires March 31, 2012. The information collection requires applicants to provide information in support of their eligibility for BIA assistance and services and requires a subset of those applicants to complete an ISP in order to obtain General Assistance. Revisions include changes to the application form to address all five types of assistance authorized by 25 CFR part 20, a new standardized form for Individual Self-Sufficiency Plans (ISPs), and a new form for tribes to submit information on the amounts of financial assistance received in the prior year.

DATES: Interested persons are invited to submit comments on or before *June 15, 2010.*

ADDRESSES: You may submit comments on the information collection to Sue Settles, Chief, Division of Human Services, Office of Indian Services, Bureau of Indian Affairs, Department of the Interior, 1849 C Street, NW., Mail Stop 4513, Washington, DC 20240, facsimile: (202) 208–5113.

FOR FURTHER INFORMATION CONTACT: You may request further information or obtain copies of the information collection request submission from Sue Settles, telephone: (202) 513–7621.

SUPPLEMENTARY INFORMATION:

I. Abstract

The BIA is seeking to revise the information collection it conducts to provide assistance under 25 CFR part 20 to eligible Indians when comparable financial assistance or social services either are not available or not provided by State, tribal, county, local, or other Federal agencies. Approval for this collection expires March 31, 2012. The information collection allows BIA to determine whether an individual is eligible for assistance and services. This information collection is being revised to allow revisions to the Application to promote usefulness in obtaining needed client information. Specifically, the application form was revised to include all Financial Assistance and Social Service components including General Assistance, Child Assistance, Adult Care Assistance, Burial Assistance, and Emergency Assistance. The Application was also revised to be more user-friendly and assist in the eligibility determination process. In addition, the revised Application includes a case management tool for case workers. The case management tool is a breakdown of each Financial Assistance component to be utilized as a checklist of items to include in the case file, to check for during the application and intake process, and again during the eligibility determination. The checklist is a guide to 25 CFR part 20. The Application includes instructions on client appeal rights, the fraud statement, the appeal process, Paperwork Reduction Act and the Privacy Act. This information collection is also being revised to standardize the Individual Self-Sufficiency Plan (ISP) that is used for a subset of the General Assistance applicants. The standardized form will guide BIA and tribal case workers in obtaining information to develop the ISP with the client. The form will allow case workers to develop more meaningful and attainable goals through specific action steps. No third party notification or public disclosure burden is associated with this collection. BIA is requesting an increase in the estimated burden hours for this information collection to better account for the groups of respondents (applicants for any of the five types of assistance versus the subset of applicants requesting General Assistance), to better account for the time it takes respondents to complete the application and, where appropriate, provide information for an employability assessment and ISP.

II. Request for Comments

The BIA requests that you send your comments on this collection to the location listed in the **ADDRESSES** section. Your comments should address: (a) The necessity of the information collection for the proper performance of the agencies, including whether the information will have practical utility; (b) the accuracy of our estimate of the burden (hours and cost) of the collection of information, including the validity of

the methodology and assumptions used; (c) ways we could enhance the quality, utility and clarity of the information to be collected; and (d) ways we could minimize the burden of the collection of the information on the respondents, such as through the use of automated collection techniques or other forms of information technology.

Please note that an agency may not sponsor or conduct, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number. Approval for this collection expires March 31, 2012.

It is our policy to make all comments available to the public for review at the location listed in the **ADDRESSES** section during the hours of 9 a.m.–5 p.m., Eastern Time, Monday through Friday except for legal holidays. Before including your address, phone number, e-mail address or other personally identifiable information, be advised that your entire comment—including your personally identifiable information—may be made public at any time. While you may request that we withhold your personally identifiable information, we cannot guarantee that we will be able to do so.

III. Data

OMB Control Number: 1076–0017.

Title: Financial Assistance and Social Services, 25 CFR Part 20.

Brief Description of Collection: Submission of this information is required of Indian applicants of BIA financial assistance and social services. BIA uses the information to determine if an individual is eligible for services and, where appropriate, to conduct an employability assessment and jointly develop with the individual an Individual Self-Sufficiency Plan outlining how the individual can attain self-sufficiency. Response is required to obtain a benefit.

Type of Review: Revision of a currently approved collection.

Respondents: Individual Indians seeking financial assistance or social services from BIA.

Number of Respondents: 240,000 provide information on the application, and of those, 95,000 contribute information to an employability assessment and ISP.

Total Number of Responses: Once, on occasion.

Estimated Time per Response: 1.5 (0.5 hours for the application + 1 hour for the employability assessment and ISP).

Estimated Total Annual Burden: 215,000 hours ((240,000 × 0.5 hours for applications) + (95,000 × 1 hour for employability assessment and ISP)).

Dated: April 6, 2010.

Alvin Foster,

Acting Chief Information Officer—Indian Affairs.

[FR Doc. 2010–8799 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2010–N066; 20124–1113–0000–F5]

Endangered and Threatened Species Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications; request for public comment.

SUMMARY: The following applicants have applied for scientific research permits to conduct certain activities with endangered species under the Endangered Species Act of 1973, as amended (Act). The Act requires that we invite public comment on these permit applications.

DATES: To ensure consideration, written comments must be received on or before May 17, 2010.

ADDRESSES: Written comments should be submitted to the Chief, Endangered Species Division, Ecological Services, P.O. Box 1306, Room 6034, Albuquerque, NM 87103. Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act. Documents will be available for public inspection, by appointment only, during normal business hours at the U.S. Fish and Wildlife Service, 500 Gold Ave. SW., Room 6034, Albuquerque, NM. Please refer to the respective permit number for each application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Susan Jacobsen, Chief, Endangered Species Division, P.O. Box 1306, Albuquerque, NM 87103; (505) 248–6920.

SUPPLEMENTARY INFORMATION:

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Permit TE–02368A

Applicant: Martin Schlaefer, Syracuse, New York.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for Sonoran tiger salamander (*Ambystoma tigirium stebbinsi*) within Arizona.

Permit TE–07059A

Applicant: Paul Marsh, Chandler, Arizona.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for the following species: Humpback chub (*Gila cypha*), bonytail chub (*Gila elegans*), Virgin River chub (*Gila robusta seminuda*), woundfin (*Plagopterus argentissimus*), Colorado pikeminnow (*Ptychocheilus lucius*), razorback sucker (*Xyrauchen texanus*), desert pupfish (*Cyprinodon macularius),* Yaqui topminnow (*Poeciliopsis occidentalis sonorensis),* Quitobaquito desert pupfish (*Cyprinodon macularius eremus*), Gila topminnow (*Poeciliopsis occidentalis*), and Gila chub (*Gila intermedia*) within Arizona, Nevada, and California.

Permit TE–07308A

Applicant: Debbie Buecher, Tucson, Arizona.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for lesser long-nosed bat (*Leptonycteris yerbabuenae*) within Arizona.

Permit TE–178778

Applicant: Marks Lab of Aquatic Ecology, Flagstaff, Arizona.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct presence/absence surveys for bonytail chub (*Gila elegans*) within Texas.

Permit TE–07360A

Applicant: Nancy Nicolai, Albuquerque, New Mexico.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for southwestern willow flycatcher (*Empidonax taillii extimus*) within New Mexico.

Permit TE–819473

Applicant: National Park Service—Grand Canyon National Park, Grand Canyon, Arizona.

Applicant requests an amendment to a current permit for research and

recovery purposes to conduct presence/absence surveys for humpback chub (*Gila cypha*) and razorback sucker (*Xyrauchen texanus*) within Arizona.

Permit TE–160521

Applicant: Tetra Tech, Salt Lake City, Utah.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct presence/absence surveys for southwestern willow flycatcher (*Empidonax traillii extimus*) within Arizona, Colorado, and Utah.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: April 8, 2010.

Thomas L Bauer,

Acting Regional Director, Southwest Region, Fish and Wildlife Service.

[FR Doc. 2010–8719 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2010–N022; 40136–1265–0000–S3]

Watercress Darter National Wildlife Refuge, Jefferson County, AL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: draft comprehensive conservation plan and environmental assessment; request for comments.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of a draft comprehensive conservation plan and environmental assessment (Draft CCP/EA) for Watercress Darter National Wildlife Refuge (NWR) for public review and comment. In this Draft CCP/EA, we describe the alternative we propose to use to manage this refuge for the 15 years following approval of the final CCP.

DATES: To ensure consideration, we must receive your written comments by May 17, 2010.

ADDRESSES: You may obtain a copy of the Draft CCP/EA by writing to: Mr. Stephen A. Miller, Mountain Longleaf National Wildlife Refuge, P.O. Box 5087, Anniston, AL 36205; telephone: 256/848–6833. The Draft CCP/EA is available on compact disk or in hard copy. You may also access and download the document from the Service's Internet Web site: *http://southeast.fws.gov/planning/* under "Draft Documents." Comments on the Draft CCP/EA may be submitted to the above address or via electronic mail to: *stephen_a_miller@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Mike Dawson, Refuge Planner, Jackson, MS; 601/965–4903, extension 20.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we continue the CCP process for Watercress Darter NWR. We started the process through a notice in the **Federal Register** on March 12, 2007 (72 FR 11048).

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year strategy for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

CCP Alternatives, Including Our Proposed Alternative

We developed three alternatives for managing the refuge and chose "Alternative C" as the proposed alternative. A full description of each alternative is in the Draft CCP/EA. We summarize each alternative below.

Alternative A—Current Management (No Action)

The current management of Watercress Darter NWR recognizes the importance of looking beyond the refuge boundary. We continue to seek partnerships with adjacent landowners to protect and enhance the habitat for the endangered watercress darter. Upland management emphasizes the maintenance and restoration of native vegetative communities. Environmental parameters are monitored, adding additional parameters as issues arise. We currently monitor long-term trends for exotic invasive species. Other institutions are sought to investigate topics in detail. Wildlife observation is incorporated in the current public use program. Some outreach avenues have been established at both the State and local level. Watercress Darter NWR is currently managed by the staff of the Mountain Longleaf NWR, which is located 90 miles to the north.

Alternative B—Refuge Focused Management

Under this alternative, we would focus on activities within the jurisdictional boundaries of Watercress Darter NWR. We would rely on interest groups to collect information on outside threats. We would emphasize protection of the endangered watercress darter, restoration of native communities, and the health of resident wildlife species. Environmental monitoring would demonstrate long-term trends, environmental changes, or the results of management practices on refuge lands. Research, management, protection, education, and public use would be conducted to maximize benefits to Watercress Darter NWR. Land acquisition would be emphasized on high-priority areas within the approved acquisition boundary. The staff needed to fully implement this alternative would include four positions to be shared with Cahaba River NWR.

Alternative C—Integrated Landscape Management (Proposed Alternative)

Threats to the refuge are becoming more prominent as development activities occur in the city of Bessemer, Alabama. Watercress Darter NWR is a small system that can be greatly compromised by activities a distance away from its boundary. Under Alternative C, we fully recognize the impact these activities may have on the integrity of the refuge. We would continue the activities as stated under Alternative A and extend beyond the immediate neighbors to address issues associated with the aquifer and spring recharge area, watershed, and biota exchange pathways. Extensive resource sharing and networking with other protected areas, State and local government agencies, non-governmental organizations, specialists, researchers, and private citizens would expand the knowledge base and develop cooperation among interest groups. Restoration of natural systems, native communities, and healthy environments would be emphasized, thus promoting regionally a high quality of life. Monitoring environmental parameters and flora and fauna would be incorporated into an integrated study to

gain knowledge on the health of the refuge ecosystem. Education and outreach would be expanded, with an emphasis on cultural and historical resources including groundwater springs. An increase in staff would occur under this alternative in order to place greater emphasis on landscape management. Additional staff members needed to fully implement this alternative would include one position stationed at Watercress Darter NWR and four positions to be shared between Cahaba River NWR and Watercress Darter NWR.

Next Step

After the comment period ends, we will analyze the comments and address them.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: February 25, 2010.

Jeffrey M. Fleming,

Acting Regional Director.

[FR Doc. 2010–8720 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Final Environmental Impact Statement for Drought Management Planning at the Kerr Hydroelectric Project, Flathead Lake, MT

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act (NEPA), the Bureau of Indian Affairs (BIA) provides this notice that the Final Environmental Impact Statement (FEIS) for Drought Management Planning at the Kerr Hydroelectric Project, Flathead Lake, Montana, is now available for public review and comment.

DATES: The BIA will issue a final decision on drought management planning at the Kerr Hydroelectric Project no sooner than 30 days following the publication date of this notice. Thus, any comments on the FEIS must arrive by May 17, 2010.

ADDRESSES: You may mail or hand-carry written comments to: Mr. Bob Dach, Hydropower Program Manager, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, OR 97232. You may e-mail written comments to: *robert.dach@bia.gov*. See the **SUPPLEMENTARY INFORMATION** section of this notice for locations where the FEIS will be available for review and instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Mr. Bob Dach, Hydropower Program Manager, Bureau of Indian Affairs, telephone: (503) 231–6711; e-mail: *robert.dach@bia.gov.*

SUPPLEMENTARY INFORMATION: This FEIS finalizes the draft document, titled Drought Management Plan and Environmental Impact Statement, for which notice was provided in the **Federal Register** on July 26, 2006 (71 FR 42415).

The Kerr Hydroelectric Project (Project) is located at river mile 72.0 on the Flathead River, just downstream from Flathead Lake. The Project is within the Flathead Indian Reservation and is operated pursuant to a July 17, 1985, license order issued jointly to PPL Montana, LLC (successor-in-interest to the Montana Power Company) and the Confederated Salish and Kootenai Tribes (Tribes).

The license contains specific operating requirements governing, among other things, lake levels (Article 43) and minimum stream flows (Article 56). Minimum stream flows were required by the Secretary of the Interior (Secretary) pursuant to his authority under section 4(e) of the Federal Power Act (16 U.S.C. 797(e)) to protect natural resources important to the Tribes.

During drought years, the available water supply may not be sufficient to provide minimum stream flows while maintaining Flathead Lake levels. As such, the Secretary also required the licensees to develop a Drought Management Plan (DMP) (Article 60) in an effort both to avoid and resolve potential water use conflicts that may arise under drought conditions. PPL Montana submitted a proposed DMP to the Secretary on March 4, 2002. Under Article 60, the Secretary has the sole authority to reject, modify, or otherwise alter the proposed DMP.

Issues addressed in the DEIS included, but were not limited to, effects on hydroelectric power production, recreation, tourism, irrigation, flooding, treaty-protected fisheries, biological resources, wildlife habitat, and Indian traditional and cultural properties and resources. Alternatives to the licensees' proposed DMP were also evaluated in the DEIS. The FEIS refines the environmental analyses based on comments received on the DEIS from State and Federal agencies, other project stakeholders, and the public.

A final decision regarding the framework and requirements of a DMP will be included in a Record of Decision (ROD), expected to be complete by Spring 2010. The ROD will identify the specific actions and procedures that must be included in the final DMP and will state specifically the next steps required by PPL Montana and the Tribes in finalizing the plan. Neither this EIS nor the ROD will include a "stand alone" DMP as required by the license (Article 60), although the ROD will have all of the fundamental components required to be included in the final plan specifically identified. Finalizing the DMP in this manner should facilitate integration of DMP requirements with Kerr Project operational requirements that are best addressed by the licensees. We anticipate that the final DMP will be developed by PPL Montana and the Tribes in consultation with the U.S. Army Corps of Engineers, Bureau of Reclamation, and BIA, and filed with the Federal Energy Regulatory Commission by Fall 2010.

Directions for Submitting Comments: To submit comments on the FEIS, please include your name, return address and the caption "FEIS Comments, Drought Management Planning at the Kerr Hydroelectric Project" on the first page of your written comments.

Directions for Obtaining Review of the FEIS: Copies of the FEIS will be mailed to individuals, agencies, organizations, and companies identified in the Draft EIS. Electronic copies of the FEIS are available upon request by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. The document is available electronically at: *http://www.flatheadlake-eis.com/*. Copies of the FEIS will also be available for review at the following locations in Montana:

- Polson City Library, 21st Avenue East, Polson, MT 59860.
- Flathead County Library, 247 1st Avenue East, Kalispell, MT 59901.

Public Availability of Comments: Before including your address, phone number, e-mail address, or other

personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: This notice is published in accordance with section 1503.1 of the Council on Environmental Quality Regulations (40 CFR parts 1500 through 1508) implementing the procedural requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4371 *et seq.*) and the Department of the Interior Manual (516 DM 1–6), and is in the exercise of authority delegated to the Assistant Secretary—Indian Affairs by 209 DM 8.

Dated: March 26, 2010.

George T. Skibine,

Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2010–8512 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–W7–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Lake Casitas Resource Management Plan, Ventura County, CA

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability of the Final Environmental Impact Statement (EIS).

SUMMARY: Pursuant to the National Environmental Policy Act, the Bureau of Reclamation (Reclamation) has made available the Final EIS for the Lake Casitas Resource Management Plan (RMP). The RMP involves alternatives for future use of the project area for recreation and resource protection and management.

A Notice of Availability of the Draft EIS was published in the **Federal Register** on July 28, 2008 (73 FR 43785). The written comment period on the Draft EIS ended on October 31, 2008. The Final EIS contains responses to all comments received and reflects comments and any additional information received during the review period.

DATES: Reclamation will not make a decision on the proposed action until at least 30 days after release of the Final EIS. After the 30-day waiting period, Reclamation will complete a Record of Decision (ROD). The ROD will state the action that will be implemented and will discuss all factors leading to the decision.

ADDRESSES: Send requests for a compact disc or a bound copy of the Final EIS to Mr. Jack Collins, Bureau of Reclamation, 1243 N Street, Fresno, CA 93721.

Copies of the Final RMP/EIS are available at: *http://www.usbr.gov/mp/nepa/nepa_projdetails.cfm?Project_ID=792.* See the **SUPPLEMENTARY INFORMATION** section for locations where copies of the Final EIS are available.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Collins, Bureau of Reclamation, Monday through Friday, 7 a.m. to 1 p.m., at (559) 349–4544 (TDD (559) 487–5933) or *jwcollins@usbr.gov.*

SUPPLEMENTARY INFORMATION: Lake Casitas is an existing reservoir formed by Casitas Dam and located in Ventura County, California. The dam, which stores water for irrigation, municipal and industrial use within the Casitas Municipal Water District (CMWD), was completed in November 1958. Lake Casitas has a storage capacity of 254,000 acre-feet and delivers between 15,000 and 23,000 acre-feet each year. Reclamation, in cooperation with the CMWD, developed the Lake Casitas RMP to establish management objectives, guidelines, and actions for the Lake Casitas Recreation Area (Park) and the 3,500 acres of Open Space Lands north of the Park, which together comprise the Plan Area. The RMP will have a planning horizon of 25 years.

The new RMP would: (1) Ensure safe storage and timely delivery of high-quality water to users while enhancing natural resources and recreational opportunities; (2) protect natural resources while educating the public about the value of good stewardship; (3) provide recreational opportunities to meet the demands of a growing, diverse population; (4) ensure recreational diversity and the quality of the experience; and (5) provide the updated management considerations for establishing a new management agreement with the managing partner(s).

The Final EIS is a program-level analysis of the potential environmental impacts associated with adoption of the RMP. The Final EIS outlines the formulation and evaluation of alternatives designed to address these issues by representing the varied interests present at the Plan Area and identifies Alternative 2 (Enhancement) as the preferred Alternative. The RMP is intended to be predominantly self-mitigating through implementation of RMP management actions and strategies, and the EIS also includes measures intended to reduce the adverse effects of the RMP.

Copies of the Final EIS are available at the following locations:

- Bureau of Reclamation, Mid-Pacific Region, Regional Library, 2800 Cottage Way, Sacramento, CA 95825.
- Bureau of Reclamation, South-Central California Area Office, 1243 N Street, Fresno, CA 93721.
- Ojai Ranger District Station, 1190 East Ojai Avenue, Ojai, CA 93023.
- E.P. Foster Public Library, 651 Main Street, Ventura, CA 93001.
- Bureau of Reclamation, Denver Office Library, Building 67, Room 167, Denver Federal Center, 6th and Kipling, Denver, CO 80225.
- Natural Resources Library, U.S. Department of the Interior, 1849 C Street, NW., Main Interior Building, Washington, DC 20240–0001.

Before including your name, address, phone number, e-mail address, or other personal identifying information in any correspondence, you should be aware that your entire correspondence—including your personal identifying information—may be made publicly available at any time. While you can ask us in your correspondence to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: January 27, 2010.

Mike Chotkowski,

Acting Regional Director, Mid-Pacific Region.

[FR Doc. 2010–8725 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVS03000 L51010000.ER0000 LVRWF0900290 241A; 10–08807; MO#4500012626; TAS: 14X5017]

Notice of Availability of the Draft Environmental Impact Statement for the NextLight Renewable Power, LLC, Silver State Solar Project, Primm, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, (NEPA), the Bureau of Land Management (BLM) has prepared a Draft Environmental Impact Statement (EIS) for the Silver State Solar Project, Primm, Nevada, and by this Notice is announcing the opening of the comment period.

DATES: To ensure comments will be considered, the BLM must receive written comments on the Silver State Solar Project Draft EIS within 45 days

following the date the Environmental Protection Agency publishes its Notice of Availability of this Draft EIS in the **Federal Register.** The BLM will announce future meetings or hearings and any other public involvement activities at least 15 days in advance through public notices, local news media, and the BLM Web site at: *http://www.blm.gov/nv/st/en/fo/lvfo.html.*

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

- *Web site: http://www.blm.gov/nv/st/en/prog/energy/fast-track_renewable.html.*
- *E-mail: nextlight_primm_nv_sep@blm.gov.*
- *Mail:* Gregory Helseth, Renewable Energy Project Manager, BLM Pahrump Field Office, 4701 North Torrey Pines Drive, Las Vegas, Nevada 89130–2301.

Copies of the Draft EIS for the Silver State Solar Project are available in the Southern Nevada District Office at the above address.

FOR FURTHER INFORMATION CONTACT: Gregory Helseth, *phone:* 702–515–5173, *e-mail: Gregory_Helseth@blm.gov.*

SUPPLEMENTARY INFORMATION: NextLight Renewable Power, LLC applied to the BLM for a right-of-way on public lands to construct a solar photovoltaic (PV) plant facility approximately two miles southeast of Primm, Clark County, Nevada. The facility is expected to operate for approximately 50 years. The proposed project would produce 400 megawatts (MW) of renewable energy.

The solar field and infrastructure would consist of single-axis tracker systems or fixed panels, an underground and overhead electrical power collection system, two step-up transformers, 230 kilovolt (kV) and 220 kV transmission lines, an operation and maintenance area, a switchyard, paved access and maintenance roads, flood and drainage controls, and a fire break.

The Draft EIS describes and analyzes site-specific impacts of the proposed project on air quality; biological, cultural, water, soil, visual, paleontological, and geological resources; recreation; land use; noise; public health; socioeconomics; and traffic and transportation. The Draft EIS also addresses hazardous materials handling, waste management, worker safety, fire protection, facility design engineering, efficiency, reliability, transmission system engineering, transmission line safety, and nuisance.

The EIS analyzes three alternatives, including the no action alternative (Alternative 1) and two action alternatives. Alternative 2—the proposed action—would disturb up to 2,996 acres of land and would include the use of berms to reduce erosion. Alternative 3 would disturb up to 3,669 acres of land and would employ an alternate drainage and flood control design to control erosion. Both action alternatives would use solar PV technology, although the specific types of arrays and trackers have not been determined at this time. The Draft EIS describes the different types of solar arrays and trackers and their respective impacts.

Formal scoping for the project occurred from June 30, 2009 to July 31, 2009 (74 FR 31306). On September 17, 2009, the reopening of the comment period published with a new closing date of October 19, 2009 (74 FR 47820). A total of 33 comments were submitted during the scoping period. The comments identified concerns in a broad range of categories: surface water/storm runoff; off-highway vehicle access for recreation; federally-listed species and their habitat, including desert tortoise habitat and rare plants; alternatives for analysis.

Maps of the proposed project area and the alternatives being analyzed in the Draft EIS are available at the BLM Southern Nevada District Office.

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; therefore, personal identifying information such as addresses, phone numbers, and e-mail address, may be withheld.

Authority: 40 CFR 1506.6 and 1506.10.

Robert B. Ross, Jr.,

Las Vegas Field Manager.

[FR Doc. 2010–8627 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUT921000–09–5101–ER–J108; UTU–79766, NVN–82385]

Notice of Availability of the Final Environmental Impact Statement for the UNEV Refined Liquid Petroleum Products Pipeline in Utah and Nevada and the Proposed Amendment of the Pony Express Resource Management Plan

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, the Federal Land Policy and Management Act of 1976, and the Mineral Leasing Act of 1920, as amended, the Bureau of Land Management (BLM) has prepared a Proposed Resource Management Plan Amendment (RMPA)/Final Environmental Impact Statement (EIS) for the UNEV Refined Liquid Petroleum Products Pipeline and by this notice is announcing its availability.

DATES: BLM planning regulations at 43 CFR 1610.5–2 state that any person who meets the described conditions may protest the BLM's Proposed RMPA/Final EIS. Such protest must be filed within 30 days of the date that the Environmental Protection Agency publishes its notice of availability of this FEIS in the **Federal Register.**

ADDRESSES: Copies of the UNEV Refined Liquid Petroleum Products Pipeline and Pony Express Proposed RMPA/Final EIS have been sent to affected Federal, state, and local government agencies and to other stakeholders, including the Moapa Band of the Paiute Tribe, the Paiute Indian Tribe of Utah, the Uintah and Ouray Ute Indian Tribe, the Kaibab Paiute Indian Tribe, and other Native American Tribes that were consulted as part of this process. Copies of the Proposed RMPA/Final EIS are available for public inspection at the Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101; the Salt Lake Field Office, 2370 South 2300 West, Salt Lake City, Utah 84119; the Fillmore Field Office, 35 East 500 North, Fillmore, Utah 84631; the Cedar City Field Office, 176 East D.L. Sargent Drive, Cedar City, Utah 84721; the St. George Field Office, 345 East Riverside Drive, St. George, Utah 84790; the Nevada State Office, 1340 Financial Boulevard., Reno, Nevada 89502; the Ely District Office, 702 North Industrial Way, Ely, Nevada 89301; and the Las Vegas Field Office, 4701 North Torrey Pines Drive, Las Vegas, Nevada 89130. Interested persons may also review the Proposed RMPA/Final EIS at the following Web site: *http://www.blm.gov/ut/st/en/prog/more/lands_and_realty/major_projects/unev_pipeline_eis.html.* All protests must be in writing and mailed to one of the following addresses:

Regular mail	Overnight mail
BLM Director (210), *Attention:* Brenda Williams, P.O. Box 66538, Washington, DC 20035.	BLM Director (210), *Attention:* Brenda Williams, 1620 L Street, NW., Suite 1075, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: For further information contact Joe Incardine, National Project Manager, by telephone at (801) 524–3833; by mail at BLM Utah State Office, P.O. Box 45155, Salt Lake City, Utah 84145–0155; or by e-mail at *Joe_Incardine@blm.gov.*

SUPPLEMENTARY INFORMATION: The Proposed RMPA/Final EIS was prepared by the BLM in consultation with cooperating agencies, Tribes, and the public. UNEV is proposing to construct and operate a 400-mile long, 12-inch diameter refined liquid petroleum products pipeline that would originate in Woods Cross, Utah, with terminals northwest of Cedar City, Utah, and near Apex, Nevada. The southernmost 150 miles of the pipeline alignment would generally follow the existing Kern River pipeline corridor. Project elements would be located in Davis, Salt Lake, Tooele, Juab, Millard, Beaver, Iron, and Washington Counties in Utah; and Lincoln and Clark Counties in Nevada. The pipeline would also cross the Reservation of the Moapa Band of the Paiute Tribe in southern Nevada. Permanent facilities would include access roads to all above-ground structures (including valves, pipeline surface access points, and receiving equipment). Temporary facilities would include construction and equipment storage yards and extra workspace for pipe assembly.

The document proposes to amend the Pony Express Resource Management Plan so that it would be consistent with the grant of a right-of-way for a major pipeline. The proposed amendment would also establish a new utility corridor to accommodate a portion of the proposed pipeline right-of-way on lands administered by the BLM Salt Lake Field Office. The right-of-way would be 100-feet wide, 50 feet on either side of the centerline of the proposed pipeline. From Milepost 50 through the Tooele County-Juab County boundary, on BLM-administered lands only, the right-of-way would be within a newly established 3,960 feet wide (0.75 miles) corridor administered by the Salt Lake Field Office. The remainder of the right-of-way on BLM-administered lands would be consistent with the RMPs regulating activities on those lands so no other RMP amendments are needed. There are four Action Alternatives to the Proposed Action. These include the Airport, Tooele County, Rush Lake, and Millard County Alternatives. Each of these alternatives would essentially re-route a portion of the Proposed Action alignment to address various resource concerns or to respond to local issues that were raised during public scoping.

The Preferred Alternative remains the same as identified in the Draft RMPA/Draft EIS published on December 19, 2008. The Preferred Alternative as identified by the BLM incorporates each of the alternative alignments identified for the Airport, Tooele County, Rush Lake, and Millard County Alternatives into the Proposed Action alignment. Comments on the Draft RMPA/Draft EIS received from the public and internal BLM review were considered and incorporated, as appropriate, into the Proposed RMPA/Final EIS. Public comments resulted in the addition of clarifying text, but did not significantly change proposed land use plan decisions.

Instructions for filing a protest with the Director of the BLM regarding the Proposed RMPA/Final EIS may be found in the "Dear Reader Letter" of the UNEV Liquid Petroleum Products Pipeline and Pony Express Proposed RMPA/Final EIS and at 43 CFR 1610.5–2. E-mail and faxed protests will not be accepted as valid protests unless the protesting party also provides the original letter by either regular or overnight mail postmarked by the close of the protest period. Under these conditions, the BLM will consider the e-mail or faxed protest as an advance copy and it will receive full consideration. If you wish to provide the BLM with such advance notification, please direct faxed protests to the attention of the BLM protest coordinator at (202) 912–7212, and e-mails to *Brenda_Hudgens-Williams@blm.gov.*

All protests, including the follow-up letter to e-mails or faxes, must be in writing and mailed to the appropriate address, as set forth in the **ADDRESSES** section above.

Before including your phone number, e-mail address, or other personal identifying information in your protest, you should be aware that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us in your protest to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6, 1506.10, 43 CFR 1610.2, and 1610.5–2.

Selma Sierra,

Utah State Director.

[FR Doc. 2010–8625 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CACA48668, 49501, 49502, 49503, LLCAD09000. L51010000. ER0000, LVRWB09B2400]

Notice of Availability of the Supplemental Draft Environmental Impact Statement for the Proposed Ivanpah Solar Electric Generation System Project, San Bernardino County, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, the Bureau of Land Management (BLM) has prepared a Supplemental Draft Environmental Impact Statement (EIS) for the Proposed Ivanpah Solar Electric Generation System (ISEGS) Project and by this notice is announcing the opening of the comment period.

DATES: To ensure that comments will be considered, the BLM must receive written comments on the Supplemental Draft EIS within 45 days following the date the Environmental Protection Agency publishes its Notice of Availability of this Supplemental Draft EIS in the **Federal Register.** The BLM will announce future meetings or hearings and any other public involvement activities at least 15 days in advance through public notices, media releases, and/or mailings.

ADDRESSES: You may submit comments on issues related to the ISEGS Supplemental Draft EIS by any of the following methods:

- *E-mail: ca690@ca.blm.gov* Attn: ISEGS.
- *Fax:* (760) 326–7099 Attn: George Meckfessel, or
- *Mail:* George Meckfessel, Planning and Environmental Coordinator, Bureau of Land Management, Needles Field

Office, 1303 South Highway 95, Needles, California 92363.

Documents pertinent to this proposal may be examined at the Needles Field Office at the above address.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact Tom Hurshman, Project Manager, telephone: (970) 240–5345; address: Bureau of Land Management, 2465 South Townsend Avenue, Montrose, Colorado 81401; e-mail: *ca690@ca.blm.gov* Attn: Ivanpah SEGS.

SUPPLEMENTARY INFORMATION: Bright Source Energy has applied for a right-of-way grant on public land to develop a 400-megawatt solar thermal power plant on approximately 4,073 acres of public land 4.5 miles south of Primm, Nevada in San Bernardino County, California. The BLM published a Notice of Availability of the Draft Ivanpah Solar Electric Generation System EIS and the Draft California Desert Conservation Area Plan Amendment in the **Federal Register** on November 10, 2009 (74 FR 58043). The Draft EIS was available for a 90-day public comment period which closed on February 11, 2010. This Supplemental Draft EIS analyzes two additional alternatives: (1) Reducing the footprint of the ISEGS in order to reduce impacts to sensitive plant and animal species; and (2) relocating a portion of the ISEGS closer to the Interstate 15 corridor. The Supplemental Draft EIS also clarifies the BLM's purpose and need for the project. The Supplemental Draft EIS does not address comments received on the Draft EIS other than those relevant to the above listed elements of the Supplemental Draft EIS. Comments on the Draft EIS that refer to issues other than the two alternatives listed above will be addressed in the ISEGS Final EIS. The Supplemental Draft EIS does not propose any changes to the proposed plan amendment to the California Desert Conservation Area Plan as outlined in the ISEGS Draft EIS.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment —including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6 and1506.10 and 43 CFR 1610.2.

Thomas Pogacnik,

Deputy State Director.

[FR Doc. 2010–8780 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMT926000–10–L19100000–BJ0000–LRCM08RS4651]

Notice of Filing of Plats of Survey; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of plats of survey.

SUMMARY: The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM Montana State Office, Billings, Montana, thirty (30) days from the date of publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Randy Thomas, Cadastral Surveyor, Branch of Cadastral Survey, Bureau of Land Management, 5001 Southgate Drive, Billings, Montana 59101–4669, telephone (406) 896–5134 or (406) 896–5009.

SUPPLEMENTARY INFORMATION: This survey was executed at the request of the Superintendent, Fort Peck Agency, through the Rocky Mountain Regional Director, Bureau of Indian Affairs, and was necessary to determine boundaries of trust or tribal interest lands.

The lands we surveyed are:

Principal Meridian, Montana

T. 27 N., R. 42 E.

The plat, in 1 sheet(s), representing the corrective dependent resurvey of a portion of the south boundary, the dependent resurvey of a portion of the subdivisional lines, a portion of the subdivision of section 35, and the adjusted original meanders of the former left bank of the Missouri River, downstream, through section 35, the subdivision of section 35, and the survey of the meanders of the present left bank of the Missouri River, downstream, through section 35, Township 27 North, Range 42 East, Principal Meridian, Montana, was accepted April 6, 2010.

We will place a copy of the plat, in 1 sheet(s), and related field notes we described in the open files. They will be available to the public as a matter of information. If the BLM receives a protest against this survey, as shown on this plat, in 1 sheet(s), prior to the date of the official filing, we will stay the filing pending our consideration of the protest. We will not officially file this plat, in 1 sheet(s), until the day after we have accepted or dismissed all protests and they have become final, including decisions or appeals.

Authority: 43 U.S.C. Chap. 3.

Dated: April 8, 2010.

Michael T. Birtles,

Chief Cadastral Surveyor, Division of Resources.

[FR Doc. 2010–8730 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMT926000–10–L19100000–BJ0000–LRCM08RS4047]

Notice of Filing of Plats of Survey; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of plats of survey.

SUMMARY: The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM Montana State Office, Billings, Montana, thirty (30) days from the date of publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Steve Toth, Cadastral Surveyor, Branch of Cadastral Survey, Bureau of Land Management, 5001 Southgate Drive, Billings, Montana 59101–4669, telephone (406) 896–5121 or (406) 896–5009.

SUPPLEMENTARY INFORMATION: This survey was executed at the request of the Superintendent, Fort Peck Agency, through the Rocky Mountain Regional Director, Bureau of Indian Affairs, and was necessary to determine boundaries of trust or tribal interest lands.

The lands we surveyed are:

Principal Meridian, Montana

T. 27 N., R. 52 E.

The plat, in 1 sheet, representing the dependent resurvey of a portion of the west boundary, a portion of the subdivisional lines, the adjusted original meanders of the former left bank of the Missouri River, downstream, through sections 19 and 30, and a portion of the subdivision of sections 19 and 30, and the survey of the meanders of the present left bank of the Missouri River, downstream, through section 19 and portion of section 30, Township 27 North, Range 52 East, Principal Meridian, Montana, was accepted March 29, 2010.

We will place a copy of the plat, in 1 sheet, and related field notes we described in the open files. They will be available to the public as a matter of information. If the BLM receives a

protest against this survey, as shown on this plat, in 1 sheet, prior to the date of the official filing, we will stay the filing pending our consideration of the protest. We will not officially file this plat, in 1 sheet, until the day after we have accepted or dismissed all protests and they have become final, including decisions or appeals.

Authority: 43 U.S.C. Chap. 3.

Dated: April 9, 2010.

Michael T. Birtles,

Chief Cadastral Surveyor, Division of Resources.

[FR Doc. 2010–8727 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2010–N046; 80221–1112–0000–F2]

Green Diamond Resource Company, California Timberlands Division, Forest Management Habitat Conservation Plan and Incidental Take Permit, Del Norte and Humboldt Counties, California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent to conduct public scoping and prepare an environmental impact statement.

SUMMARY: We, the U.S. Fish and Wildlife Service (USFWS), intend to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) regarding an expected application from the Green Diamond Resource Company, California Timberlands Division (Green Diamond), for an incidental take permit (ITP, or permit) authorizing incidental take of federally threatened wildlife species under the Endangered Species Act of 1973, as amended (ESA). Green Diamond is preparing a Habitat Conservation Plan (HCP) and application for an ITP related to forest management and timber operations on its lands in Del Norte and Humboldt Counties, California. The HCP and ITP will cover the northern spotted owl (*Strix occidentalis caurina*) (NSO or spotted owl) and may also cover the Pacific fisher (*Martes pennanti*) (fisher), a currently unlisted species which has the potential to become listed during the term of the HCP. We are furnishing this notice to announce the initiation of a public scoping period during which we invite other agencies, Tribes, and the public to submit written comments providing suggestions and information on the scope of issues and alternatives to be addressed in the EIS.

DATES: Please send written comments on or before May 17, 2010.

ADDRESSES: Please send written comments to Mr. Randy Brown, Acting Field Supervisor, U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office, 1655 Heindon Road, Arcata, CA 95521. You may also submit comments by e-mail to *fw8_greendiamondeis@fws.gov* or by fax to (707) 822–8411. Comments we receive will be available for public inspection, by appointment, during normal business hours (Monday through Friday, 8 a.m. to 4:30 p.m.) at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. Ray Bosch, Fish and Wildlife Biologist, at the Arcata Fish and Wildlife Office address above; by telephone at (707) 822–7201 or fax at (707) 822–8411; or by e-mail at *ray_bosch@fws.gov.*

SUPPLEMENTARY INFORMATION:

Statutory Authority

In accordance with section 10(a)(2)(A) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), Green Diamond is preparing a HCP in support of an application for a permit from the USFWS to incidentally take the northern spotted owl and, potentially, the Pacific fisher. Section 9 of the ESA (16 U.S.C. 1538) and the implementing regulations prohibit the take of animal species listed as endangered or threatened. The term "take" is defined under the ESA (16 U.S.C. 1532) as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. "Harm" is defined by Service regulation (50 CFR 17.3) to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, and sheltering. For certain circumstances, under Section 10(a)(1)(B) of the ESA we may issue permits to authorize "incidental take" of listed species. "Incidental take" is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Regulations governing permits for threatened and endangered species are found in the Code of Federal Regulations at 50 CFR 17.32 and 50 CFR 17.22, respectively. If the permit is issued, Green Diamond would receive assurances for all species included on the incidental take permit under the USFWS "No Surprises" regulation (50 CFR 17.22(b)(5) and 17.32 (b)(5)).

Section 10 of the ESA specifies the requirements for the issuance of incidental take permits to non-Federal entities. Any proposed take must be incidental to otherwise lawful activities and cannot appreciably reduce the likelihood of the survival and recovery of the species in the wild. The impacts of such take must also be minimized and mitigated to the maximum extent practicable. To obtain an incidental take permit, an applicant must prepare a HCP describing the impact that will likely result from the proposed taking, the measures for minimizing and mitigating the take, the funding available to implement such measures, alternatives to the taking, and the reason why such alternatives are not being implemented.

NEPA (42 U.S.C. 4321 *et seq.*) requires that Federal agencies conduct an environmental analysis of their proposed actions to determine if the actions may significantly affect the human environment. Under NEPA, our proposed action is the authorization of incidental take through issuance of an ITP conditioned on our approval of Green Diamond's HCP. We will develop and evaluate a reasonable range of alternatives to the proposed action in our environmental review. Alternatives considered for analysis in an environmental document may include variations in the scope of covered activities; variations in the location, amount, and type of conservation; variations in permit duration; or a combination of these elements. In addition, the environmental document will identify potentially significant direct, indirect, and cumulative impacts on biological resources, land use, air quality, water quality, water resources, socioeconomics, and other environmental issues that could occur with the implementation of the proposed action and alternatives. For potentially significant impacts, the environmental document may identify avoidance, minimization, and mitigation measures to reduce these impacts, where feasible, to a level below significance.

Background

Green Diamond (formerly Simpson Timber Company) owns more than 400,000 acres in Del Norte, Humboldt, and Trinity Counties, California, which are managed as commercial timberland. Green Diamond's property includes habitat in landscapes important to the conservation of forest and aquatic wildlife species in the North Coast region of California. Some of Green Diamond's management activities have the potential to impact wildlife species protected by the ESA. Green Diamond is preparing a 50-year HCP that is

intended to provide for management of approximately 406,783 acres of its California properties in Del Norte and Humboldt Counties in a manner that will minimize and mitigate the impacts of take of certain wildlife species currently listed under the ESA or which may be listed during the life of the Plan. Once completed, we expect that Green Diamond will submit the HCP to us as part of an application for an ITP.

Green Diamond is currently implementing two HCPs and associated incidental take permits on its northern California lands, one covering the northern spotted owl (issued in 1992) and the other covering aquatic species (issued in 2007).

We issued a 30-year NSO ITP in September 1992, authorizing the incidental take of up to 50 spotted owl pairs. As required by the NSO HCP, Green Diamond and the USFWS conducted a comprehensive review of the first 10 years of implementation, including a comparison of actual and estimated levels of owl displacement, a comparison of estimated and actual distribution of habitat, a re-evaluation of the biological basis for the HCP's conservation strategy, an examination of the efficacy of and continued need for habitat set-asides, and an estimate of future owl displacements. During the comprehensive review, Green Diamond requested an amendment to the 1992 ITP to allow incidental take of up to eight additional spotted owl pairs, to provide operational flexibility while we and Green Diamond evaluated the findings of the comprehensive review. In October 2007 we published a Final Environmental Assessment and approved an amendment to the 1992 ITP authorizing incidental take of eight additional spotted owl pairs.

In 2007, we issued an enhancement of survival permit (ESP), and the National Marine Fisheries Service (NMFS) issued a separate ITP to Green Diamond, based on a federally approved Aquatic HCP designed to address listed and unlisted fish and amphibian species. That Aquatic HCP and ITP/ESP establish standards for management and maintenance of streamside protection and geologic hazard zones with limited timber harvest entry, along with other aquatic species conservation measures.

In the near future, Green Diamond intends to submit a new proposed HCP addressing the northern spotted owl, and perhaps also the fisher. This new HCP, which would replace the 1992 HCP and ITP, will be based upon the results of the NSO HCP comprehensive review, and the results of extensive NSO and other monitoring and research conducted by Green Diamond, the USFWS, and other entities. During the nearly 18 years of implementation of the 1992 HCP, Green Diamond conducted extensive monitoring and research on spotted owls, fishers, and other species. In addition, the recently implemented Aquatic HCP includes provisions for streamside management and geologic hazard zones that Green Diamond anticipates will provide benefits to spotted owls, fishers, and other terrestrial species. The new HCP will seek to integrate terrestrial species conservation measures with compatible elements of the Aquatic HCP, including the associated establishment and management of streamside protection and geological hazard zones, and incorporate updated information on spotted owls and fishers, to more effectively conserve those species and their habitats.

Proposed Plan

The proposed new HCP will likely cover the following activities, which could result in incidental take of the covered species: Mechanized timber harvest; forest product transportation; construction, use, maintenance and abandonment of roads and landings; site preparation; tree planting; certain types of vegetation management; fertilizer application; forest thinning; fire suppression; rock quarries and borrow pit operations; gravel extraction; other forest management and silvicultural activities typical of commercial timberland operation in northwestern California; and implementation of take avoidance, minimization, mitigation, and conservation measures, including habitat management, deadwood management, species monitoring, and species research projects.

As required by the ESA, the proposed new HCP must specify the measures Green Diamond will take to minimize and mitigate the impacts of the proposed incidental take to the maximum extent practicable. We anticipate that the proposed new HCP will address some or all of the following:

(1) Retention of suitable nesting habitat associated with all or some portion of active spotted owl sites well distributed throughout Green Diamond's ownership;

(2) Specific habitat management measures, including retention and recruitment of late seral habitat elements;

(3) The use of dynamic core areas of spotted owl habitat in lieu of and/or in conjunction with the retention of some or all currently existing static set-asides identified in the 1992 NSO HCP;

(4) Conditions under which currently retained owl sites may be released for harvest following future establishment of spotted owl nest sites in maturing streamside retention zones established and managed pursuant to the Aquatic HCP;

(5) Distribution of owl retention sites across the Green Diamond landscape in a clustering pattern, rather than a random or uniform pattern, based upon documented conservation principles for the species;

(6) Appropriate forest age class distribution constituting suitable spotted owl and fisher habitat in the redwood (*Sequoia sempervirens*) region;

(7) Stand-specific habitat elements to be retained or managed during harvest to promote future habitat suitability for the covered species;

(8) Studies of barred owl and spotted owl interactions and, if warranted, authorization for implementation of a barred owl management plan;

(9) Current requirements imposed on Green Diamond as mandated by other applicable Federal and State laws; and

(10) An effectiveness monitoring program, which will include ongoing spotted owl and fisher studies to validate and/or revise habitat models.

Environmental Review of This Proposal

Prior to issuing a new ITP, we will prepare a draft Environmental Impact Statement (EIS) to analyze the environmental impacts associated with the potential issuance of the requested ITP and the implementation of the HCP by Green Diamond. The EIS will be prepared in accordance with the requirements of NEPA and its implementing regulations (40 CFR parts 1500 through 1508), and in accordance with other applicable Federal laws and regulations and USFWS policies and procedures for compliance with those regulations. We anticipate that the draft EIS will be available for public review by Fall/Winter 2010.

The EIS will analyze the environmental impacts of the proposed action (permit issuance) and of a reasonable range of alternatives. We are currently in the process of developing alternatives for analysis. In connection with developing the alternatives, we will consider, for example, modified lists of covered species, modified permit coverage areas (i.e., portions of the landscape subject to permit coverage), modified permit terms, and different resource management strategies that would serve the purpose of minimizing and mitigating the impacts of incidental take.

Based on our consideration of these factors to date, we anticipate the

alternatives to the proposed Plan may include the following: (1) A "no action" alternative in which the requested ITP would not be issued and the conservation measures in the proposed new HCP would not be implemented; (2) an alternative that would focus on northern spotted owls and that would not include deadwood management and other habitat management efforts intended primarily to provide conservation benefits to the fisher; (3) an alternative that would include other species as covered species, with appropriate habitat management for them; (4) an alternative that would not include measures to manage barred owls; and (5) an alternative that would not utilize dynamic core areas but would instead maintain the static set-aside approach from the 1992 NSO HCP/ITP.

We invite comments and suggestions from all interested parties to ensure consideration of a full range of reasonable alternatives related to development of the EIS, and that all significant issues are identified. We request that comments be as specific as possible, and that comments include information and concerns regarding the following issues:

(1) The direct, indirect, and cumulative effects that implementation of any reasonable alternatives could have on endangered and threatened species and their habitats;

(2) Other reasonable alternatives consistent with the purpose of the proposed new HCP as described above, and their associated effects;

(3) Measures that would minimize and mitigate potentially adverse effects of the proposed action;

(4) Baseline environmental conditions in and adjacent to the covered lands;

(5) Adaptive management or monitoring provisions that may be incorporated into the alternatives, and their benefits to listed species;

(6) Other plans or projects that might be relevant to this action; and

(7) Any other information pertinent to evaluating the effects of the proposed action on the human environment.

The EIS will analyze and document the effects that the considered alternatives would have on spotted owls, fishers, and any other species, as well as other components of the human environment, including but not limited to cultural resources, social resources (including public safety), economic resources, water and air quality, global climate change, and environmental justice.

Please direct any comments to the USFWS contact listed above in the **ADDRESSES** section, and any questions to the USFWS contact listed in the **FOR FURTHER INFORMATION CONTACT** section. All comments and materials received, including names and addresses, will become part of the administrative record and may be released to the public. 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. This notice is provided under section 10(a) of the ESA and USFWS regulations for implementing NEPA (40 CFR 1506.6).

Michael Fris,

Acting Deputy Regional Director, Pacific Southwest Region, Sacramento, California.

[FR Doc. 2010–8763 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Meeting for the Denali National Park and Preserve Aircraft Overflights Advisory Council Within the Alaska Region

AGENCY: National Park Service, Interior.

ACTION: Notice of meeting for the Denali National Park and Preserve Aircraft Overflights Advisory Council within the Alaska Region.

SUMMARY: The National Park Service (NPS) announces a meeting of the Denali National Park and Preserve Aircraft Overflights Advisory Council. The purpose of this meeting is to discuss mitigation of impacts from aircraft overflights at Denali National Park and Preserve. The Aircraft Overflights Advisory Council is authorized to operate in accordance with the provisions of the Federal Advisory Committee Act.

Public Availability of Comments: These meetings are open to the public and will have time allocated for public testimony. The public is welcome to present written or oral comments to the Aircraft Overflights Advisory Council. Each meeting will be recorded and meeting minutes will be available upon request from the park superintendent for public inspection approximately six weeks after each meeting. Before including your address, telephone 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.

DATES: The Denali National Park and Preserve Aircraft Overflights Advisory Council meeting will be held on Thursday, May 6, 2010, from 9 a.m. to 5 p.m., Alaska Standard Time. The meeting may end early if all business is completed.

Location: Talkeetna Alaskan Lodge, Mile 13.5 Talkeetna Spur Road, Talkeetna, AK 99676. *Telephone:* (907) 733–9500.

FOR FURTHER INFORMATION CONTACT: Miriam Valentine, Denali Planning. *E-mail: Miriam_Valentine@nps.gov. Telephone:* (907) 733–9102 at Denali National Park, Talkeetna Ranger Station, PO Box 588, Talkeetna, AK 99676. For accessibility requirements please call Miriam Valentine at (907) 733–9102.

SUPPLEMENTARY INFORMATION: Meeting location and dates may need to be changed based on weather or local circumstances. If the meeting dates and location are changed, notice of the new meeting will be announced on local radio stations and published in local newspapers.

The agenda for the meeting will include the following, subject to minor adjustments:

1. Call to order.
2. Roll Call and Confirmation of Quorum.
3. Chair's Welcome and Introductions.
4. Review and Approve Agenda.
5. Member Reports.
6. Agency and Public Comments.
7. Superintendent and NPS Staff Reports.
8. Agency and Public Comments.
9. Other New Business.
10. Agency and Public Comments.
11. Set time and place of next Advisory Council meeting.
12. Adjournment.

Dated: March 30, 2010.

Sue E. Masica,

Regional Director, Alaska.

[FR Doc. 2010–8544 Filed 4–15–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–ES–2010–N077; 30120–1113–0000–F6]

Endangered and Threatened Wildlife and Plants; Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of permit applications; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (Act) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. The Act requires that we invite public comment before issuing these permits.

DATES: We must receive any written comments on or before May 17, 2010.

ADDRESSES: Send written comments by U.S. mail to the Regional Director, Attn: Peter Fasbender, U.S. Fish and Wildlife Service, Ecological Services, 1 Federal Drive, Fort Snelling, MN 55111–4056; or by electronic mail to *permitsR3ES@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Peter Fasbender, (612) 713–5343.

SUPPLEMENTARY INFORMATION:

Background

We invite public comment on the following permit applications for certain activities with endangered species authorized by section 10(a)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*) and our regulations governing the taking of endangered species in the Code of Federal Regulations (CFR) at 50 CFR part 17. Submit your written data, comments, or request for a copy of the complete application to the address shown in **ADDRESSES**.

Permit Applications

Permit Application Number: TE06778A.
Applicant: U.S. Forest Service, Shawnee National Forest, Rod McClanahan, P.I., Vienna, Illinois.

The applicant requests a permit renewal/amendment to take (capture and release) Indiana bats (*Myotis sodalis*) and gray bats (*Myotis grisescens*) in the States of Indiana, Ohio, Illinois, and Missouri to document presence/absence and distribution of the species and to conduct habitat use assessments. Proposed activities involve capture, radio-tracking, and non-lethal tissue sampling for scientific research aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE06795A.
Applicant: Field Museum of Natural History, Chicago, Illinois.

The applicant requests a permit renewal to salvage dead threatened and endangered species for scientific museum collections and public education/display. Salvage activities are proposed in Florida, Illinois, Indiana, Minnesota, and Wisconsin, in accordance with State regulations. Activities are proposed in the interest of conservation and recovery of the species through scientific study.

Permit Application Number: TE06797A.
Applicant: Rod D. McClanahan, Anna, Illinois.

The applicant requests a permit renewal to take (capture and release) Indiana bats, gray bats, Virginia big-eared bats (*Corynorhinus townsendii virginianus*), Ozark big-eared bat (*Corynorhinus townsendii ingens*), and Northern flying squirrel (*Glaucomys sabrinus)* throughout Alabama, Arkansas, Georgia, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina,Vermont, Virginia, West Virginia, and Wisconsin. Proposed activities are to document presence/absence and distribution of the species and to conduct habitat use assessments. Activities involve capture, radio-tracking, tagging and non-lethal tissue sampling for scientific research aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE06800A.
Applicant: Land Conservancy of West Michigan, Grand Rapids, Michigan.

The applicant requests a permit to take Karner blue butterflies (*Lycaeides melissa samuelis*) within the Maas Preserve, Kent County, Michigan. Proposed activities include presence/absence survey work and habitat management and restoration to increase habitat suitability for the butterfly. Proposed activities are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE809227.
Applicant: BHE Environmental, Inc., Cincinnati, Ohio.

The applicant requests a permit amendment to their permit related to authorized activities with Topeka shiner (*Notropis topeka*). The proposed amendment would authorize the applicant to temporarily relocate endangered Topeka shiners to protect them from impacts due to in-stream projects such as pipeline crossings. Proposed activities are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE06801A.
Applicant: Pittsburgh Wildlife & Environmental, Inc., McDonald, Pennsylvania.

The applicant requests a permit to take (capture and release; radio-track) Indiana bats and gray bats throughout the range of the species. Proposed activities include presence/absence surveys, hibernacula surveys, and radio-telemetry work to document habitat use. Proposed activities are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE06809A.
Applicant: U.S. Forest Service, Northern Research Station, Columbia, Missouri.

The applicant requests a permit renewal to take (capture and release) Indiana bats, gray bats, and Ozark big-eared bats throughout the State of Missouri. Proposed activities include presence/absence surveys, radio-telemetry, tagging using passive integrated transponders, and collection of blood/tissue samples for scientific analysis. Proposed activities are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE06720A.
Applicant: Russell A. Benedict, Pella, Iowa.

The applicant requests a permit renewal to take (capture and release) Indiana bats and gray bats throughout the States of Iowa, Illinois, and Missouri. Proposed activities include presence/absence surveys and radio-telemetry to document habitat use and inform project planning. Proposed activities are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE06822A.
Applicant: Upper Peninsula Land Conservancy, Marquette, Michigan.

The applicant requests a permit renewal to take (harass) Piping Plover (*Charadrius melodus*) within the Upper Peninsula, State of Michigan. Proposed activities include installing protective exclosures to preclude predation, nest monitoring, and salvage of abandoned chicks and/or eggs. Proposed activities are for the enhancement of survival of the species in the wild.

Permit Application Number: TE06841A.
Applicant: U.S. Fish and Wildlife Service, Ecological Services Field Office, (Dr. Mary Knapp), Columbus, Ohio.

The applicant requests a permit renewal to take (handle and release) American burying beetles (*Nicrophorus americanus*) within Muskingum County, Ohio, under a cooperative agreement with The Wilds, New Cumberland, Ohio. Beetles have been raised in captivity at authorized propagation facilities. Proposed activities include the handling, release, and follow-up surveys to determine the success of the release. Activities are proposed in the interest of species recovery and enhancement of survival of the species in the wild.

Permit Application Number: TE06843A.
Applicant: Andrew B. Kniowski, Columbus, Ohio.

The applicant requests a permit to take (capture and release; radio-track) Indiana bats throughout the range of the species in Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. Proposed activities are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE06844A.
Applicant: U.S. Environmental Protection Agency, Region 7, Kansas City, Kansas.

The applicant requests a permit renewal to take (capture and release; salvage) the following unionid species: Curtis' pearlymussel (*Epioblasma florentina curtisi*), Pink mucket pearlymussel (*Lampsilis orbiculata*), Fat pocketbook (*Potamilus capax*), Scaleshell (*Leptodea leptodon*), Higgins' eye pearlymussel (*Lampsilis higginsi*), and Winged mapleleaf (*Quadrula fragosa*) in the State of Missouri. Proposed activities are for the enhancement of survival of the species in the wild.

Permit Application Number: TE06845A.
Applicant: Bernardin, Lochmueller, & Associates, Inc., Evansville, Indiana.

The applicant requests a permit renewal/amendment to take (capture and release) Indiana bats and gray bats throughout the State of Indiana to document presence/absence of the species and to conduct habitat use assessments. Proposed activities are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE06846A.
Applicant: Smithsonian Migratory Bird Center, Washington, DC.

The applicant requests a permit renewal to take (harass through capture and release, banding, collection of blood/tissue samples, and nest monitoring) Kirtland's warbler (*Dendroica kirtlandii*) throughout the State of Michigan. Proposed activities are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE07358A.
Applicant: Civil & Environmental Consultants, Inc., Columbus, Ohio.

The applicant requests a permit renewal/amendment to take (capture and release; radio-track) Indiana bats and gray bats throughout the range of the species in Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. Proposed activities are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE07361A.
Applicant: Nicholas L. Owens, Chicago, Illinois.

The applicant requests a permit renewal to take (capture and release; capture and relocate) the following unionid species: Fanshell (*Cyprogenia stegaria*), Pink mucket pearlymussel, Higgins' eye pearlymussel, Orangefoot pimpleback pearlymussel (*Plethobasus cooperianus*), Clubshell (*Pleurobema clava*), Fat pocketbook, Rough pigtoe (*Pleurobema plenum*), and Northern riffleshell (*Epioblasma torulosa rangiana*) in the States of Illinois, Indiana, and Iowa. Proposed activities are for the enhancement of survival of the species in the wild.

Permit Application Number: TE07730A.
Applicant: Redwing Ecological Services, Inc., Louisville, Kentucky.

The applicant requests a permit to take (capture, handle and release) the following species of mussels and fish: Cumberland Elktoe (*Alasmidonta atropurpurea*), Fanshell, Dromedary pearlymussel (*Dromus dromas*), Cumberlandian combshell (*Epioblasma brevidens*), Oyster Mussel (*E. capsaeformis*), Tan riffleshell (*E. florentina walkeri*), Catspaw (*E. obliquata obliquata*), White catspaw (*E. obliquata perobliqua*), Northern riffleshell, Tubercled Blossom (*E. torulosa torulosa*), Cracking pearlymussel (*Hemistena lata*), Pink mucket pearlymussel, Higgins' Eye pearlymussel, Scaleshell, Ring Pink (*Obovaria retusa*), Littlewing pearlymussel (*Pegias fabula*), White wartyback (*Plethobasus cicatricosus*), Orangefoot pimpleback, Clubshell, Rough pigtoe, Fat Pocketbook, Winged Mapleleaf, Cumberland Bean (*Villosa trabalis*), Palezone shiner (*Notropis albizonatus*), and Blackside dace (*Phoxinus cumberlandensis*). Proposed activities are requested within aquatic habitats in the States of Kentucky, Illinois, Indiana, Missouri, Iowa, Ohio, Wisconsin, Minnesota, Tennessee, Pennsylvania, and West Virginia. Proposed activities are to assess potential impacts to listed species and are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE08602A.
Applicant: University of Wisconsin, Stevens Point, Wisconsin.

The applicant requests a permit to take (harass) Karner blue butterflies within the State of Wisconsin for scientific research. Proposed activities may disturb adult and larval butterflies through presence of researchers observing and studying the relationship between larvae and ants. Proposed activities are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE08603A.
Applicant: Michelle Malcosky, Hudson, Ohio.

The applicant requests a permit to take (capture and release; radio-track) Indiana bats (*Myotis sodalis*) throughout the States of Illinois, Indiana, Kentucky, Michigan, Ohio, Pennsylvania, and West Virginia to document presence/absence of the species and to conduct habitat use assessments. Proposed activities are aimed at enhancement of survival of the species in the wild.

Permit Application Number: TE08604A.
Applicant: Stanley D. Gehrt, Columbus, Ohio.

The applicant requests a permit to take (capture and release; radio-track) Indiana bats throughout Ohio to document presence/absence of the species and to conduct habitat use assessments. Proposed activities are aimed at enhancement of survival of the species in the wild.

Public Comments

We seek public review and comments on these permit applications. Please refer to the permit number when you submit comments. Comments and materials we receive are available for public inspection, by appointment, during normal business hours at the address shown in the **ADDRESSES** section. 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.

National Environmental Policy Act (NEPA)

In compliance with NEPA (42 U.S.C. 4321 *et seq.*), we have made an initial determination that the proposed activities in these permits are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement (516 DM 6 Appendix 1, 1.4C(1)).

Dated: April 9, 2010.

Lynn M. Lewis,

Assistant Regional Director, Ecological Services, Region 3.

[FR Doc. 2010–8724 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUT920000–L13100000–FI0000–25–7A]

Notice of Proposed Class II Reinstatement of Oil and Gas Lease, Utah, UTU–79113

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Proposed Reinstatement of Oil and Gas Lease.

SUMMARY: In accordance with Title IV of the Federal Oil and Gas Royalty Management Act, Marion Energy Inc. timely filed a petition for reinstatement of oil and gas lease UTU–79113, for lands in Carbon County, Utah. The petition was accompanied by all required rentals and royalties accruing from September 1, 2009, the date of termination.

FOR FURTHER INFORMATION CONTACT: Roger L. Bankert, Chief, Branch of Minerals, Utah State Office, Bureau of Land Management, 440 West 200 South, Salt Lake City, Utah, 84145; phone (801) 539–4037.

SUPPLEMENTARY INFORMATION: The lessee has agreed to new lease terms for rentals and royalties at rates of $5 per acre and 16–2/3 percent, respectively. The $500 administrative fee for the lease has been paid and the lessee has reimbursed the Bureau of Land Management (BLM) for the cost of publishing this notice.

Having met all the requirements for reinstatement of the lease, as set out in Section 31 (d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), the BLM is proposing to reinstate the lease, effective September 1, 2009, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Jeff Rawson,

Associate State Director.

[FR Doc. 2010–8779 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCO922000–L13100000–FI0000; COC72479]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease COC72479

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement of oil and gas lease COC72479 from Transcontinent Oil Company, for lands in Jackson County, Colorado. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: BLM, Milada Krasilinec, Land Law Examiner, Branch of Fluid Minerals Adjudication, at (303) 239–3767.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10 per acre or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in section 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease COC72479 effective November 1, 2009, under the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Stuart Cox,

Acting State Director.

[FR Doc. 2010–8777 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW175745]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(2), the Bureau of Land Management (BLM) received a petition for reinstatement from Golden Energy Partners LLC for competitive oil and gas lease WYW175745 for land in Sweetwater County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Julie L. Weaver, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10 per acre or fraction thereof, per year and 16-2/3 percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease WYW175745 effective August 1, 2009, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. The BLM has not issued a valid lease affecting the lands.

Julie L. Weaver,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. 2010–8621 Filed 4–15–10; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR–936000–L14300000–ET0000; HAG–09–0126; WAOR–42920]

Public Land Order No. 7739; Extension of Public Land Order No. 6776; Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order extends the withdrawal created by Public Land Order No. 6776 for an additional 20-year period. This extension is necessary to continue protection of the North Cascades Scenic Highway Zone in Chelan, Okanogan, Skagit, and Whatcom Counties, Washington which would otherwise expire on April 17, 2010.

DATES: *Effective Date:* April 18, 2010.

FOR FURTHER INFORMATION CONTACT: Gregory B. Graham, U.S. Forest Service Okanogan-Wenatchee National Forest, 215 Melody Lane, Wenatchee, Washington 98801, (509) 664–9262, or Charles R. Roy, Bureau of Land Management Oregon/Washington State Office, P.O. Box 2965, Portland, Oregon 97208, (503) 808–6189.

SUPPLEMENTARY INFORMATION: The purpose for which the withdrawal was first made requires this extension to continue protection of the unique natural, scenic, and recreational values and the investment of Federal funds along the North Cascades Scenic Highway Zone within the Mt. Baker, Okanogan, and Wenatchee National Forest. The United States Forest Service will continue to manage the lands to protect these values.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714, it is ordered as follows:

1. Public Land Order No. 6776 (55 FR 14422, (1990)) that withdrew 8,950 acres of National Forest System lands from location or entry under the United States mining laws (30 U.S.C. ch. 2) on behalf of the Forest Service to protect the North Cascades Scenic Highway Zone, is hereby extended for an additional 20-year period.

2. Public Land Order No. 6776 will expire on April 17, 2030, unless, as a result of a review conducted prior to the expiration date, pursuant to Section 204(f) of the Federal Land Policy Management Act of 1976, 43 U.S.C. 1714(f), the Secretary of the Interior determines that the withdrawal shall be extended.

Dated: April 9, 2010.

Wilma A. Lewis,

Assistant Secretary—Land and Minerals Management.

[FR Doc. 2010–8778 Filed 4–15–10; 8:45 am]

BILLING CODE 3410–11–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–10–011]

Government in the Sunshine Act Meeting Notice; Change of Time of Commission Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

ORIGINAL DATE AND TIME: April 15, 2010 at 11 a.m.

NEW DATE AND TIME: April 15, 2010 at 2:30 p.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

In accordance with 19 CFR 201.37(a), the Commission has determined to reschedule the above referenced Commission meeting from 11 a.m. to 2:30 p.m. on April 15, 2010. Earlier announcement of this rescheduling was not possible.

Issued: April 13, 2010.

By order of the Commission.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. 2010–8852 Filed 4–14–10; 11:15 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Title 21 Code of Federal Regulations (CFR), 1301.34(a), this is notice that on February 15, 2010, Lipomed, Inc., One Broadway, Cambridge, Massachusetts 02142, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed in schedules I and II:

Drug	Schedule
Cathinone (1235)	I
Methcathinone (1237)	I
N-Ethylamphetamine (1475)	I
Fenethylline (1503)	I
Methaqualone (2565)	I
Gamma Hydroxybutyric Acid (2010)	I
Lysergic acid diethylamide (7315)	I
2,5-Dimethoxy-4-(n)-propylthiophenethylamine (7348)	I
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I
Mescaline (7381)	I
3,4,5-Trimethoxyamphetamine (7390)	I
4–Bromo-2,5-dimethoxyamphetamine (7391)	I
4–Bromo-2,5-dimethoxyphenethylamine (7392)	I
4–Methyl-2,5-dimethoxyamphetamine (7395)	I
2,5–Dimethoxyamphetamine (7396)	I
2,5–Dimethoxy-4-ethylamphetamine (7399)	I
3,4–Methylenedioxyamphetamine (7400)	I
3,4–Methylenedioxy-N-ethylamphetamine (7404)	I
3,4–Methylenedioxymethamphetamine (7405)	I
4–Methoxyamphetamine (7411)	I
Dimethyltryptamine (7435)	I
Psilocybin (7437)	I
Psilocyn (7438)	I
N–Benzylpiperazine (7493)	I

Drug	Schedule
Acetyldihydrocodeine (9051)	I
Dihydromorphine (9145)	I
Heroin (9200)	I
Normorphine (9313)	I
Pholcodine (9314)	I
Tilidine (9750)	I
3–Methylfentanyl (9813)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Methylphenidate (1724)	II
Amobarbital (2125)	II
Pentobarbital (2270)	II
Secobarbital (2315)	II
Phencyclidine (7471)	II
Phenylacetone (8501)	II
Cocaine (9041)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Benzoylecgonine (9180)	II
Ethylmorphine (9190)	II
Hydrocodone (9193)	II
Levorphanol (9220)	II
Meperidine (9230)	II
Methadone (9250)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273)	II
Morphine (9300)	II
Thebaine (9333)	II
Oxymorphone (9652)	II
Alfentanil (9737)	II
Sufentanil (9740)	II
Fentanyl (9801)	II

The company plans to import analytical reference standards for distribution to its customers for research and analytical purposes.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances may file comments or objections to the issuance of the proposed registration, and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43, and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than May 17, 2010.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745–46), all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: March 29, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–8792 Filed 4–15–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on February 23, 2010, Siemens Healthcare Diagnostics Inc., *Attn:* RA, 100 GBC Drive, Mail Stop 514, Newark, Delaware 19702, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedules I and II:

Drug	Schedule
Tetrahydrocannabinols (7370)	I
Ecgonine (9180)	II
Morphine (9300)	II

The company utilizes the listed controlled substances in bulk to manufacture in-vitro diagnostic test kits. The company distributes the test kits for sale to its customers. The process used in manufacturing the test kits irreversibly alters the controlled substances involved in such a manner that they are no longer classified as controlled substances as defined under the Controlled Substances Act.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than June 15, 2010.

Dated: March 29, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–8797 Filed 4–15–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated October 16, 2009, and published in the **Federal Register** on October 28, 2009, (74 FR 55587), Varian Inc., Lake Forest, 25200 Commercentre Drive, Lake Forest, California 92630, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedule II:

Drug	Schedule
Phencyclidine (7471)	II
1-Piperidinocyclohexanecarbonitrile (8603).	II
Benzoylecgonine (9180)	II

The company plans to manufacture small quantities of the listed controlled substances for use in diagnostic products.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Varian Inc., to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Varian Inc., to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: March 29, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–8796 Filed 4–15–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated November 23, 2009, and published in the **Federal Register** on December 2, 2009 (74 FR 63156), Mylan Pharmaceuticals Inc., 781 Chestnut Ridge Road, Morgantown, West Virginia 26505, made application by letter to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed in schedule II:

Drug	Schedule
Oxycodone (9143)	II
Hydromorphone (9150)	II

The company plans to import the listed controlled substances in finished dosage form (FDF) for analytical testing and distribution for clinical trials.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a), and determined that the registration of Mylan Pharmaceuticals Inc. to import the basic classes of controlled substances is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Mylan Pharmaceuticals Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic classes of controlled substances listed.

Dated: March 29, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2010–8794 Filed 4–15–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993 Joint Venture Under Tip Award Number: 7ONANB1OHOO1

Notice is hereby given that, on February 3, 2010, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), the Joint Venture under TIP Award Number: 7ONANB1OHOO1 ("Brewer-Swent") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the identities of the parties to the venture are: Brewer Science, Inc., Rolla, MO; and SouthWest Nano Technologies, Norman, OK. The general area of Brewer-Swent's planned activity is to demonstrate the production of low-cost, high-quality metallic and semiconducting single wall carbon nanotube inks.

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 2010–8573 Filed 4–15–10; 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—OpenSAF Foundation

Notice is hereby given that, on March 11, 2010, 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, Aricent Technologies (holding) Ltd., Gurgaon, Haryana, INDIA; GoAhead Software, Belleirue, WA; and Oracle Corporation, Santa

Clara, CA have been added as parties to this venture. Also, Nokia Siemens Networks, Hiomotie, Helsinki, FINLAND; Sun Microsystems, Inc., Santa Clara, CA; and ENEA AB, Chandler, AZ 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 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 September 10, 2009. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 22, 2009 (74 FR 54594).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 2010–8577 Filed 4–15–10; 8:45 am]

BILLING CODE M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993 Open SystemC Initiative

Notice is hereby given that, on March 4, 2010, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Open SystemC Initiative ("OSCI") 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, Vast Systems, Sunnyvale, CA; SpringSoft, Inc., Hsinchu, TAIWAN; and Virtutech, Inc., San Jose, CA 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 OSCI intends to file additional written notifications disclosing all changes in membership.

On October 9, 2001, OSCI 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 January 3, 2002 (67 FR 350).

The last notification was filed with the Department on November 12, 2009. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on December 17, 2009 (74 FR 66996).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 2010–8574 Filed 4–15–10; 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—Wireless Industrial Technology Konsortium, Inc.

Notice is hereby given that, on March 12, 2010, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Wireless Industrial Technology Konsortium, Inc. ("WITECK") 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, Freescale Semiconductor, Inc., Austin, TX; and Cooper Industries, Houston, 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 WITECK intends to file additional written notifications disclosing all changes in membership.

On August 8, 2008, WITECK 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 September 18, 2008 (73 FR 54170).

The last notification was filed with the Department on December 2, 2008. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on January 21, 2009 (74 FR 3641).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 2010–8576 Filed 4–15–10; 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—Connected Media Experience, Inc.

Notice is hereby given that, on March 12, 2010, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Connected Media Experience, Inc. ("CMX") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the venture and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties to the venture are: MXP4, Paris, FRANCE; Universal Music Group, Inc., Santa Monica, CA; Omediae, LLC aka Pypeline, Kapaa, HI; Opendisc, Paris, FRANCE; George White (individual), New Rochelle, NY; and Greg Kellogg (individual), San Rafael, CA. The general area of CMX's planned activity is to develop and to promote the development and adoption of open, accessible standards and specifications relating to the enhancement of end user digital media experiences (collectively, "the Specifications"), and to undertake such other activities as may from time to time be appropriate to further the purposes and achieve the goals set forth above, including without limitation, licensing, maintaining and supporting the Specifications, promoting the Specifications worldwide, providing for testing and conformity assessment of implementations in order to ensure compliance with Specifications, creating and owning distinctive trademarks, and if advisable, operating a branding program to create high customer awareness of, demand for, and

confidence in products designed in compliance with Specifications.

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 2010–8575 Filed 4–15–10; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Office of the Secretary

Notice of Closed Meeting

AGENCY: Bureau of International Labor Affairs, Labor.

ACTION: Notice of closed meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given of a meeting of the President's Committee on the International Labor Organization (ILO).

Purpose: The Secretary of Labor will chair a meeting of the President's Committee on the International Labor Organization to review and discuss current issues relating to the United States' tripartite participation in the ILO. The discussion will involve information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action. Accordingly, the meeting will be closed to the public, pursuant to Section 10(d) of the Federal Advisory Committee Act and the Government in the Sunshine Act, 5 U.S.C. 552b(c)(9)(B).

Date, Time and Place: May 4, 2010; 10:30 a.m.; U.S. Department of Labor, Secretary's Conference Room, 200 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra Polaski, Deputy Undersecretary for International Affairs, U.S. Department of Labor; Phone (202) 693–4770.

SUPPLEMENTARY INFORMATION: The President's Committee on the ILO consists of the Secretaries of Labor (chair), State and Commerce, the Assistants to the President for National Security Affairs and Economic Policy, and the Presidents of the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) and the U.S. Council for International Business. Under its Charter, the Committee's objective "is to formulate and coordinate United States policy towards the International Labor Organization in order to promote continued reform and progress in that organization." The Committee considers all matters relating to United States participation in the ILO.

Signed at Washington, DC, this 12th day of April, 2010.

Hilda L. Solis,

Secretary of Labor.

[FR Doc. 2010–8770 Filed 4–15–10; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Proposed Collection, Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a 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 requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed revision of the "Survey of Occupational Injuries and Illnesses." A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the Addresses section of this notice on or before *June 15, 2010.*

ADDRESSES: Send comments to Nora Kincaid, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue, NE., Washington, DC 20212. Written comments also may be transmitted by fax to 202–691–5111 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Nora Kincaid, BLS Clearance Officer, 202–691–7628 (this is not a toll free number). (*See* **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

Section 24(a) of the Occupational Safety and Health Act of 1970 requires the Secretary of Labor to develop and maintain an effective program of collection, compilation, and analysis of statistics on occupational injuries and illnesses. The Commissioner of Labor Statistics has been delegated the responsibility for "Furthering the purpose of the Occupational Safety and Health Act by developing and maintaining an effective program of collection, compilation, analysis and publication of occupational safety and health statistics." The BLS fulfills this responsibility, in part, by conducting the Survey of Occupational Injuries and Illnesses in conjunction with participating State statistical agencies. The BLS Survey of Occupational Injuries and Illnesses provides the Nation's primary indicator of the progress towards achieving the goal of safer and healthier workplaces. The survey produces the overall rate of occurrence of work injuries and illnesses by industry which can be compared to prior years to produce measures of the rate of change. These data are used to assess the Nation's progress in improving the safety and health of America's work places; to prioritize scarce Federal and State resources; to guide the development of injury and illness prevention strategies; and to support Occupational Safety and Health Administration (OSHA) and State safety and health standards and research. Data are essential for evaluating the effectiveness of Federal and State programs for improving work place safety and health. For these reasons, it is necessary to provide estimates separately for participating States.

II. Current Action

Office of Management and Budget clearance is being sought for the Survey of Occupational Injuries and Illnesses. The survey measures the overall rate of occurrence of work injuries and illnesses by industry for private industry, State governments, and local governments. For the more serious injuries and illnesses, those with days away from work, the survey provides detailed information on the injured/ill worker (age, sex, race, industry, occupation, and length of service), the time in shift, and the circumstances of the injuries and illnesses classified by standardized codes (nature of the injury/illness, part of body affected, primary and secondary sources of the injury/illness, and the event or exposure which produced the injury/illness).

Beginning with the 2010 survey year, the BLS will test collection of injury and illness cases that require only days of job transfer or restriction. In the two

decades prior to the OSHA recordkeeping changes in 2002, incidence rates for cases with days away from work decreased significantly, while incidence rates for cases with only restricted work activity increased significantly. Since the BLS presently collects case and demographic data only for cases with days away from work, data are not obtained about a growing class of injury and illness cases. If the test(s) prove successful, the BLS will explore implementing this practice for additional States beginning with survey year 2011. The BLS regards the collection of these cases with only job transfer or restriction as significant in its coverage of the American workforce.

III. Desired Focus of Comments

The Bureau of Labor Statistics is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Type of Review: Revision of a currently approved collection.

Agency: Bureau of Labor Statistics.

Title: Survey of Occupational Injuries and Illnesses.

OMB Number: 1220–0045.

Affected Public: Businesses or other for-profits; Not-for-profit institutions; Farms; State, Local or Tribal Governments.

Form	Total respondents	Frequency	Total responses	Average time per response (in hours)	Estimated total burden (in hours)
BLS 9300	240,000	Annually	240,000	.44	105,000
Pre-notification Package	182,000 out of 240,000	Annually	182,000 out of 240,000	1.35	245,266
Totals	240,000		240,000		350,266

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 12th day of April 2010.

Tod Sirois,

Acting Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. 2010–8750 Filed 4–15–10; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0015]

Crawler, Locomotive, and Truck Cranes Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comment.

SUMMARY: OSHA solicits public comments concerning its proposal to extend OMB approval of the information collection requirements contained in its Crawler, Locomotive, and Truck Cranes Standard (29 CFR 1910.180).

DATES: Comments must be submitted (postmarked, sent, or received) by June 15, 2010.

ADDRESSES: *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit three copies of your comments and attachments to the OSHA Docket Office, OSHA Docket No.OSHA–2010–0015, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number for this Information Collection Request (ICR) (OSHA Docket No. OSHA–2010–0015). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments, see the "Public Participation" heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.*, copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You also may contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a pre-clearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimized, collection instruments are understandable, and OSHA's estimate of the information collection burden is correct. The Occupational Safety and Health Act of 1970 (the OSH Act) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act, or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

The Standard specifies several paperwork requirements. The following sections describe who uses the information collected under each requirement, as well as how they use it. The purpose of each of these requirements is to prevent workers from using unsafe cranes and ropes, thereby reducing their risk of death or serious injury caused by a crane or rope failure during material handling.

(A) Inspection of and Certification Records of Cranes (§ 1910.180(d)(4) and (d)(6))

Paragraph 1910.180(d) specifies that employers must prepare a written record to certify that the monthly inspection of critical items in use on cranes (such as brakes, crane hooks, and ropes) has been performed. The certification record must include the inspection date, the signature of the person who conducted the inspection, and the serial number (or other identifier) of the inspected crane. Employers must keep the certificate readily available. The certification record provides employers, workers, and OSHA compliance officers with assurance that critical items on cranes have been inspected, and that the equipment is in good operating condition so that the crane and rope will not fail during material handling. These records also enable OSHA to determine that an employer is complying with the Standard.

(B) Rated Load Tests (§ 1910.180(e)(2))

This provision requires employers to make available written reports of load-rating tests showing test procedures and confirming the adequacy of repairs or alterations, and to make readily available any rerating test reports. These reports inform the employer, workers, and OSHA compliance officers of a crane's lifting limitations, and provide information to crane operators to prevent them from exceeding these limits and, thereby causing crane failure.

(C) Inspection of and Certification Records for Ropes (§ 1910.180(g)(1) and (g)(2)(ii))

Paragraph (g)(1) requires employers to thoroughly inspect any rope in use at least once a month. The authorized person conducting the inspection must observe any deterioration resulting in appreciable loss of original strength and determine whether or not the condition is hazardous. Before reusing a rope that has not been used for at least a month because the crane housing the rope is shut down or in storage, paragraph (g)(2)(ii) specifies that employers must have an appointed or authorized person inspect the rope for all types of deterioration. Employers must prepare a certification record for the inspections required by paragraphs (g)(1) and (g)(2)(ii). These certification records must include the inspection date, the signature of the person conducting the inspection, and the identifier for the inspected rope; paragraph (g)(1) states that employers must keep the certificates "on file where readily available," while paragraph (g)(2)(ii) requires that certificates "be * * * kept readily available." The certification records assure employers, workers, and OSHA that the inspected ropes are in good condition.

(D) Disclosure of Crane and Rope Inspection Certification Records

The disclosure of certification records provide the most efficient means for OSHA compliance officers to determine that an employer is complying with the Standard.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the collection of information requirements contained in the Crawler, Locomotive, and Truck Cranes Standard (29 CFR 1910.180). The Agency is requesting a decrease in the burden hours of the paperwork requirements contained in the Standard from 174,062 burden hours to 30,452 hours, a total decrease of 143,610 burden hours. The decrease is a result of new data which indicates that there are fewer cranes used in general industry than estimated in the previous ICR. The Agency will summarize the comments submitted in response to this notice, and will include this summary in the request to OMB to extend the approval of these information collection requirements.

Type of Review: Extension of a currently approved collection.

Title: Crawler, Locomotive, and Truck Cranes (29 CFR 1910.180).

OMB Number: 1218–0221.

Affected Public: Business or other for-profits; Federal Government; State, Local, or Tribal government.

Number of Respondents: 3,499.

Frequency of Recordkeeping: On occasion; Monthly, Semi-annually.

Average Time per Response: Varies from 5 minutes (.08 hour) to disclose certification records to 1 hour to conduct rated load tests.

Estimated Total Burden Hours: 30,452.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile; (fax) or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for this ICR (Docket No. OSHA–2010–0015). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your

electronic comments by your full name, date, and docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's "User Tips" link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 5–2007 (72 FR 31160).

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2010–8690 Filed 4–15–10; 8:45 am]

BILLING CODE 4510–26–P

MERIT SYSTEMS PROTECTION BOARD

The Merit Systems Protection Board (MSPB) Is Providing Notice of the Opportunity To File Amicus Briefs in the Matter of Hyginus U. Aguzie v. Office of Personnel Management, MSPB Docket Number DC–0731–09–0261–R–1

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: *Aguzie* and several other cases pending before the Board present the following legal issue: When the Office of Personnel Management (OPM) directs an agency to separate a tenured employee for suitability reasons, must the Board consider a subsequent appeal under 5 CFR part 731 as contemplated therein, or should the Board instead consider the appeal under 5 U.S.C. Chapter 75, given that the scope of a Chapter 75 appeal is broader than a part 731 appeal and that OPM generally lacks authority to issue regulations limiting statutory rights?

Interested parties may submit amicus briefs or other comments on this issue no later than May 24, 2010. Amicus briefs must be filed with the Clerk of the Board. Briefs shall not exceed 15 pages in length. The text shall be double-spaced, except for quotations and footnotes, and the briefs shall be on 8½ by 11 inch paper with one inch margins on all four sides.

DATES: All briefs submitted in response to this notice shall be filed with the Clerk of the Board on or before May 24, 2010.

ADDRESSES: All briefs shall be captioned "*Hyginus U. Aguzie* v. *Office of Personnel Management*" and entitled "Amicus Brief." Only one copy of the brief need be submitted. Briefs must be filed with the Office of the Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419.

FOR FURTHER INFORMATION CONTACT: Matthew Shannon, Deputy Clerk of the Board, (202) 653–7200.

Dated: April 12, 2010.

Melissa Jurgens,

Deputy Clerk of the Board (Acting).

[FR Doc. 2010–8682 Filed 4–15–10; 8:45 am]

BILLING CODE 7400–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Education and Human Resources; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Education and Human Resources (#1119).

Date/Time:
May 5, 2010; 8:30 a.m. to 5 p.m.
May 6, 2010; 8:30 a.m. to 1 p.m.

Place: Hilton Arlington, Gallery Rooms, 2nd Floor, 950 North Stafford Street, Arlington, VA 22203.

Type of Meeting: Open.

Contact Person: James Colby, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, (703) 292–5331, *jcolby@nsf.gov.*

Purpose of Meeting: To provide advice with respect to the Foundation's science, technology, engineering, and mathematics (STEM) education and human resources programming.

Agenda

May 5, 2010

I. Acting Assistant Director's Remarks: *The Next Challenge: Leveraging What We Know to Make a Difference in STEM Education.*

II. Overview of New Program Planning: *Comprehensive Broadening Participation—Undergraduate Science, Technology, Engineering & Mathematics (STEM).*

III. Discussion of Graduate Education/Career Development Programs.

IV. Collaborations with the Department of Education.

V. Acceptance of Committee of Visitor Reports for:

- National STEM Distributed Learning program.
- Science, Technology, Engineering, and Mathematics Talent Expansion Program (STEP).

May 6, 2010

I. Discussion: Overview of Draft NSF Strategic Plan FY2010–FY2015; Vision/Mission for Education and Human Resources (EHR) Directorate;

II. Visit From the Office of the NSF Director.

III. Future Issues for Consideration.

Dated: April 13, 2010.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2010–8722 Filed 4–15–10; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Chemistry; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463 as amended), the National Science Foundation announces the following meeting:

Name: Site visit of the Center for Chemical Innovation (CCI) at The California Institute of Technology by NSF Division of Chemistry (1191).

Dates & Times: May 9, 2010; 8 p.m.–9 p.m., May 10, 2010; 8 a.m.–9 p.m., May 11, 2010; 8 a.m.–1 p.m.

Place: Department of Chemistry, California Institute of Technology, Pasadena, CA 91125.

Type of Meeting: Part-open.

Contact Person: Dr. William Brittain, Program Director, Chemistry Centers Program, Division of Materials Research, Room 1055, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Telephone (703) 292–5039.

Purpose of Meeting: To provide advice and recommendations concerning Phase II award.

Agenda

Sunday, May 9, 2010

8 p.m.–9 p.m. Closed—Panel Briefing.

Monday, May 10, 2010

8 a.m.–11:25 a.m. Open—CCI Presentation.
11:25 a.m.–12:45 p.m. Closed—Executive Session.
12:45 p.m.–5 p.m. Open—CCI Presentation.
5 p.m.–9 p.m. Closed—Executive Session/Dinner.

Tuesday, May 11, 2010

8 a.m.–9 a.m. Open—CCI Presentation.
9 a.m.–1 p.m. Closed—Executive Session/Lunch.

Reason for Closing: The work being reviewed may include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552 b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: April 13, 2010.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2010–8723 Filed 4–15–10; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2010–0064]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The NRC invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* 10 CFR part 25—Access Authorization for Licensee Personnel.

2. *Current OMB approval number:* 3150–0046.

3. *How often the collection is required:* On occasion.

4. *Who is required or asked to report:* NRC-regulated facilities and other organization requiring access to NRC-classified information.

5. *The number of annual respondents:* 78.

6. *The number of hours needed annually to complete the requirement or request:* 365.

7. *Abstract:* NRC-regulated facilities and other organizations are required to provide information and maintain records to ensure that an adequate level of protection is provided NRC-classified information and material.

Submit, by June 15, 2010, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC–2010–0064. You may submit your comments by any of the following methods. Electronic comments: Go to *http://www.regulations.gov* and search for Docket No. NRC–2010–0064. Mail comments to NRC Clearance Officer, Tremaine Donnell (T–5F42), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Questions about the information collection requirements may be directed to the NRC Clearance Officer, Tremaine Donnell (T–5F42), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–6258, or by e-mail to *INFOCOLLECTS.Resource@NRC.GOV.*

Dated at Rockville, Maryland, this 9th day of April 2010.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2010–8754 Filed 4–15–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2010–0153]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The NRC invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:*

NRC Form 136, "Security Termination Statement";

NRC Form 237, "Request for Access Authorization";

NRC Form 277, "Request for Visit or Access Authorization".

2. *Current OMB approval numbers:*

3150–0049, NRC Form 136;

3150–0050, NRC Form 237;

3150–0051, NRC Form 277.

3. *How often the collection is required:*

NRC Form 136: Routinely;

NRC Form(s): 237 and 277: On occasion.

4. *Who is required or asked to report:* NRC employees, licensees and contractors.

5. *The number of annual respondents:*

NRC Form 136: 300;

NRC Form 237: 420;

NRC Form 277: 60.

6. *The number of hours needed annually to complete the requirement or request:*

NRC Form 136: 50;

NRC Form 237: 84;

NRC Form 277: 10.

7. *Abstract:* The NRC Form 136 is completed by NRC employees licensees and contractors that are leaving the NRC. The NRC Form 237 is completed

by NRC contractors, subcontractors, licensee employees, employees of other government agencies, and other individuals who are not NRC employees that require an NRC access authorization. The NRC Form 277 affects NRC contractor and licensees who have been granted an NRC access authorization and require verification of that access authorization and need-to-know in conjunction with a visit to NRC, other contractors/licensees or government agencies in which access to classified information will be involved or unescorted area access is desired.

Submit, by June 15, 2010, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, Maryland 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC–2010–0153. You may submit your comments by any of the following methods. Electronic comments: Go to *http://www.regulations.gov* and search for Docket No. NRC–2010–0153. Mail comments to NRC Clearance Officer, Tremaine Donnell (T–5 F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Questions about the information collection requirements may be directed to the NRC Clearance Officer, Tremaine Donnell (T–5 F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–6258, or by e-mail to *INFOCOLLECTS.Resource@NRC.GOV.*

Dated at Rockville, Maryland, this 9th day of April 2010.

For the Nuclear Regulatory Commission,

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2010–8747 Filed 4–15–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0485]

Development of NRC's Safety Culture Policy Statement: Cancellation of Public Workshops Scheduled for April 13–15, 2010, and October 27–28, 2010

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Cancellation of public workshops tentatively scheduled for April 13–15, 2010, and October 27–28, 2010.

SUMMARY: On December 15, 2009, the NRC announced in a **Federal Register** Notice (FRN) (74 FR 66387) (ADAMS Number: ML100150141) its plans for holding a series of workshops to support an overarching goal of forging a consensus around the objectives, strategies, activities and measures that enhance safety culture for NRC-regulated activities. Specific plans for the workshops included the development of the safety culture common terminology effort comprised of: (1) Development of a common safety culture definition; and (2) development of high-level description/traits of areas important to safety culture. The series of workshops were designed to build upon each other, and to be used to develop these concepts for incorporation into the NRC's draft final policy statement. In addition, the information gathered at the workshop was to be considered when revising the NRC's oversight programs for NRC-regulated nuclear industries. The tentative dates planned for the public workshops were February 2–4, 2010, April 13–15, 2010, and October 27–28, 2010, at or near NRC headquarters in Rockville, MD. At the time the NRC issued the FRN (74 FR 66387), it was anticipated that three workshops would be needed to reach alignment on the safety culture common terminology effort.

The NRC held the first workshop on February 2–4, 2010. The goal of the workshop was to: (1) Obtain input regarding a high-level safety culture definition that could apply to all licensees/certificate holders; (2) obtain input regarding description/traits of safety culture that could apply to all licensees/certificate holders; and (3) receive comments on the draft safety culture policy statement that was published in the FRN for public comment until March 1, 2010 (74 FR 57525; 75 FR 1656;) (ADAMS Numbers: ML093240408 and ML100050288). The structure of this workshop was unique in that the NRC sought nominations of individuals (74 FR 66387) to represent interests from a large spectrum of licensees/certificate holders regulated by the NRC to participate in panel discussions on safety culture. Additionally, the NRC utilized an external steering committee (made up of various stakeholders) to help plan for the first workshop as well as encourage stakeholders to nominate individuals to be panel members and to participate in this effort. From those nominated, the NRC selected sixteen stakeholders to serve as panel members at the workshop. At the February 2–4, 2010, safety culture workshop, panel members, through discussions and frequent input provided by workshop attendees, developed and aligned on a single safety culture definition and a group of traits.

While the NRC anticipated that it might take three workshops for stakeholder representatives to develop and align on a common safety culture definition and a set of high-level description/traits of areas important to safety, this was accomplished during the February 2–4, 2010, workshop. Post-workshop discussions with the panel members and the external steering committee concluded that another workshop of this kind was not needed since the panel had reached alignment on a single safety culture definition and a set of high-level description/traits (*see* meeting summary ADAMS Number: ML100700065). Based on this feedback, the NRC has decided to cancel the remaining two workshops tentatively scheduled for April 13–15, 2010, and October 27–28, 2010.

In lieu of the originally planned workshops, for the remainder of calendar year 2010, the NRC now plans to perform more tailored, outreach activities addressing safety culture. This will include the NRC staff and stakeholders continuing a dialogue at NRC and industry-sponsored conferences to obtain a broad spectrum of views regarding the draft policy statement and the products developed from the February 2–4, 2010, workshop. Examples of planned outreach activities will be largely aimed at gatherings of individual industry groups, such as,

medical users of licensed, radioactive materials; industrial users of licensed, radioactive materials; fuel facility operators; vendors and suppliers; power and non-power reactors and members of the public. Based on the insights gained from these additional outreach activities a need to revise the products from the February workshop could be identified. Notice of additional meetings/workshops, will be available on the NRC Public Meeting Schedule Web site at *http://www.nrc.gov/public-involve/public-meetings/index.cfm* at least ten days prior to each meeting/workshop. Additionally, any pertinent information regarding this effort will be made available at the NRC's safety culture Web site *http://www.nrc.gov/about-nrc/regulatory/enforcement/safety-culture.html*). The NRC may issue another FRN for additional stakeholder input on this initiative if the staff determines that the safety culture definition and traits it has drafted for the final Commission policy statement (due March 2011) differ substantially from the original draft policy statement and/or the products developed at the February 2–4, 2010, workshop.

SUPPLEMENTARY INFORMATION:

Publicly Available Documents: Publicly available documents related to this safety culture initiative can be accessed using the following methods: NRC's Public Document Room (PDR), where the public may examine, and have copied for a fee, publicly available documents. The address is U.S. Nuclear Regulatory Commission Public Document Room, Public File Area 0–1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852; or NRC's Agency wide Documents Access and Management System (ADAMS), which can be accessed at *http://www.nrc.gov/reading-rm/adams.html.* From this site, the public can gain entry into ADAMS which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if you encounter problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1–800–397–4209, or (301) 415–4737 or by e-mail to *pdr.resource@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Alex Sapountzis, telephone (301) 415–7822 or by e-mail to *Alexander.Sapountzis@nrc.gov*; or Maria Schwartz, telephone (301) 415–1888 or by e-mail to *Maria.Schwartz@nrc.gov.* Both of these individuals can also be contacted by mail at the U.S. Nuclear Regulatory Commission, Office of Enforcement, Concerns Resolution Branch, Mail Stop O–4 A15A, Washington, DC 20555–0001.

Dated at Rockville, Maryland, this 9th day of April 2010.

For the Nuclear Regulatory Commission.

Roy P. Zimmerman,

Director, Office of Enforcement.

[FR Doc. 2010–8746 Filed 4–15–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–275–LR and 50–323–LR; ASLBP No. 10–900–01–LR–BD01]

Pacific Gas & Electric Company; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28,710 (1972), and the Commission's regulations, *see, e.g.,* 10 CFR 2.104, 2.105, 2.300, 2.309, 2.313, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2)

This proceeding involves an application by Pacific Gas & Electric Company (PG&E) for a twenty-year renewal of licenses DPR–80 and DPR–82, which authorize PG&E to operate Diablo Canyon Nuclear Power Plant, Units 1 and 2, located near San Luis Obispo, California. The current operating licenses expire on, respectively, November 2, 2024 and August 26, 2025. In response to a January 21, 2010 Notice of Opportunity for Hearing published in the **Federal Register** (75 FR 3493), a petition to intervene was submitted by Diane Curran, representing San Luis Obispo Mothers for Peace.

The Board is comprised of the following administrative judges:

Alex S. Karlin, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Nicholas G. Trikouros, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Paul B. Abramson, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 2007 (72 FR 49,139).

Issued at Rockville, Maryland, this 8th day of April 2010.

Thomas S. Moore,

Associate Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2010–8755 Filed 4–15–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0155; EA–10–058]

In the Matter of: Certain Licensees Requesting Unescorted Access to Radioactive Material; Order Imposing Trustworthiness and Reliability Requirements for Unescorted Access to Certain Radioactive Material (Effective Immediately)

I

The Licensees identified in Attachment 1 [1] to this Order hold licenses issued in accordance with the Atomic Energy Act (AEA) of 1954, as amended, by the U.S. Nuclear Regulatory Commission (NRC or Commission) or an Agreement State, authorizing them to perform services on devices containing certain radioactive material for customers licensed by the NRC or an Agreement State to possess and use certain quantities of the radioactive materials listed in Attachment 2 to this Order. Commission regulations at 10 CFR 20.1801 or equivalent Agreement State regulations require Licensees to secure, from unauthorized removal or access, licensed materials that are stored in controlled or unrestricted areas. Commission regulations at 10 CFR 20.1802 or equivalent Agreement State regulations require Licensees to control and maintain constant surveillance of licensed material that is in a controlled or unrestricted area and that is not in storage.

II

Subsequent to the terrorist events of September 11, 2001, the NRC issued immediately effective security Orders to NRC and Agreement State Licensees under the Commission's authority to protect the common defense and security of the nation. The Orders required certain manufacturing and distribution (M&D) Licensees to implement Additional Security Measures (ASMs) for the radioactive materials listed in Attachment 2 to this

[1] Attachment 1 contains sensitive information and will not be released to the public.

Order (the radionuclides of concern), to supplement the existing regulatory requirements. The ASMs included requirements for determining the trustworthiness and reliability of individuals that require unescorted access to the radionuclides of concern. Section 652 of the Energy Policy Act of 2005, which became law on August 8, 2005, amended section 149 of the AEA to require fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records check for "any individual who is permitted unescorted access to radioactive materials or other property subject to regulation by the Commission that the Commission determines to be of such significance to the public health and safety or the common defense and security as to warrant fingerprinting and background checks." Section 149 of the AEA also requires that "all fingerprints obtained by a Licensee or applicant * * * shall be submitted to the Attorney General of the United States through the Commission for identification and a criminal history records check." As a result, the trustworthiness and reliability requirements of the ASMs were updated and the M&D Licensees were issued additional Orders imposing the new fingerprinting requirements.

In late 2005, the NRC and the Agreement States began issuing Increased Controls (IC) Orders or other legally binding requirements to Licensees who are authorized to possess the radionuclides of concern. Paragraph IC 1.c of the IC requirements stated that "service providers shall be escorted unless determined to be trustworthy and reliable by an NRC-required background investigation as an employee of a Manufacturing and Distribution Licensee." Starting in December 2007, the NRC and the Agreement States began issuing additional Orders or other legally binding requirements to the IC Licensees, imposing the new fingerprinting requirements. In the December 2007 Fingerprinting Order, Paragraph IC 1.c of the IC requirements was superseded by the requirement that "Service provider Licensee employees shall be escorted unless determined to be trustworthy and reliable by an NRC-required background investigation." However, NRC did not require background investigations for non-M&D service provider Licensees. Consequently, only service representatives of certain M&D Licensees may be granted unescorted access to the radionuclides of concern at an IC Licensee facility, even though non-M&D service provider Licensees provide similar services and have the same degree of knowledge of the devices they service as M&D Licensees. To maintain appropriate access control to the radionuclides of concern, and to allow M&D Licensees and non-M&D service provider Licensees to have the same level of access at customers' facilities, NRC is imposing trustworthiness and reliability requirements for unescorted access to radionuclides of concern, as set forth in this Order. These requirements apply to non-M&D service provider Licensees that request and have a need for unescorted access by their representatives to the radionuclides of concern at IC Licensee facilities. These trustworthiness and reliability requirements are equivalent to the requirements for M&D Licensees who perform services requiring unescorted access to the radionuclides of concern.

In order to provide assurance that non-M&D service provider Licensees are implementing prudent measures to achieve a consistent level of protection for service providers requiring unescorted access to the radionuclides of concern at IC Licensee facilities, all Licensees identified in Attachment 1 to this Order shall implement the requirements of this Order. In addition, pursuant to 10 CFR 2.202, because of potentially significant adverse impacts associated with a deliberate malevolent act by an individual with unescorted access to the radionuclides of concern, I find that the public health, safety, and interest require this Order to be effective immediately.

III

Accordingly, pursuant to sections 81, 149, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 10 CFR parts 20, 30 and 33, *it is hereby ordered, effective immediately, that all licensees identified in attachment 1 to this order comply with the requirements set forth in this order.*

A.1. The Licensee shall establish and maintain a fingerprinting program that meets the requirements of Attachment 3 to this Order for individuals that require unescorted access to the radionuclides of concern. The Licensee shall complete implementation of the requirements of Attachment 3 to this Order within one hundred eighty (180) days of the date of this Order, or before (1) providing written verification to another Licensee subject to the IC requirements, or (2) attesting to or certifying the trustworthiness and reliability of a service provider for unescorted access to the radionuclides of concern at a customer's facility.

A.2. Within ninety (90) days of the date of this Order, the Licensee shall designate a "Reviewing Official" for determining unescorted access to the radioactive materials as listed in Attachment 2 to this Order by other individuals. The designated Reviewing Official shall be determined to be trustworthy and reliable by the Licensee in accordance with the requirements described in Attachment 3 to this Order and must be permitted to have unescorted access to the radioactive materials listed in Attachment 2 to this Order as part of his or her job duties.

A.3. Fingerprints for unescorted access need not be taken if a designated Reviewing Official is relieved from the fingerprinting requirement by 10 CFR 73.61, or has been favorably decided by a U.S. Government program involving fingerprinting and a FBI identification and criminal history records check [2] within the last five (5) years, or for any person who has an active federal security clearance (provided in the latter two cases that they make available the appropriate documentation [3]). The Licensee may provide, for NRC review, written confirmation from the Agency/employer which granted the federal security clearance or reviewed the FBI identification and criminal history records results based upon a fingerprint identification check. The NRC will determine whether, based on the written confirmation, the designated Reviewing Official may have unescorted access to the radioactive materials listed in Attachment 2 to this Order, and

[2] Examples of such programs include (1) National Agency Check, (2) Transportation Worker Identification Credentials in accordance with 49 CFR part 1572, (3) Bureau of Alcohol Tobacco Firearms and Explosives background checks and clearances in accordance with 27 CFR part 555, (4) Health and Human Services security risk assessments for possession and use of select agents and toxins in accordance with 42 CFR part 73, and (5) Hazardous Material security threat assessment for hazardous material endorsement to commercial drivers license in accordance with 49 CFR part 1572, Customs and Border Patrol's Free and Secure Trade (FAST) Program. The FAST program is a cooperative effort between the Bureau of Customs and Border Patrol and the governments of Canada and Mexico to coordinate processes for the clearance of commercial shipments at the U.S.-Canada and U.S.-Mexico borders. Participants in the FAST program, which requires successful completion of a background records check, may receive expedited entrance privileges at the northern and southern borders.

[3] This documentation must allow the NRC or NRC-approved Reviewing Official to verify that the individual has fulfilled the unescorted access requirements of Section 149 of the AEA by submitting to fingerprinting and a FBI identification and criminal history records check.

therefore, be permitted to serve as the Licensee's Reviewing Official.[4]

A.4. A designated Reviewing Official may not review the results from the FBI identification and criminal history records checks or make unescorted access determinations until the NRC has approved the individual as the Licensee's Reviewing Official.

A.5. The NRC will determine whether this individual (or any subsequent Reviewing Official) may have unescorted access to the radionuclides of concern, and therefore, will be permitted to serve as the Licensee's Reviewing Official. The NRC-approved Reviewing Official shall be the recipient of the results of the FBI identification and criminal history records check of the other Licensee employees requiring unescorted access to the radioactive materials listed in Attachment 2 to this Order, and shall control such information as specified in the "Protection of Information" section of Attachment 3 to this Order.

A.6. The NRC-approved Reviewing Official shall determine whether an individual may have unescorted access to radioactive materials that equal or exceed the quantities in Attachment 2 to this Order, in accordance with the requirements described in Attachment 3 to this Order.

B. Prior to requesting fingerprints from a Licensee employee, a copy of this Order shall be provided to that person.

C.1. The Licensee shall, in writing, within twenty-five (25) days of the date of this Order, notify the Commission, (1) If it is unable to comply with any of the requirements described in this Order, including Attachment 3 to this Order, (2) if compliance with any of the requirements is unnecessary in its specific circumstances, or (3) if implementation of any of the requirements would cause the Licensee to be in violation of the provisions of any Commission or Agreement State regulation or its license. The notification shall provide the Licensee's justification for seeking relief from or variation of any specific requirement.

C.2. The Licensee shall complete implementation of the requirements of Attachment 3 to this Order within one hundred eighty (180) days of the date of this Order.

C.3. The Licensee shall report to the Commission when they have achieved full compliance with the requirements described in Attachment 3 to this Order. The report shall be made within twenty-five (25) days after full compliance has been achieved.

C.4. If during the implementation period of this Order, the Licensee is unable, due to circumstances beyond its control, to meet the requirements of this Order by September 26, 2010, the Licensee shall request the Commission, in writing, the need for an extension of time to implement the requirements. The request shall provide the Licensee's justification for seeking additional time to comply with the requirements of this Order.

C.5. Licensees shall notify the NRC's Headquarters Operations Office at 301–816–5100 within 24 hours if the results from a FBI identification and criminal history records check indicate that an individual is identified on the FBI's Terrorist Screening Data Base.

Licensee responses to C.1, C.2., C.3., and C.4. above shall be submitted in writing to the Director, Division of Materials Safety and State Agreements, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Licensee responses shall be marked as "Security-Related Information—Withhold Under 10 CFR 2.390.

The Director, Division of Materials Safety and State Agreements, Office of Federal and State Materials and Environmental Management Programs, may, in writing, relax or rescind any of the above conditions upon demonstration of good cause by the Licensee.

IV

In accordance with 10 CFR 2.202, the Licensee must, and any other person adversely affected by this Order may, submit an answer to this Order within twenty-five (25) days of the date of this Order. In addition, the Licensee and any other person adversely affected by this Order may request a hearing of this Order within twenty-five (25) days of the date of the Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made, in writing, to the Director, Division of Materials Safety and State Agreements, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension.

The answer may consent to this Order. If the answer includes a request for a hearing, it shall, under oath or affirmation, specifically set forth the matters of fact and law on which the Licensee relies and the reasons as to why the Order should not have been issued. If a person other than the Licensee requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d).

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC

[4] The NRC's determination of this individual's unescorted access to the radionuclides of concern in accordance with the process described in Enclosure 4 to the transmittal letter of this Order is an administrative determination that is outside the scope of this Order.

Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

If a hearing is requested by the Licensee or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), the Licensee may, in addition to requesting a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section III above shall be final twenty-five (25) days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section III shall be final when the extension expires if a hearing request has not been received.

An answer or a request for hearing shall not stay the immediate effectiveness of this order.

Dated this 30th day of March, 2010.

For the Nuclear Regulatory Commission.

Robert J. Lewis,

Director, Division of Materials Safety and State Agreements, Office of Federal and State Materials and Environmental Management Programs.

Attachment 1: List of Applicable Materials Licensees Redacted

Attachment 2: Table 1: Radionuclides of Concern

TABLE 1—RADIONUCLIDES OF CONCERN

Radionuclide	Quantity of concern [1] (TBq)	Quantity of concern [2] (Ci)
Am-241	0.6	16
Am-241/Be	0.6	16
Cf-252	0.2	5.4
Cm-244	0.5	14
Co-60	0.3	8.1
Cs-137	1	27
Gd-153	10	270

TABLE 1—RADIONUCLIDES OF CONCERN—Continued

Radionuclide	Quantity of concern [1] (TBq)	Quantity of concern [2] (Ci)
Ir-192	0.8	22
Pm-147	400	11,000
Pu-238	0.6	16
Pu-239/Be	0.6	16
Ra-226	0.4	11
Se-75	2	54
Sr-90 (Y-90)	10	270
Tm-170	200	5,400
Yb-169	3	81
Combinations of radioactive materials listed above [3]	([4])	

[1] The aggregate activity of multiple, collocated sources of the same radionuclide should be included when the total activity equals or exceeds the quantity of concern.

[2] The primary values used for compliance with this Order are TBq. The curie (Ci) values are rounded to two significant figures for informational purposes only.

[3] Radioactive materials are to be considered aggregated or collocated if breaching a common physical security barrier (*e.g.,* a locked door at the entrance to a storage room) would allow access to the radioactive material or devices containing the radioactive material.

[4] If several radionuclides are aggregated, the sum of the ratios of the activity of each source, *i* of radionuclide, *n,* $A_{(i,n)}$, to the quantity of concern for radionuclide *n,* $Q_{(n)}$, listed for that radionuclide equals or exceeds one. [(aggregated source activity for radionuclide A) ÷ (quantity of concern for radionuclide A)] + [(aggregated source activity for radionuclide B) ÷ (quantity of concern for radionuclide B)] + etc. * * * ≥ 1

Guidance for Aggregation of Sources

NRC supports the use of the International Atomic Energy Agency's (IAEA) source categorization methodology as defined in IAEA Safety Standards Series No. RS–G–1.9, "Categorization of Radioactive Sources," (2005) (see *http://www-pub.iaea.org/MTCD/publications/PDF/Pub1227_web.pdf*) and as endorsed by the agency's Code of Conduct for the Safety and Security of Radioactive Sources, January 2004 (*see http://www-pub.iaea.org/MTCD/publications/PDF/Code-2004_web.pdf*). The Code defines a three-tiered source categorization scheme. Category 1 corresponds to the largest source strength (equal to or greater than 100 times the quantity of concern values listed in Table 1.) and Category 3, the smallest (equal or exceeding one-tenth the quantity of concern values listed in Table 1.). Additional security measures apply to sources that are equal to or greater than the quantity of concern values listed in Table 1, plus aggregations of smaller sources that are equal to or greater than the quantities in Table 1. Aggregation only applies to sources that are collocated.

Licensees who possess individual sources in total quantities that equal or exceed the Table 1 quantities are required to implement additional security measures. Where there are many small (less than the quantity of concern values) collocated sources whose total aggregate activity equals or exceeds the Table 1 values, Licensees are to implement additional security measures.

Some source handling or storage activities may cover several buildings, or several locations within specific buildings. The question then becomes, "When are sources considered collocated for purposes of aggregation?" For purposes of the additional controls, sources are considered collocated if breaching a single barrier (*e.g.,* a locked door at the entrance to a storage room) would allow access to the sources. Sources behind an outer barrier should be aggregated separately from those behind an inner barrier (*e.g.,* a locked source safe inside the locked storage room). However, if both barriers are simultaneously open, then all sources within these two barriers are considered to be collocated. This logic should be continued for other barriers within or behind the inner barrier.

The following example illustrates the point: A lockable room has sources stored in it. Inside the lockable room, there are two shielded safes with additional sources in them. Inventories are as follows:

The room has the following sources outside the safes: Cf-252, 0.12 TBq (3.2 Ci); Co-60, 0.18 TBq (4.9 Ci), and Pu-238, 0.3 TBq (8.1 Ci). Application of the unity rule yields: (0.12 ÷ 0.2) + (0.18 ÷ 0.3) + (0.3 ÷ 0.6) = 0.6 + 0.6 + 0.5 = 1.7. Therefore, the sources would require additional security measures.

Shielded safe #1 has a 1.9 TBq (51 Ci) Cs-137 source and a 0.8 TBq (22 Ci) Am-241 source. In this case, the sources would require additional security measures, regardless of location, because they each exceed the quantities in Table 1.

Shielded safe #2 has two Ir-192 sources, each having an activity of 0.3 TBq (8.1 Ci). In this case, the sources would not require additional security measures while locked in the safe. The combined activity does not exceed the threshold quantity 0.8 TBq (22 Ci).

Because certain barriers may cease to exist during source handling operations (*e.g.,* a storage location may be unlocked during periods of active source usage), Licensees should, to the extent practicable, consider two modes of source usage—"operations" (active source usage) and "shutdown" (source storage mode). Whichever mode results in the greatest inventory (considering barrier status) would require additional security measures for each location.

Use the following method to determine which sources of radioactive material require implementation of the additional security measures:

- Include any single source equal to or greater than the quantity of concern in Table
- Include multiple collocated sources *of the same radionuclide* when the combined quantity equals or exceeds the quantity of concern
- For combinations of radionuclides, include multiple collocated sources of *different radionuclides* when the aggregate quantities satisfy the following unity rule: [(amount of radionuclide A) ÷ (quantity of concern of radionuclide A)] + [(amount of radionuclide B) ÷ (quantity of concern of radionuclide B)] + etc.* * * ≥ 1

Attachment 3: Requirements for Service Provider Licensees Providing Written Verification Attesting to or Certifying the Trustworthiness and Reliability of Service Providers for Unescorted Access to Certain Radioactive Material at Customer Facilities, Including Requirements for Fingerprinting and Criminal History Checks

A. General Requirements

Licensees subject to the provisions of this Order shall comply with the requirements of this attachment. The term "certain radioactive material"

means the radionuclides in quantities equal to or greater than the quantities listed in Attachment 2 to this Order.

1. The Licensee shall provide the customer's facility written verification attesting to or certifying the trustworthiness and reliability of an individual as a service provider only for employees the Licensee has approved in writing (see requirement A.3 below). The Licensee shall request unescorted access to certain radioactive material at customer licensee facilities only for approved service providers that require the unescorted access in order to perform a job duty.

2. The trustworthiness, reliability, and true identity of a service provider shall be determined based on a background investigation. The background investigation shall address at least the past three (3) years, and as a minimum, include fingerprinting and a Federal Bureau of Investigation (FBI) criminal history records check as required in Section B, verification of employment history, education, and personal references. If a service provider's employment has been less than the required three (3) years period, educational references may be used in lieu of employment history.

3. The Licensee shall document the basis for concluding that there is reasonable assurance that a service provider requiring unescorted access to certain radioactive material at a customer facility is trustworthy and reliable, and does not constitute an unreasonable risk for unauthorized use of the radioactive material. The Licensee shall maintain a list of service providers approved for unescorted access to certain radioactive material.

4. The Licensee shall retain documentation regarding the trustworthiness and reliability of approved service providers for three years after the individual no longer requires unescorted access to certain radioactive material associated with the Licensee's activities.

5. Each time the Licensee revises the list of approved service providers (see requirement 3 above), the Licensee shall retain the previous list for three years after the revision.

6. The Licensee shall provide to a customer written certification for each service provider for whom unescorted access to certain radioactive material at the customer's facility is required and requested. The written certification shall be dated and signed by the Reviewing Official. A new written certification is not required if an individual service provider returns to the customer facility within three years, provided the customer has retained the prior certification.

B. Specific Requirements Pertaining to Fingerprinting and Criminal History Records Checks

1. The Licensee shall fingerprint each service provider to be approved for unescorted access to certain radioactive materials following the procedures outlined in Enclosure 3 of the transmittal letter. The Licensee shall review and use the information received from the FBI identification and criminal history records check and ensure that the provisions contained in the subject Order and this attachment are satisfied.

2. The Licensee shall notify each affected individual that the fingerprints will be used to secure a review of his/her criminal history record and inform the individual of the procedures for revising the record or including an explanation in the record, as specified in the "Right to Correct and Complete Information" section of this attachment.

3. Fingerprints for unescorted access need not be taken if an employed individual (*e.g.*, a Licensee employee, contractor, manufacturer, or supplier) is relieved from the fingerprinting requirement by 10 CFR 73.61, or any person who has been favorably-decided by a U.S. Government program involving fingerprinting and an FBI identification and criminal history records check (*e.g.* National Agency Check, Transportation Worker Identification Credentials in accordance with 49 CFR part 1572, Bureau of Alcohol Tobacco Firearms and Explosives background checks and clearances in accordance with 27 CFR part 555, Health and Human Services security risk assessments for possession and use of select agents and toxins in accordance with 42 CFR part 73, Hazardous Material security threat assessment for hazardous material endorsement to commercial drivers license in accordance with 49 CFR part 1572, Customs and Border Patrol's Free and Secure Trade Program [5]) within the last five (5) years, or any person who has an active federal security clearance (provided in the latter two cases that they make available the appropriate documentation [6]). Written confirmation from the Agency/employer which granted the federal security clearance or reviewed the FBI criminal history records results based upon a fingerprint identification check must be provided. The Licensee must retain this documentation for a period of three (3) years from the date the individual no longer requires unescorted access to certain radioactive material associated with the Licensee's activities.

4. All fingerprints obtained by the Licensee pursuant to this Order must be submitted to the Commission for transmission to the FBI.

5. The Licensee shall review the information received from the FBI and consider it, in conjunction with the trustworthiness and reliability requirements of Section A of this attachment, in making a determination whether to approve and certify the individual for unescorted access to certain radioactive materials. The Licensee shall use any information obtained as part of a criminal history records check solely for the purpose of determining an individual's suitability for unescorted access to certain radioactive materials.

6. The Licensee shall document the basis for its determination whether to approve the individual for unescorted access to certain radioactive materials.

C. Prohibitions

A Licensee shall not base a final determination to not provide certification for unescorted access to certain radioactive material for an individual solely on the basis of information received from the FBI involving: an arrest more than one (1) year old for which there is no information of the disposition of the case, or an arrest that resulted in dismissal of the charge or an acquittal.

A Licensee shall not use information received from a criminal history check obtained pursuant to this Order in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States, nor shall the Licensee use the information in any way which would discriminate among individuals on the basis of race, religion, national origin, sex, or age.

D. Right To Correct and Complete Information

Prior to any final adverse determination, the Licensee shall make available to the individual the contents of any criminal records obtained from

[5] The FAST program is a cooperative effort between the Bureau of Customs and Border Patrol and the governments of Canada and Mexico to coordinate processes for the clearance of commercial shipments at the U.S.-Canada and U.S.-Mexico borders. Participants in the FAST program, which requires successful completion of a background records check, may receive expedited entrance privileges at the northern and southern borders.

[6] This documentation must allow the Reviewing Official to verify that the individual has fulfilled the unescorted access requirements of Section 149 of the AEA by submitting to fingerprinting and an FBI identification and criminal history records check.

the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the Licensee for a period of one (1) year from the date of the notification.

If, after reviewing the record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either direct application by the individual challenging the record to the agency (*i.e.,* law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation Identification Division, Washington, DC 20537–9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an Official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency. The Licensee must provide at least ten (10) days for an individual to initiate an action challenging the results of an FBI identification and criminal history records check after the record is made available for his/her review. The Licensee may make a final unescorted access to certain radioactive material determination based upon the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record. Upon a final adverse determination on unescorted access to certain radioactive material, the Licensee shall provide the individual its documented basis for denial. Unescorted access to certain radioactive material shall not be granted to an individual during the review process.

E. Protection of Information

1. Each Licensee who obtains a criminal history record on an individual pursuant to this Order shall establish and maintain a system of files and procedures for protecting the record and the personal information from unauthorized disclosure.

2. The Licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining whether to verify the individual for unescorted access to certain radioactive material. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have a need-to-know.

3. The personal information obtained on an individual from a criminal history record check may be transferred to another Licensee if the Licensee holding the criminal history record check receives the individual's written request to re-disseminate the information contained in his/her file, and the gaining Licensee verifies information such as the individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

4. The Licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the NRC to determine compliance with the regulations and laws.

5. The Licensee shall retain all fingerprints and criminal history records from the FBI, or a copy if the individual's file has been transferred:

a. For three (3) years after the individual no longer requires unescorted access, or

b. For three (3) years after unescorted access to certain radioactive material was denied.

After the required three (3) year period, these documents shall be destroyed by a method that will prevent reconstruction of the information in whole or in part.

[FR Doc. 2010–8745 Filed 4–15–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61862; File No. SR–Phlx–2010–43]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Quote Spread Parameters and Batching of Violations

April 7, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 26, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Section 19(b)(1) of the Act[3] and Rule 19b–4 thereunder,[4] proposes to amend Options Floor Procedure Advice ("Advice") F–6, Option Quote Parameters, to copy from Rule 1014(c)(i)(A) a provision relating to $5 wide bid-ask differentials for electronic quotes in equity, index and foreign currency options after the opening, which was inadvertently omitted from Advice F–6. The Exchange also proposes to change the fine schedule to add three warning letters, implement the fine schedule on a one year running calendar basis, and permit the "batching" of violations of both Advice F–6 and the corresponding Rule 1014(c)(i)(A), pursuant to Rules 960 and 970, for purposes of determining what is an occurrence.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to correct Advice F–6 and update it in order to reflect the current

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

trading environment, as well as to permit the batching of certain such violations, as described below. Currently, Rule 1014(c)(i)(A) and its corresponding Advice F–6, which is part of the Exchange's minor rule plan,[5] govern bid/ask differentials, which are also known as quotation or quote spread parameters; quote spread parameters establish the maximum permissible width between the bid and an offer in a particular series.[6] The Exchange proposes to update Advice F–6 to reflect language permitting options quoted electronically to be quoted with a $5 wide spread after the opening of an option. Those who are quoting verbally (in open outcry) must, throughout the trading day, comply with the regular quote spread parameters that apply on the opening; those quote spread parameters appear in a chart in Advice F–6 and in the text of Rule 1014(c)(i)(A)(1)(a). The language permitting $5 wide quote spreads after the opening for those quoting electronically was added to Rule 1014(c)(i)(A)(2) but, inadvertently, not to Advice F–6.[7] The Exchange proposes to correct this by inserting this language into Advice F–6.

The Exchange also proposes to change the fine schedule applicable to Advice F–6, which is administered pursuant to the Exchange's minor rule plan. The fine schedule would now consist of warning letters respecting the first three occurrences and three fines thereafter ($250, $500 and $1,000), before the seventh occurrence would result in referral to the Business Conduct Committee ("BCC") for disciplinary action. In addition, the fine schedule would be administered on a one year running calendar basis, such that violations within one year of the last occurrence would count as the next "occurrence," rather than a two year running calendar basis.[8]

The Exchange believes that these changes are appropriate because quoting has become entirely electronic; most Streaming Quote Traders ("SQTs") and Remote Streaming Quote Traders ("RSQTs")[9] quote electronically, relying on their firm's quoting technology and computer models to establish an option's price and generate the quote electronically to the Exchange. Historically, when Registered Options Traders ("ROTs")[10] quoting on the Exchange did so verbally (even though they relied on computer models to produce a price), the quote was subject to their own judgment and verbal delivery; sometimes an ROT stated a quote that did not comply with the maximum quote spread parameter, thus triggering a violation under Advice F–6 and a fine under the minor rule plan. In contrast, today, the Exchange believes that computer models do not make the sorts of individualized mistakes that Advice F–6 was intended to deal with; instead, when there is a quoting error today, electronically, it usually affects every series that RSQT or SQT is quoting on that particular technology, generating, potentially, hundreds of instances of quote spread parameter violations. Rather than taking each event to the BCC as a fourth occurrence under the current rule (because there may be hundreds), the Exchange proposes to treat these as a single occurrence by "batching" the violations. This way, the firm would receive a warning letter for the first three events, before being subject to a fine schedule. Of course, the Exchange could in any particular situation deem it to be egregious rather than "minor" and refer it directly to the BCC for disciplinary action. The Exchange believes that this is appropriate because the relevant warning letter or monetary fine should serve as a deterrent against future violations, while recognizing that a single programming error can have a widespread effect.

Currently, Rules 960.2(f)(ii) and 970.01 permit the Exchange to aggregate or "batch" multiple numbers of violations as one single offense, for purposes of initiating disciplinary action under Exchange rules, or imposing fines pursuant to fine schedules set forth in the relevant Options Floor Procedure Advices under the Exchange's minor rule plan.[11] Violations that are currently eligible for batching are listed on the Exchange's internal Numerical Criteria for Bringing Cases for Violations of Phlx Order Handling Rules. At this time, the Exchange proposes to permit batching with respect to Advice F–6 and Rule 1014(c)(i)(A), and proposes to amend Rules 960 and 970 accordingly. Currently, the language in both rules limits batching to certain Exchange order handling rules.

Pursuant to Rules 960.2(f)(ii) and 970.01, the batching program will continue to require that the violations be determined based on an exception-based surveillance program, with the specific surveillance guidelines (which are similar to compliance thresholds) maintained on the Numerical Criteria for Bringing Cases for Violations of Phlx Order Handling Rules.[12] The Exchange believes that these changes should result in a fine schedule that better fits the current electronic trading environment. In addition, the Exchange believes that Advice F–6 (and its corresponding rule) is appropriate for batching because the automated surveillance for quote spread parameter compliance,[13] as well as the issuance of sanctions pursuant to the minor rule plan,[14] will be conducted daily. The Exchange believes that its representation by regulatory staff that daily surveillance will be conducted and daily sanctions will be administered should serve as a strong deterrent against future violations.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b)

[5] The Exchange's minor rule plan consists of options floor procedure advices ("OFPAs" or "Advices") with preset fines, pursuant to Rule 19d–1(c) under the Act. 17 CFR 240.19d–1(c). Most OFPAs have corresponding options rules.

[6] *See* Rule 1014(c)(i)(A)(1)(a).

[7] *See* Securities Exchange Act Release No. 50728 (November 23, 2004), 69 FR 69982 (December 1, 2004) (SR–Phlx–2004–74).

[8] A running calendar basis means that violations within a one year period count as the next "occurrence" for purposes of the fine schedule, regardless of the calendar year. A "one-year running calendar basis" means that a violation of an Advice that occurs within one year of the first violation of that Advice will be treated as a second occurrence, and any violation of an Advice within one year of the previous violation of that Advice will be subject to the next highest fine specified in the Advice. *See* Securities Exchange Act Release No. 41201 (March 22, 1999), 64 FR 15391 (March 31, 1999) (SR–Phlx–99–06). The terms "running" and "rolling" calendar basis are often used interchangeably. *See, e.g.,* Securities Exchange Act Release No. 33130 (November 2, 1993), 58 FR 29502 (November 9, 1993) (SR–Phlx–93–28).

[9] *See* Rule 1014(b)(ii).

[10] *See* Rule 1014(b)(i).

[11] The Exchange may also refer the matter to the Business Conduct Committee ("BCC") for possible disciplinary action when the Exchange determines that there exists a pattern or practice of violative conduct without exceptional circumstances or when any single instance of violative conduct without exceptional circumstances is deemed to be egregious. *See* Securities Exchange Act Release No. 45570 (March 15, 2002), 67 FR 13395 (March 22, 2002) (SR–Phlx–2001–114).

[12] Such criteria can be updated subject to the Exchange providing notice to the Commission's Office of Compliance Inspections and Examinations. *See* Securities Exchange Act Release No. 45570 (March 15, 2002), 67 FR 13395 (March 22, 2002) (SR–Phlx–2001–114). Because neither is an "order handling rule," the Exchange is proposing herein to expressly permit batching of violations of Advice F–6 and Rule 1014(c)(i)(A).

[13] *See* confidential letters from Stephen M. Pettibone, Managing Director Surveillance, Phlx, to Michael Gaw, Division of Trading and Markets, and Tina Barry, Office of Compliance Inspections and Examinations, Securities and Exchange Commission, dated October 6, 2009 and December 30, 2009.

[14] *See* letter from Charles Rogers, Chief Regulatory Officer, Phlx, to Tina Barry, Office of Compliance Inspections and Examinations and Michael Gaw, Division of Trading and Markets, Securities and Exchange Commission, dated February 18, 2010.

of the Act [15] in general, and furthers the objectives of Section 6(b)(5) of the Act [16] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange also believes that its proposal is consistent with Sections 6(b)(1) and (6) of the Act,[17] which require that the rules of an exchange enforce compliance with, and provide appropriate discipline for, violations of Commission and Exchange rules. In addition, because existing Rule 970 provides procedural rights to a person fined under the minor rule plan to contest the fine and permits a hearing on the matter, the Exchange believes that the proposal is consistent with Sections 6(b)(7) and 6(d)(1) of the Act,[18] by providing a fair procedure for the disciplining of members and persons associated with members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2010–43 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2010–43. 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 Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2010–43 and should be submitted on or before May 7, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–8683 Filed 4–15–10; 8:45 am]

BILLING CODE 8011–01–P

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

[17] 15 U.S.C. 78f(b)(1) and (6).

[18] 15 U.S.C. 78f(b)(7) and (d)(1).

[19] 17 CFR 200.30–3(a)(12) and 200.30–3(a)(44).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61885; File No. SR–BATS–2010–002]

Self-Regulatory Organizations; BATS Exchange, Inc.; Order Approving a Proposed Rule Change, As Amended, To Offer Certain BATS Exchange Data Products

April 9, 2010.

I. Introduction

On February 2, 2010, BATS Exchange, Inc. ("BATS" or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 [2] thereunder, a proposed rule change to offer certain new Exchange data products to Exchange Members [3] and other market data recipients. On February 22, 2010, BATS filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on March 5, 2010.[4] The Commission received one comment letter in response to the proposed rule change.[5] On April 8 , 2010, BATS filed Amendment No. 2 to the proposed rule change.[6] This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2.

II. Description of the Proposal

The Exchange proposes to offer several new market data products: BATS Last Sale Feed; BATS Historical Data Products; and BATS Market Insight ("New Market Data Products"). In connection with making available the New Market Data Products, the Exchange proposes to amend its fee schedule applicable to Members and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c).[7]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[4] *See* Securities Exchange Act Release No. 61592 (March 5, 2010), 75 FR 10332 ("Notice").

[5] *See* letter to Elizabeth M. Murphy, Secretary, SEC, from Joan C. Conley, Senior Vice President and Corporate Secretary, The NASDAQ OMX Group, Inc., dated March 26, 2009 ("NASDAQ OMX Letter").

[6] *See* Amendment No. 2 dated April 8, 2010 ("Amendment No. 2"). The text of Amendment No. 2 is available on the Exchange's Web site at *http://www.batstrading.com,* at the principal office of BATS, and on the Commission's Web site (*http://www.sec.gov/rules/sro.shtml*). Amendment No. 2 is a non-substantive, clarifying amendment.

[7] The Exchange currently offers other data products to Members and other data recipients free of charge. The Exchange states that such data

BATS Last Sale Feed. The BATS Last Sale Feed will be a direct data feed product that provides real-time, intraday trade information, including price, volume, and time of executions.[8] The BATS Last Sale Feed will include last sale information regarding all NYSE-listed securities ("Tape A Securities"), NASDAQ-listed securities ("Tape C Securities"), and securities listed on exchanges other than NYSE or NASDAQ ("Tape B Securities") with respect to activity occurring solely on the Exchange.[9]

No market participant will be required to subscribe to the BATS Last Sale Feed and the same last sale prices will continue to be available in the Exchange's other data feeds.[10] The Exchange represents that it will not distribute the BATS Last Sale Feed sooner than it makes available the data that is provided to the SIPs for consolidation and dissemination.[11] BATS proposes to charge $5,000 per month for the BATS Last Sale Feed for any data recipient that chooses to receive the data feed for internal use only ("Internal Distributor"). The Exchange will not require data recipients that wish to redistribute the BATS Last Sale Feed to count, classify (*e.g.,* professional or non-professional), or report to the Exchange information regarding the customers to which they provide the data. Instead, the Exchange proposes a flat fee of $25,000 per month for any data recipient that wishes to redistribute the BATS Last Sale Feed externally ("External Distributor"). End users will not have to pay the Exchange for the BATS Last Sale Feed or enter into contracts with the Exchange.

BATS Historical Data Products. The Exchange proposes to offer data recipients upon request the following three products: (1) Historical top of book data from the Exchange's TOP data feed ("Historical TOP Data"); (2) historical quotation and transaction data from the Exchange's PITCH data feed ("Historical PITCH Data"); and (3) historical transaction data from the Exchange's Last Sale Feed ("Historical Last Sale Data").[12] BATS Historical TOP Data, BATS Historical PITCH Data and BATS Historical Last Sale Data will be provided to data recipients for internal use only, and thus, no redistribution will be permitted.[13]

The proposed cost of user-accessible BATS Historical TOP Data, BATS Historical PITCH Data or BATS Historical Last Sale Data is $500 per month of data accessed by any individual user. For data that the Exchange provides on an external hard drive to a market participant the proposed cost is $2,500 per 1 terabyte (TB) drive generated by the Exchange.[14]

BATS Market Insight. The Exchange proposes to begin offering BATS Market Insight that can be used to analyze the depth of liquidity of the Exchange's book, including reserve and hidden interest, on a historical basis. BATS Market Insight will provide a market participant with information regarding the depth of the market at the Exchange in minute increments. Data will become available for access by market participants 10 days following each trade date (T + 10) and will be available for 30 days.[15] BATS Market Insight will be provided to data recipients for internal use only, and thus, no redistribution will be permitted. The proposed cost for access to BATS Market Insight is $1,000 per user per month.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[16] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[17] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,[18] which requires, among other things, that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also finds that the proposed rule change is consistent with Section 6(b)(8) of the Act[19] in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission has reviewed the proposal using the approach set forth by the Commission for non-core market data fees.[20] In the NYSE Arca Order, the Commission stated that "when possible, reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory."[21] It noted that the "existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory."[22] If an exchange "was subject to significant competitive forces in setting the terms of a proposal," the Commission will approve a proposal unless it determines that "there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder."[23]

As noted in the NYSE Arca Order, the standards in Section 6 of the Act do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data.[24] All U.S. exchanges trading NMS

products include, but are not limited to, TCP PITCH, Multicast PITCH, and TCP FAST PITCH, which are depth of book data feeds containing real-time quotation and transaction data from the Exchange; TCP DROP, which contains order execution and other information (*e.g.,* modifications and cancellations) specific to the Exchange activity of one or more Users; and TCP TOP, which contains real-time top of book quotation and transaction information from the Exchange. The Exchange represents that BATS will file a proposed rule change pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder to describe its existing free data feeds. *See* Amendment No. 2, *supra* note 6.

[8] The BATS Last Sale feed will not include quotation information.

[9] Currently, under the joint-industry plans that provide for the dissemination of last sale information for equity securities, the Exchange and other self-regulatory organizations ("SROs") provide real-time last sale information to a Security Information Processor ("SIP"), which then consolidates the information into a single stream for dissemination to the public, including market data vendors.

[10] *See supra* note 7.

[11] *See* Notice, *supra* note 4, at 10333.

[12] The Exchange proposes to provide data recipients with the requested historical data on an external hard drive provided by the Exchange. As an alternative means to obtain historical data, the Exchange proposes to provide market participants with access to a database from which they can download data that is up to three months old.

[13] The Exchange currently provides historical data upon request on an ad hoc basis, but proposes to begin charging a fee due to the infrastructure costs of storing and providing such data.

[14] For a more detailed description of how the proposed fees operate, *see* Notice, *supra* note 4, at 10334.

[15] Specifically, a participant using BATS Market Insight will be able to obtain data regarding total order interest, displayed order interest and hidden order interest at each price point in specific Tape A, B, and C securities traded on the Exchange.

[16] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 15 U.S.C. 78f(b)(4).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78f(b)(8).

[20] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21) ("NYSE Arca Order").

[21] *Id.* at 74771.

[22] *Id.* at 74782.

[23] *Id.* at 74781.

[24] *Id.* at 74779.

stocks are required pursuant to Rule 603(b) [25] of the Act to provide "core data"—the best-priced quotations and comprehensive last sale reports—to a SIP to consolidate and disseminate to the public pursuant to joint-SRO plans.[26] In contrast, individual exchanges and other market participants distribute non-core data voluntarily.[27] The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.[28] Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. The Commission therefore is able to rely on competitive forces in its determination of whether an exchange's proposal to distribute non-core data meets the standards of Section 6.[29]

Because the instant proposal to offer New Market Data Products relates to the distribution of non-core data, the Commission will apply the market-based approach set forth in the NYSE Arca Order. Pursuant to this approach, the first step is to determine whether BATS was subject to significant competitive forces in setting the terms of its non-core market data proposal, including the level of any fees. As in the NYSE Arca Order, in determining whether BATS was subject to significant competitive forces in setting the terms of New Market Data Products, the Commission has analyzed BATS' compelling need to attract order flow from market participants, and the availability to market participants of alternatives to purchasing BATS' non-core market data.

Attracting order flow is the core competitive concern of any equity exchange. Given the competitive pressures that currently characterize the U.S. equity markets, no exchange can afford to take its market share percentages for granted—they can change significantly over time, either up or down.[30] BATS competes with the other national securities exchanges that currently trade equities, with electronic communication networks, with quotes posted in FINRA's Alternative Display Facility, with alternative trading systems, and with securities firms that primarily trade as principal with their customer order flow.[31]

In addition to the need to attract order flow, the availability of alternatives to New Market Data Products significantly affect the terms on which BATS can distribute this market data.[32] In setting the fees for New Market Data Products, BATS must consider the extent to which market participants would choose one or more alternatives instead of purchasing its data.[33] With respect to BATS Last Sale Feed, market participants can also gain access to BATS last sale prices through free data feeds provided by the Exchange or those integrated with the prices that other markets make available through the SIPs.[34] Further, other national securities exchanges, the several Trade Reporting Facilities of FINRA, and ECNs can produce last sale information products, and thus are sources of potential competition for BATS.[35] With respect to BATS Market Insight, BATS states that a market participant could gain access to the same information through a combination of: (1) Existing, free data feeds from the Exchange (for displayed trading interest); and (2) information gathered by the market participant through its trading activities on the Exchange and/or through the consolidated data published by the SIPs reporting executions that occurred on the Exchange (for non-displayed trading interest).[36] With respect to BATS Historical Data Products, the Exchange notes that market participants can gain access to the same information that BATS proposes to make available through BATS Historical Data Products feed through existing, free data feeds from the Exchange. Further, the Commission notes that BATS last sale and quotation information also is available through the consolidated data feed disseminated by the SIPs. The Exchange also notes that a similar product is offered by Nasdaq.[37]

The Commission believes that there are a number of alternative sources of information that impose significant competitive pressures on BATS in setting the terms for distributing the New Market Data Products. The Commission believes that the availability of those alternatives, as well as BATS' compelling need to attract order flow, imposed significant competitive pressure on BATS to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because BATS was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that the terms of the proposal fail to meet the applicable requirements of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis. The Commission notes that the proposed fees for BATS Last Sale Feed are lower for Internal Distributors than for External Distributors. Because Internal Distributors are by definition more limited in the scope of their distribution of BATS Last Sale Feed than External Distributors, it is reasonable to expect that Internal Distributors will provide BATS Last Sale Feed to a smaller number of internal recipients.[38] The Commission notes that the fees for BATS Historical Data Products and BATS Market Insight are the same for all persons. The fees therefore do not unreasonably discriminate among types of recipients.

As noted above, the Commission received one comment letter on the proposed rule change.[39] The commenter questions whether the Act and the rules thereunder require SROs to file a proposed rule change to offer at no charge electronic data feeds of transaction information generated by an SRO. In response to this comment, BATS filed Amendment No. 2, in which it represents that BATS will file a proposed rule change pursuant to Section 19(b)(1) of the Act and Rule 19b–4[40] thereunder describing its current free data feeds.[41]

Further, NASDAQ OMX asserts that the proposal raises the question of

[25] 17 CFR 242.603(b).

[26] *See* Consolidated Tape Association Plan ("CTA Plan") and Consolidated Quotation Plan ("CQ Plan). The two plans, which have been approved by the Commission, are available at *http://www.nysedata.com. See also* the Joint-Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis ("Nasdaq UTP Plan"). The Nasdaq UTP Plan, which has been approved by the Commission, is available at *http://www.utpdata.com.*

[27] *See* NYSE Arca Order, *supra* note 20, at 74779.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 74782.

[31] *See* Notice, *supra* note 4, at 10334.

[32] *See* NYSE Arca Order *supra,* note 20, at 74784.

[33] *Id.* at 74783.

[34] *See* Notice, *supra* note 4, at 10334.

[35] BATS represented that many other market centers, including Nasdaq and the New York Stock Exchange LLC, do in fact currently produce last sale information products. *Id.*

[36] *See* Notice, *supra* note 4, at 10334.

[37] *See* Nasdaq Rule 7022.

[38] Conversely, External Distributors can reasonably be expected to distribute BATS Last Sale Feed to a higher number of recipients because they do not have the same limitation. Accordingly, the Exchange will charge a higher fee to External Distributors than to Internal Distributors. The Exchange noted in its filing that "[r]egardless of a data recipient's reasons for subscribing to the BATS Last Sale Feed, the fee for such feed applies equally to all data recipients that wish to use the feed for internal use only and equally to all data recipients that wish to redistribute the feed." *See* Notice, *supra* note 4, at 10333. For a similar distinction, *see, e.g.,* Securities Exchange Act Release No. 60459 (August 7, 2009), 74 FR 41466 (August 17, 2009) (SR–Phlx–2009–54) (order approving a proposed rule change to establish fees for the Top of Phlx Options direct data feed product).

[39] *See supra* note 5.

[40] 17 CFR 240.19b–4.

[41] *See supra* note 6.

whether the Act permits an exchange to offer the same transaction information via two different delivery mechanisms for two different prices.[42] NASDAQ OMX then cites two of its own proposed rule changes and attempts to analogize them with the instant proposal, stating that the instant proposal implicates issues of what constitutes fair versus unfair discrimination with respect to the fees charged for market data. The Commission believes that the two proposed rule changes cited by NASDAQ OMX are factually different than the BATS' proposed rule change. As discussed above, the Commission believes that BATS offering of New Market Data Products is not unfairly discriminatory.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–BATS–2010–002), as modified by Amendments No. 1 and 2, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–8689 Filed 4–15–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61863; File No. SR–Phlx–2010–54]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Fees for Participation in NASDAQ OMX PSX

April 7, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], and Rule 19b–4 thereunder,[2] notice is hereby given that on March 31, 2010, NASDAQ OMX PHLX, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt a new access fee applicable to Exchange members approved for participation in PSX, to waive this fee for a six month period, and to waive certain Exchange membership fees for new members seeking to participate solely in PSX.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In October 2008, the Exchange ceased operation of its cash equities trading platform, XLE[3], and since has solely operated an options market. The Exchange plans to launch PSX, a new cash equities market to be operated by the Exchange, in the second quarter of 2010, at a time following effectiveness of necessary filings with the Securities and Exchange Commission ("Commission").

Membership Fees

Under the Exchange's current fee schedule, a broker-dealer applying for Exchange membership ("Applicant") is assessed a non-refundable application fee of $350.00, which must be provided to the Exchange concurrent with the membership application. An applicant that is subsequently approved for Exchange membership is assessed an initiation fee of $1,500.00 and in return receives an A–1 trading permit,[4] which allows the approved Applicant to use the trading facilities of the Exchange. In addition to these two one-time fees, members are assessed a permit fee of $1,000.00 per month.[5]

As a consequence of the Exchange's pending operation of both a cash equities and options market, an Applicant will have the option of applying to participate in one or both of the markets. The Exchange is proposing to waive the application, initiation, and permit fees for Applicants applying to participate in PSX. The proposed fee waivers would apply to new Exchange members applying to participate solely in PSX. The proposed fee waiver does not apply to an Applicant seeking approval to participate solely in the options market, or to an Applicant seeking to participate in both markets. In these cases, the application, initiation, and permit fees, as they relate to options, would apply. An Exchange member approved to participate in PSX would not be assessed an application fee should it subsequently determine to participate in the Exchange's options market, but would be charged the one-time initiation fee and would thereafter be charged the monthly account fee and permit fee.[6]

Because the Exchange proposes to waive the application, initiation, and permit fees as an incentive to attract market participants to the PSX, it seeks to implement the fee waivers immediately so that Applicants seeking to participate in PSX may begin submitting applications to the Exchange prior to the market's commencement of operations.

[42] NASDAQ OMX was referring to the BATS Last Sale Feed that contains last sale information that is also offered via PITCH free of charge.

[43] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58613 (September 22, 2008), 73 FR 57181 (October 1, 2008) (SR–Phlx–2008–65).

[4] *See* Rule 908.

[5] A member participating in the Exchange's options market is also assessed an account fee of $50 per month for each account number assigned to the member in addition to the account number provided with the permit. Account numbers are assigned by the Exchange to options participants as a means to identify the member in options market transactions. Members may request additional account numbers for various business purposes. The additional account fee will not be applicable to PSX participants as MPIDs will be used to identify member firms' participation, not account numbers.

[6] PHLX notes that the majority of time and expense incurred in reviewing an application is realized in the initial membership application process. As a consequence, a PSX participant that submits a subsequent application to participate on the Exchange's options market would result in little additional expense to the Exchange. In addition, the Exchange believes that many of the new PSX market participants will be current Exchange options market participants and therefore will have paid an application fee to participate on that market. Coupled with the fact that the current application fee set at a low level, the Exchange believes that the fee waiver will result in a non-material loss in application fee revenues.

Access Services Fees

Access to PSX will be provided through the OUCH, FIX, and RASH access protocols, with drop copies provided through the DROP protocol. Connections to PSX will be available through extranets, direct connection, and Internet-based virtual private networks. Prior to the launch of the PSX, the Exchange will make the PSX trading platform available for testing purposes, but will not charge for testing or for access ports used for testing. After the first full six months during which PSX operates, the Exchange will assess a fee of $400 per month for each port pair, with an additional $200 per month charged for each Internet port that requires additional bandwidth.[7] The Exchange believes these fees are reasonable as they are identical to the fees charged by NASDAQ OMX BX ("BX") for comparable access to its cash equities market.[8] The Exchange expects that the proposed fees will eventually cover the costs associated with establishing the service, responding to customer requests, configuring Exchange systems, programming to user specifications, and administering the service, among other things, and may provide the Exchange with a profit. Similar to the membership fees discussed above, however, the Exchange will waive access services fees until the end of the sixth calendar month of PSX's operation as an incentive to attract market participants to the PSX. Prior to launch, however, access ports will be available for testing purposes.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act[9] in general, and furthers the objectives of Section 6(b)(4) of the Act[10] in particular, in that it provides for an equitable allocation of reasonable fees and other charges among Exchange members. The Exchange makes all services and products subject to its fees available on a non-discriminatory basis to similarly situated recipients. The proposed new access fees are structured in a manner comparable to corresponding fees of BX already in effect, and are set at levels equal to these comparable fees. Moreover, the proposed access fees are set at levels that are uniform for all members. The proposed waivers of both the access fees and certain membership fees are designed to encourage broader participation in the proposed new market, and are appropriate in light of the lack of certainty with respect to the start date of the new market as well as the speed with which liquidity will develop on it.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Despite its long history of operating a cash equities market, the Exchange will effectively be entering the competitive markets for equities trading as a start-up venture, having shuttered its cash equities market in the fourth quarter of 2008. Accordingly, its fees must be set at a level that will promote competition in the markets, or potential users of its services will simply continue to obtain services from the Exchange's multiple competitors. In waiving certain fees associated with membership in the new market, the Exchange believes that market participants will be attracted to the market, which will help ensure market depth and liquidity. In its discretion, the Exchange may determine to eliminate the proposed membership fee waivers, in part or altogether, through a subsequent rule change.

The Exchange is also proposing a new fee for access to the new market and to waive this fee for a limited period to attract market participants. The fee is based on the fees assessed by BX for access to its market. Accordingly, the Exchange believes that the proposed new access fee is fairly priced based on its similarity to the fee assessed for access to BX. As a consequence, the Exchange believes that the proposed fee will not unduly place a burden on competition. The Exchange notes that, if it sets fees at inappropriately high levels, market participants will avoid using the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change establishes or changes a due, fee, or other charge applicable only to a member pursuant to Section 19(b)(3)(A)(ii) of the Act[11] and Rule 19b–4(f)(2)[12] thereunder. Accordingly, the proposal will take effect upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2010–54 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2010–54. 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 Web site viewing and printing 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

[7] *See* the NASDAQ OMX PHLX Fee Schedule, proposed Item XII.

[8] *See* BX Rule 7015.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78s(b)(3)(A)(ii).

[12] 17 CFR 240.19b–4(f)(2).

copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2010–54 and should be submitted on or before May 7, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–8684 Filed 4–15–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61878; File No. SR–Phlx–2010–48]

Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Market Data Fees

April 8, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 6, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its fee schedule by establishing fees for a direct data product, Top of Phlx Options Plus Orders ("TOPO Plus Orders"), which currently provides disseminated Exchange top-of-market data (including orders, quotes and trades), together with all information that is included in the Exchange's Specialized Order Feed ("SOF"), as described more fully below. The proposed fees would become effective on and after June 1, 2010.

The Exchange anticipates that it will generally phase out SOF as of June 1, 2010, and instead offer TOPO Plus Orders to participants that wish to continue to receive the data currently included in SOF. Accordingly, current SOF users must migrate to TOPO Plus Orders by June 1, 2010. In the event that an SOF user is unable to migrate to TOPO Plus Orders by June 1, 2010 due to circumstances beyond their control, the Exchange will apply the same monthly fee applicable to TOPO Plus Orders users that are Internal Distributors (as defined below) to such SOF users.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to raise revenue for the Exchange by establishing fees for the TOPO Plus Orders market data product.

Beginning in June, 2009, the Exchange launched its enhanced electronic trading platform for options, Phlx XL II, on which all options on the Exchange are currently traded.[3]

TOPO

In conjunction with the launch and rollout of the Phlx XL II system, the Exchange developed the Top of Phlx Options data feed ("TOPO")[4] which provides to subscribers a direct data feed that includes the Exchange's best bid and offer position, with aggregate size, based on displayable order and quoting interest on the Phlx XL II system. The data contained in the TOPO data feed is identical to the data sent to the processor for the Options Price Regulatory Authority ("OPRA"), and the TOPO and OPRA data leave the Phlx XL II system at the same time.

Specialized Order Feed

Specialized Order Feed ("SOF") is the Exchange's real-time full limit order book data feed. SOF is currently available to any Exchange quoting participant (i.e., specialists, Streaming Quote Traders ("SQTs"),[5] and Remote Streaming Quote Traders ("RSQTs")[6] (collectively, "users")) and is available to users on an issue-by-issue basis at the user's request. A user does not have to be assigned in an issue for the Exchange to provide SQF to such user in that issue.

The SOF provides real-time information to keep track of the single order book(s), single and complex orders, complex strategy and Live Auction for all symbols for which the user is configured. Users may be configured for one or more symbols. SOF provides real-time data for the entire book to its users. It is a compilation of limit order data resident in the Exchange's limit order book for options traded on the Exchange that the Exchange provides through a real-time data feed. The Exchange updates SOF information upon receipt of each displayed limit order. For every limit price, the SOF includes the aggregate order volume.

TOPO Plus Orders

In October, 2009, the Exchange made the TOPO Plus Orders data feed available to all market participants.[7] TOPO Plus Orders provides disseminated Exchange top-of-market data (including orders, quotes and trades) together with all information that is included in SOF. Currently, the Exchange does not charge fees for the use of TOPO Plus Orders. When it established TOPO Plus Orders, the

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32).

[4] *See* Securities Exchange Act Release No. 60459 (August 7, 2009), 74 FR 41466 (August 17, 2009) (SR–Phlx–2009–54).

[5] An SQT is an Exchange Registered Options Trader ("ROT") who has received permission from the Exchange to generate and submit option quotations electronically through an electronic interface with AUTOM via an Exchange approved proprietary electronic quoting device in eligible options to which such SQT is assigned. *See* Exchange Rule 1014(b)(ii)(A).

[6] An RSQT is an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange. *See* Exchange Rule 1014(b)(ii)(B).

[7] *See* Securities Exchange act Release No. 60877 (October 26, 2009), 74 FR 56255 (October 30, 2009) (SR–Phlx–2009–92).

Exchange represented that it would submit a proposed rule change to the Commission in order to implement fees for the use of TOPO Plus Orders. The instant proposed rule change is intended to establish and implement such fees.

The Exchange proposes to charge monthly fees to distributors for use of TOPO Plus Orders. The amount of the monthly distributor fee will depend on whether the distributor is an "Internal Distributor" or an "External Distributor," as defined below.

The Exchange's fee schedule currently reflects that a "distributor" of NASDAQ OMX PHLX data is any entity that receives a feed or data file of data directly from NASDAQ OMX PHLX or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity), and that all distributors would be required to execute a NASDAQ OMX PHLX distributor agreement.[8]

Discontinuation of SOF

As an incentive for SOF users to migrate to TOPO Plus Orders, the Exchange anticipates that it will generally phase out SOF as of June 1, 2010. The Exchange recognizes, however, that some SOF users may encounter issues beyond their control that render them unable to migrate from SOF to the TOPO Plus Orders feed on or before that date. Accordingly, the Exchange will make SOF available only to current SOF users that have not migrated to TOPO Plus Orders for a period of time after June 1, 2010. Beginning June 1, 2010, such SOF users will be charged for SOF at the same monthly rate as TOPO Plus Orders users that are Internal Distributors, as defined below.

Once migrated from SOF to TOPO Plus Orders, a user will not have the option of reverting to SOF. New subscribers currently do not have, and will not be given, the option to use SOF. New subscribers must subscribe to TOPO Plus Orders to receive the market data feed.

Internal Distributor

An Internal Distributor is an organization that subscribes to the Exchange for the use of TOPO or TOPO Plus Orders, and is permitted by agreement with the Exchange to provide TOPO or TOPO Plus Orders data to internal users (i.e., users within their own organization). Under the proposal, Internal Distributors of TOPO Plus Orders would be charged a monthly fee of $4,000 per organization.[9] This charge will also apply to SOF users that have not migrated to TOPO Plus Orders on or before June 1, 2010.[10]

External Distributor

An External Distributor is an organization that subscribes to the Exchange for the use of TOPO Plus Orders, and is permitted by agreement with the Exchange to provide TOPO Plus Orders data to both internal users and to external users (i.e., users outside of their own organization). External Distributors will be charged a monthly fee of $5,000 per organization.[11]

Monthly Subscriber Fee

The Exchange proposes to assess a monthly Subscriber Fee on External Distributors of TOPO Plus Orders. A "subscriber" is a person or entity to whom the External Distributor provides the TOPO Plus Orders data feed. The monthly Subscriber Fee would be assessed on a per-subscriber basis depending upon whether the subscriber is a Non-Professional Subscriber or a Professional Subscriber.

A Non-Professional Subscriber is a natural person who is neither: (i) Registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an "investment adviser" as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.[12] The monthly Subscriber Fee assessed to External Distributors would be $1 per Non-Professional Subscriber. This Monthly Subscriber Fee will also apply to SOF users that have not migrated to TOPO Plus Orders on or before June 1, 2010.

A Professional Subscriber is any subscriber that is not a Non-Professional Subscriber. If the NASDAQ OMX PHLX distributor agreement is signed in the name of a business or commercial entity, such entity would be considered a Professional Subscriber. The monthly Subscriber Fee assessed to External Distributors would be $20 per Professional Subscriber. This Monthly Subscriber Fee will also apply to SOF users that have not migrated to TOPO Plus Orders on or before June 1, 2010.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[13] in general and with Sections 6(b)(4) of the Act,[14] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Phlx operates or controls.

The Exchange believes that the proposed rule change is also consistent with the provisions of Section 6(b)(5) of the Act,[15] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange.

The Exchange believes that the proposed rule change is also consistent with Section 6(b)(8) of the Act[16] in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, as set forth in more detail below.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of

[8] The Exchange notes that the proposed definition of "distributor" and references to internal and external distribution are identical to those set forth in NASDAQ Rule 7019(c).

[9] Internal Distributors of TOPO are currently charged a monthly fee of $2,000 per organization. This fee will continue to apply to Internal Distributors that distribute the TOPO feed.

[10] SOF users do not distribute SOF to any external users. Therefore, the Exchange will assess the lesser fee applicable to internal distributors of TOPO Plus Orders on SOF users that have not migrated as of June 1, 2010.

[11] External Distributors of TOPO are currently charged a monthly fee of $2,500 per organization. This fee will continue to apply to External Distributors that distribute the TOPO feed.

[12] This definition of "non-professional" is based on Nasdaq Options Market ("NOM") Rule 7011(B)(2).

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(4).

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78f(b)(8).

data available to consumers, and also spur innovation and competition for the provision of market data.

The Commission has recently issued an order firmly establishing that in reviewing non-core data products such as TOPO Plus Orders, the Commission will utilize a market-based approach that relies primarily on competitive forces to determine the terms on which non-core data is made available to investors.[17] The Commission adopted a two-part test:

The first is to ask whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees. If an exchange was subject to significant competitive forces in setting the terms of a proposal, the Commission will approve the proposal unless it determines that there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder. If, however, the exchange was not subject to significant competitive forces in setting the terms of a proposal for non-core data, the Commission will require the exchange to provide a substantial basis, other than competitive forces, in its proposed rule change demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.[18]

This standard begins from the premise that no Commission rule requires exchanges or market participants either to distribute non-core data to the public or to display non-core data to investors.[19]

In its NetCoalition Order, the Commission concluded that "at least two broad types of significant competitive forces applied to NYSE Arca in setting the terms of its Proposal to distribute the ArcaBook data: (1) NYSE Arca's compelling need to attract order flow from market participants; and (2) the availability to market participants of alternatives to purchasing the ArcaBook data. The Commission conducted an exhaustive 14-page review of these two competitive forces before concluding that the availability of alternatives, as well as the compelling need to attract order flow, imposed significant competitive pressure on the exchange's need to act equitably, fairly, and reasonably in setting the terms of the fees for its non-core data product.[20]

The market data provided in TOPO Plus Orders is non-core data that is governed by the same analysis the Commission set forth in the NetCoalition Order. As with the NYSE Arca depth-of-book product, no rule requires Phlx or any other exchange to offer depth of book data; nor are vendors required to purchase or display that data.

Additionally, Phlx is constrained by the same two competitive forces in the options market as the Commission found are present in the proposal of the International Securities Exchange, Inc. ("ISE") to establish fees for a real-time depth of market data offering, the ISE Depth of Market Data Feed ("Depth of Market").[21]

First, Phlx has a compelling need to attract order flow from market participants, just as ISE, in order to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on Phlx to act reasonably in setting its fees for Phlx market data, particularly given that the market participants that will pay such fees often will be the same market participants from whom Phlx must attract order flow. These market participants include broker-dealers that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one exchange to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.

As an illustration of the intensity of the competition for options order flow among the seven U.S. options exchanges, the ISE and Chicago Board Options Exchange, Inc. ("CBOE") each enjoy close to thirty percent market share of volume, followed by NYSE Arca and Phlx at close to fifteen percent market share, followed by four other exchanges with meaningful market share.

Phlx currently trades options on 7 proprietary index products that are not traded on any other exchange. These 7 options currently represent less than 0.04% of Phlx's total contract volume. Given the small percentage of Phlx's total contract volume represented by these 7 products, the Exchange believes that the inclusion of data on these products in the TOPO Plus Orders product should not confer market power on Phlx to compel market participants to purchase the entire Phlx data feed. The Exchange therefore believes that the inclusion of depth-of-book data for these products in Phlx's TOPO Plus Orders product does not undermine the fact that Phlx is subject to significant competitive forces in setting the terms of its proposal.

Second, Phlx is constrained in pricing TOPO Plus Orders by the availability to market participants of alternatives to purchasing TOPO Plus Orders. Phlx must consider the extent to which market participants would choose one or more alternatives instead of purchasing the Exchange's data. For example, although the TOPO Plus Orders data feed is separate from the core data feed made available by OPRA, all the information available in the TOPO market data product, which is included in the TOPO Plus Orders market data product, is included in the core data feed. The core OPRA data is widely distributed and relatively inexpensive, thus constraining Phlx's ability to price TOPO and TOPO Plus Orders. Additionally, both ISE and CBOE are potential competitors because each exchange enjoys greater market share and thus the ability to offer a top-of-book product that would compete favorably with TOPO.

If the Commission finds that Phlx is subject to significant competitive forces in setting the terms of TOPO Plus Orders pricing, then the Commission should approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. Phlx submits that no such countervailing basis exists.

To the contrary, Phlx's considerations in setting the fees for TOPO Plus Orders are virtually identical to those the Commission approved in the NetCoaltion Order. First, the proposed fees for TOPO Plus Orders are lower for Internal Distributors than for External Distributors. Because Internal Distributors are by definition more limited in the scope of their distribution of TOPO Plus Orders data than External Distributors, it is reasonable to expect that Internal Distributors will provide TOPO Plus Orders data to a smaller number of internal subscribers. Conversely, External Distributors can reasonably be expected to distribute the TOPO Plus Orders data to a higher number of subscribers because they do not have the same limitation.

[17] *See* Securities Exchange Act Release No. 57917 (Dec. 2, 2008) [sic] (["]NetCoalition Order" resolving File No. SR–NYSEArca–2006–21).

[18] *Id.* at 48–49 [sic].

[19] *Id.* at 4 [sic].

[20] *Id.* at 51–65 [sic]. The Commission then spent an additional 36 pages (65–101 [sic]) analyzing and refuting comments challenging the Commission's competition analysis.

[21] *See* Securities Exchange Act Release No. 59949 (May 20, 2009), 74 FR 25593 (May 28, 2009) (SR–ISE–2007–97) (Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Relating to Market Data Fees).

Accordingly, the Exchange will charge a higher fee to External Distributors than to Internal Distributors. The fees therefore do not unreasonably discriminate among types of distributors, such as by favoring participants in the Phlx market or penalizing participants in other markets. Second, Phlx projects that the total revenues generated by the TOPO Plus Orders fee initially will amount to $1.2 million per year, which is significantly less than the $8 million per year that NYSE Arca projected would be generated by its ArcaBook data.[22]

The Exchange also reasonably believes that External Distributors will distribute TOPO Plus Orders market data to Professional Subscribers who would use the data for commercial purposes, whereas Non-Professional Subscribers may not by definition use the data for any commercial purpose. Therefore, the Exchange will assess on External Distributors a monthly subscriber fee of $20 per Professional Subscriber, and $1 per Non-Professional Subscriber. The monthly subscriber fees assessed upon External Distributors are based upon the manner in which the data will ultimately be used, i.e., for commercial vs. non-commercial purposes, and therefore do not unreasonably discriminate among types of distributors, such as by favoring participants in the Phlx market or penalizing participants in other markets.

B. Self-Regulatory Organization's Statement on Burden on Competition

Phlx does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, the market for options orders and executions is already highly competitive and Phlx's proposal is itself pro-competitive in several ways. First, the TOPO Plus Orders depth of book data feed offers a comprehensive, competitive alternative to the consolidated data OPRA feed for users and situations where consolidated data is unnecessary. Second, the Phlx believes that offering the TOPO Plus Orders data feed will help attract new users and new order flow to the Phlx market, thereby improving Phlx's ability to compete in the market for options order flow and executions.

[22] *Id.* at 101–104 [sic].

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2010–48 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2010–48. 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,[23] 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 Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2010–48 and should be submitted on or before May 7, 2010.

[23] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–8686 Filed 4–15–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61879; File No. SR–CBOE–2010–031]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Title of CBOE Rule 6.8C

April 8, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on March 29, 2010, Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[24] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to make a technical amendment to change the title of a rule. The text of the proposed rule change is available on CBOE's Web site at *http://www.cboe.org,* on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In April 2009, the Commission approved a CBOE rule change to modify Rule 6.8C, *Prohibition Against Members Functioning as Market-Makers,* to eliminate some of its restrictions. As revised, Rule 6.8C's restrictions are now only applicable to customer orders (*i.e.,* non-broker-dealer orders that are not Voluntary Professional and Professional orders), since such customer orders have priority at any price over the bids and offers of non-customers.[5] The restrictions are no longer applicable to instances where a member is acting as principal on its own behalf or is acting as agent on behalf of other broker-dealer orders or Voluntary Professional or Professional order [sic].

The purpose of this rule change is solely to amend the title of Rule 6.8C to better reflect the current application of the rule. In particular, the title of Rule 6.8C will be changed from "Prohibition Against Members Functioning as Market-Makers" to "Prohibition Against Customers Functioning as Market-Makers."

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[6] that an exchange have rules that are designed to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the proposed rule change seeks to update the title of CBOE Rule 6.8C to better reflect the current application of the rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6)[9] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[10] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission notes that the amended title of CBOE Rule 6.8C better reflects the current application of the rule. Therefore, the Commission designates the proposal operative upon filing.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2010–031 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–031. 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

[5] *See* Securities Exchange Act No. 59700 (April 2, 2009), 74 FR 16246 (April 9, 2009) (SR–CBOE–2009–009). When Rule 6.8C was amended in April 2009, it only referenced Voluntary Professionals. In December 2009, the Exchange received Commission approval of a rule change related to Professionals. That rule change, among other things, excluded Professional orders from the restrictions of Rule 6.8C in the same manner that Voluntary Professionals are excluded from the restrictions of Rule 6.8C. *See* Securities Exchange Act Release No. 61198 (December 17, 2009), 74 FR 68880 (December 29, 2009) (SR–CBOE–2009–078).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2010–031 and should be submitted on or before May 7, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–8687 Filed 4–15–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61881; File No. SR–NYSEArca–2010–14]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Accelerated Approval of Proposed Rule Change Relating to the Listing of the United States Brent Oil Fund, LP

April 9, 2010.

I. Introduction

On March 3, 2010, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") 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 list and trade units of the United States Brent Oil Fund, LP. The proposed rule change was published for comment in the **Federal Register** on March 24, 2010.[3] The Commission received no comments on the proposed rule change. This order approves the proposed rule change on an accelerated basis.

II. Description of Proposed Rule Change

The Exchange proposes to list and trade units ("Units") of the United States Brent Oil Fund, LP ("USBO") pursuant to NYSE Arca Equities Rule 8.300, which governs the listing and trading of partnership units on the Exchange.[4] USBO, a Delaware limited partnership, is a commodity pool that is managed and controlled by its general partner, United States Commodity Funds LLC ("General Partner"). The General Partner is a single member limited liability company that was formed in Delaware on May 10, 2005 and is registered as a commodity pool operator with the Commodity Futures Trading Commission ("CFTC"), and is a member of the National Futures Association. The General Partner is not affiliated with a broker-dealer. The Exchange represents that USBO will comply with the requirements NYSE Arca Equities Rule 8.300[5] and with the requirements of Rule 10A–3 under the Act[6] as it applies to limited partnerships.

The net assets of USBO will consist primarily of investments in futures contracts for crude oil, heating oil, gasoline, natural gas and other petroleum-based fuels that are traded on the ICE Futures Exchange, New York Mercantile Exchange ("NYMEX"), or other U.S. and foreign exchanges (collectively, "Futures Contracts"). USBO may also invest in other crude oil-related investments, such as cash-settled options on Futures Contracts, forward contracts for crude oil, cleared swap contracts and over-the-counter transactions that are based on the price of crude oil, and other petroleum-based fuels, Futures Contracts, and indices based on the foregoing ("Other Crude Oil-Related Investments" and, together with Futures Contracts, "Crude Oil Interests").

USBO will invest in Crude Oil Interests to the fullest extent possible without being leveraged or unable to satisfy its current or potential margin or collateral obligations with respect to its investments in Futures Contracts and Other Crude Oil-Related Investments. The primary focus of the General Partner will be investing in Futures Contracts and the management of investments in short-term obligations of the United States of two years or less ("Treasuries"), cash and/or cash equivalents for margining purposes and as collateral.

The investment objective of USBO is intended to have the daily changes in percentage terms of its Units' NAV reflect the daily changes in percentage terms of the spot price of Brent crude oil as measured by the changes in the price of the futures contract on Brent crude oil, as traded on ICE Futures Exchange that is the near-month contract to expire, except when the near-month contract is within two weeks of expiration, in which case the futures contract will be the next-month contract to expire ("Benchmark Futures Contract"), less USBO's expenses. The General Partner will employ a "neutral" investment strategy intended to track the changes in the price of the Benchmark Futures Contract regardless of whether the price goes up or goes down. USBO may invest in Crude Oil Interests other than the Benchmark Futures Contract to comply with accountability levels and position limits. On each day during a four-day period, the General Partner anticipates it will "roll" USBO's positions in oil investments by closing, or selling, a percentage of USBO's positions in Crude Oil Interests and reinvesting the proceeds from closing those positions in new Crude Oil Interests that reflect the change in the Benchmark Futures Contract.

The Exchange represents that USBO will create and redeem Units only in blocks of 100,000 Units called Creation Baskets and Redemption Baskets, respectively. Only Authorized Purchasers may purchase or redeem Creation Baskets or Redemption Baskets.

Additional information regarding the Units, USBO, the investment objective, policies, investment strategies, accountability levels, position limits, calculation of NAV, availability of information, trading rules and halts, and surveillance procedures, among other things, can be found in the Registration Statement and in the Notice, as applicable.[7]

III. Discussion and Commission's Findings

After careful review, the Commission finds that NYSE Arca's proposal to list and trade the Units is consistent with

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1)

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61721 (March 16, 2010), 75 FR 14237 ("Notice").

[4] USBO has filed with the Commission Amendment No. 2 to Form S–1, dated January 22, 2010 (File No. 333–162015) ("Registration Statement").

[5] The Exchange represents that a minimum of 100,000 Units will be outstanding at the commencement of trading on the Exchange, the net asset value ("NAV") per Unit will be calculated daily, and the NAV and the portfolio composition will be made available to all market participants at the same time.

[6] 17 CFR 240.10A–3.

[7] *See supra* notes 3 and 4.

the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[8] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[9] which requires that an exchange have rules designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general to protect investors and the public interest. The Commission notes that it has previously approved the listing and trading of other petroleum-based funds that are substantially similar to USBO.[10]

The Commission finds that the proposal to list and trade the Units on the Exchange is also consistent with Section 11A(a)(1)(C)(iii) of the Act,[11] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors, of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Units will be disseminated through the facilities of the Consolidated Tape Association, and the Indicative Partnership Value ("IPV") will be calculated, updated and disseminated on a per-Unit basis every 15 seconds during the Exchange's Core Trading Session by one or more major market data vendors. In addition, USBO will make available on its Web site on each business day its total portfolio composition that will include, as applicable, the name and value of each Crude Oil Interest, the specific types of Other Crude Oil-Related Investments, Treasuries, and the amount of cash and cash equivalents held in USBO's portfolio. With respect to information regarding the underlying Futures Contracts, ICE Futures Exchange disseminates price information on the Futures Contracts traded on the ICE Futures Exchange on a real-time basis during normal trading hours on the ICE Futures Exchange from 8 p.m. to 6 p.m. Eastern Time. With respect to any Futures Contracts that are traded on NYMEX, NYMEX disseminates price information on a real-time basis during normal trading hours on NYMEX from 10 a.m. to 2:30 p.m. E.T.

The Commission further believes that the proposal is reasonably designed to promote fair disclosure of information that may be necessary to price the Units appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that if the Exchange becomes aware that the NAV or the portfolio composition applicable to the Units is not disseminated to all market participants at the same time, the Exchange will halt trading in the Units. Further, if the indicative partnership value or the underlying benchmark investment, commodity or asset applicable to the Units is not being disseminated as required, the Exchange may halt trading during the day in which the interruption first occurs; if the interruption persists past the trading day on which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.[12]

The Exchange has represented that the Units are equity securities subject to the Exchange's rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

1. USBO will comply with the requirements of NYSE Arca Equities Rule 8.300, which includes initial and continued listing criteria.

2. The Exchange has appropriate rules to facilitate transactions in this type of security in all trading sessions.

3. The Exchange's surveillance procedures are adequate to properly monitor the trading of the Units in all trading sessions and to deter and detect violations of Exchange rules and applicable Federal securities laws.

4. Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Units. Specifically, the Information Bulletin will discuss the following: (a) The risks involved in trading the Units during the Opening and Late Trading Sessions (for Futures Contracts traded on ICE Futures), or, in addition, part of the Core Trading Session (for Futures Contracts traded on NYMEX) when an updated IPV will not be calculated or publicly disseminated; (b) the procedures for purchases and redemptions of Units (and that Units are not individually redeemable); (c) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Units; (d) how information regarding the IPV is disseminated; (e) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Units prior to or concurrently with the confirmation of a transaction; and (f) trading information.

5. USBO will be in compliance with Rule 10A–3 under the Act.[13]

6. To the extent that USBO invests in Futures Contracts traded on exchanges other than ICE Futures Exchange and NYMEX, not more than 10% of USBO's assets in the aggregate shall consist of Crude Oil Interests whose principal trading market is not a member of the Intermarket Surveillance Group or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

This approval order is based on the Exchange's representations.[14]

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations

[8] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78f(b)(5).

[10] *See, e.g.,* Securities Exchange Act Release Nos. 53582 (March 31, 2006), 71 FR 17510 (April 6, 2006) (SR–Amex–2005–127) (order approving listing and trading on the American Stock Exchange LLC ("Amex") of United States Oil Fund, LP); 56831 (November 21, 2007), 72 FR 67612 (November 29, 2007) (SR–Amex–2007–98) (order approving listing and trading on the Amex of United States 12 Month Oil Fund, LP and United States 12 Month Natural Gas Fund, LP); 55632 (April 13, 2007), 72 FR 19987 (April 20, 2007) (SR–Amex–2006–112) (order approving listing and trading on the Amex of United States Natural Gas Fund, LP); 57188 (January 23, 2008), 73 FR 5607 (January 30, 2008) (SR–Amex–2007–70) (order approving listing and trading on the Amex of United States Heating Oil Fund, LP and United States Gasoline Fund, LP); 58965 (November 17, 2008), 73 FR 71078 (November 24, 2008) (SR–NYSEArca–2008–127) (order approving listing and trading on the Exchange of United States Oil Fund, LP, United States 12 Month Oil Fund, LP, United States Heating Oil Fund, LP, United States Gasoline Fund, LP, United States 12 Month Natural Gas Fund, LP and United States Natural Gas Fund, LP); and 59173 (December 29, 2008), 74 FR 490 (January 6, 2009) (SR–NYSEArca–2008–125) (order approving listing and trading on the Exchange of United States Short Oil Fund, LP).

[11] 15 U.S.C. 78k–l(a)(1)(C)(iii).

[12] Trading in the Units may also be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Units inadvisable. These may include: The extent to which trading is not occurring in the underlying Futures Contracts; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present; or (3) pursuant to the Exchange's "circuit breaker" rule (*see* NYSE Arca Equities Rule 7.12).

[13] 17 CFR 240.10A–3.

[14] The Commission notes that it does not regulate the market for the futures in which USBO plans to take positions, which is the responsibility of the CFTC. The CFTC has the authority to set limits on the positions that any person may take in futures on commodities. These limits may be directly set by the CFTC, or by the markets on which the futures are traded. The Commission has no role in establishing position limits on futures in commodities, even though such limits could impact a commodity-based exchange-traded product that is under the jurisdiction of the Commission.

thereunder applicable to a national securities exchange.

IV. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[15] for approving the proposal prior to the thirtieth day after the publication of the Notice in the **Federal Register**. The Commission notes that it has approved the listing and trading of other limited partnerships, the characteristics of which are substantially similar to USBO.[16] The Commission also notes that it has not received any comments regarding this proposal. The Commission believes that the proposal to list and trade the Units does not raise any novel regulatory issues and accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for limited partnership units.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[17] that the proposed rule change (SR–NYSEArca–2010–14) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–8688 Filed 4–15–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61868; File No. SR–NYSEArca-2010–21]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Rule Change Amending Its Fee Schedule

April 7, 2010.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the "Act") [2] and Rule 19b-4 thereunder,[3] notice is hereby given that, on March 30, 2010, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes changes to its Schedule of Fees and Charges for Exchange Services (the "Schedule"). While changes to the Schedule pursuant to this proposal will be effective upon filing, the changes will become operative on April 1, 2010. The amended section of the Schedule is available on the Commission's Website at *http://www.sec.gov.* A copy of this filing is available on the Exchange's Web site at *http://*www.nyse.com, at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing changes to the Tier 1 rates and volume levels. Under this proposal, Tier 1 rates will be applied to ETP Holders and Market Makers that provide liquidity on the Exchange with an ADV per month of greater than 55 million shares. Currently the Tier 1 volume level is set at 60 million shares. The Exchange also proposes to increase the credit for orders that provide liquidity to the Book in Tape A and Tape C securities from $0.0029 per share to $0.0030 per share in Tier 1. In conjunction with these changes, the Exchange will eliminate the Super Tier. All other Tiered pricing remains the unchanged.

The Exchange is also proposing to modify its fees structure for securities that execute at prices below $1. For these securities, the Exchange currently charges ETP Holders accessing liquidity a fee equal to 0.1% (10 basis points) of the total dollar value of the execution and provides no credit to ETP Holders providing liquidity. Under the new fee structure, ETP Holders accessing liquidity will be charged 0.3% (30 basis points) of the total dollar value of the execution, and ETP Holder providing liquidity will be provided a credit equal to 0.25% (25 basis points) of the total dollar value of the transaction. These fees are consistent with the limitations of Regulation NMS, SEC Rule 610(c), for securities with a price of less than $1.00.

The proposed changes to the Schedule are part of the Exchange's continued effort to attract and enhance participation on the Exchange by offering volume based incentives along with attractive rates for removing liquidity and rebates for providing liquidity. The Exchange believes the proposed fees are reasonable and equitable in that they apply uniformly to all similarly situated ETP Holders. The proposed changes will become operative on April 1, 2010.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Securities Exchange Act of 1934 (the "Act"),[4] in general, and Section 6(b)(4) of the Act,[5] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The proposed changes to the Schedule are part of the Exchange's continued effort to attract and enhance participation on the Exchange by offering volume based incentives along with attractive rates for removing liquidity and rebates for providing liquidity to the Exchange. The proposed changes to the Schedule are reasonable and equitable in that they apply uniformly to all similarly situated ETP Holders.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[15] 15 U.S.C. 78s(b)(2).

[16] *See supra* note 10 and accompanying text.

[17] 15 U.S.C. 78s(b)(2).

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b-4.

[4] 15 U.S.C. 78f(b). [sic]

[5] 15 U.S.C. 78f(b)(4).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[6] of the Act and subparagraph (f)(2) of Rule 19b–4[7] thereunder, because it establishes a due, fee, or other charge imposed by NYSE Arca on its members. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2010–21 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca-2010–21. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca-2010–21 and should be submitted on or before May 7, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–8685 Filed 4–15–10; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

[8] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 6956]

Culturally Significant Objects Imported for Exhibition Determinations: "The Spectacular Art of Jean-Léon Gérôme"

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition "The Spectacular Art of Jean-Léon Gérôme," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the J. Paul Getty Museum, Los Angeles, California, from on or about June 15, 2010, until on or about September 12, 2010, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: April 8, 2010.

Maura M. Pally,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2010–8784 Filed 4–15–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6954]

Notice of Public Meeting on FY 2011 Refugee Admissions Program

There will be a meeting on the President's FY 2011 Refugee Admissions Program on Tuesday, May 4, 2010 from 2 p.m. to 4 p.m. The meeting will be held at the Refugee Processing Center, 1401 Wilson Boulevard, Suite 700, Arlington, Virginia. The meeting's purpose is to hear the views of attendees on the appropriate size and scope of the FY 2011 Refugee Admissions Program.

Persons wishing to attend this meeting must notify the Bureau of Population, Refugees, and Migration at telephone (202) 663–1006 by 5 p.m. on Thursday, April 29, 2010, to reserve a seat. Persons wishing to present written comments should submit them by 5 p.m. on Thursday, April 29, 2010 via e-mail *spruellda@state.gov* or fax (202) 663–1364.

If you have questions about the public meeting, please contact Delicia Spruell, PRM/Admissions Program Officer at (202) 663–1006. Information about the Refugee Admissions Program may be found at *http://www.state.gov/g/prm/*.

Dated: April 12, 2010.

David Robinson,

Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, Department of State.

[FR Doc. 2010–8785 Filed 4–15–10; 8:45 am]

BILLING CODE 4710–33–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2010 0036]

Information Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD's) intention to request extension of approval for three years of a currently approved information collection.

DATES: Comments should be submitted on or before June 15, 2010.

FOR FURTHER INFORMATION CONTACT: Otto Strassburg, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. *Telephone:* 202–366–4161or or *E-Mail:joe.strassburg@dot.gov.* Copies of this collection can also be obtained from that office.

SUPPLEMENTARY INFORMATION:

Title of Collection: Approval of Underwriters of Marine Hull Insurance.

Type of Request: Extension of currently approved information collection.

OMB Control Number: 2133–0517.

Form Numbers: None.

Expiration Date of Approval: Three years from date of approval by the Office of Management and Budget.

Summary of Collection of Information: This collection of information involves the approval of marine hull underwriters to insure Maritime Administration program vessels. Foreign and domestic applicants will be required to submit financial data upon which Maritime Administration approval would be based.

Need and Use of the Information: The information is needed in order for Maritime Administration officials to evaluate the underwriters and determine their suitability for providing marine hull insurance on Maritime Administration vessels.

Description of Respondents: Marine insurance brokers and underwriters of marine insurance.

Annual Responses: 62 responses.

Annual Burden: 46 hours.

Comments: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Comments also may be submitted by electronic means via the Internet at *http://www.regulations.gov/search/index.jsp.* Specifically address whether this information collection is necessary for proper performance of the functions of the agency and will have practical utility, accuracy of the burden estimates, ways to minimize this burden, and ways to enhance the quality, utility, and clarity of the information to be collected. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m. *EDT* (*or EST*), Monday through Friday, except Federal Holidays. An electronic version of this document is available on the World Wide Web at *http://www.regulations.gov/search/index.jsp.*

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

Authority: 49 CFR 1.66.

By Order of the Maritime Administrator.

Dated: April 8, 2010.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–8670 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2010 0042]

Information Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD's) intention to request extension of approval for three years of a currently approved information collection.

DATES: Comments should be submitted on or before June 15, 2010.

FOR FURTHER INFORMATION CONTACT: Anne Dougherty, Maritime Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: 202–366–5469 or E-mail: *anne.dougherty@dot.gov.* Copies of this collection can also be obtained from that office.

SUPPLEMENTARY INFORMATION:

Title of Collection: Information to Determine Seamen's Reemployment Rights—National Emergency.

Type of Request: Extension of currently approved information collection.

OMB Control Number: 2133–0526.

Form Numbers: None.

Expiration Date of Approval: Three years from date of approval by the Office of Management and Budget.

Summary of Collection of Information: This collection is needed in order to implement provisions of the Maritime Security Act of 1996. These provisions grant re-employment rights and other benefits to certain merchant seamen serving aboard vessels used by the United States during times of national emergencies. The Maritime Security Act of 1996 establishes the procedures for obtaining the necessary MARAD certification for re-employment rights and other benefits.

Need and Use of the Information: MARAD will use the information to determine if U.S. civilian mariners are eligible for re-employment rights under the Maritime Security Act of 1996.

Description of Respondents: U.S. merchant seamen who have completed designated national service during a time of maritime mobilization need and are seeking re-employment with a prior employer.

Annual Responses: 10 responses.

Annual Burden: 10 hours.

Comments: Comments should refer to the docket number that appears at the top of this document. Written comments may be submitted to the Docket Clerk, U.S. DOT Dockets, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Comments also may be submitted by electronic means via the Internet at *http://www.regulations.gov/search/index.jsp.* Specifically address whether this information collection is necessary for proper performance of the functions of the agency and will have practical utility, accuracy of the burden estimates, ways to minimize this burden, and ways to enhance the quality, utility, and clarity of the information to be collected. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m. EDT (or EST), Monday through Friday, except Federal Holidays. An electronic version of this document is available on the World Wide Web at *http://www.regulations.gov/search/index.jsp.*

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

Authority: 49 CFR 1.66.

By Order of the Maritime Administrator.

Dated: April 12, 2010.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–8732 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: Maritime Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The nature of the information collection is described as well as its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on December 29, 2009. No comments were received.

DATES: Comments must be submitted on or before May 17, 2010.

FOR FURTHER INFORMATION CONTACT: Patricia Ann Thomas, Maritime Administration 1200 New Jersey Avenue, SE., Washington, DC 20590. *Telephone:* 202–366–2646; or *e-mail: patricia.thomas@dot.gov.* Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION: Maritime Administration (MARAD).

Title: Merchant Marine Medals and Awards.

OMB Control Number: 2133–0506.

Type of Request: Extension of currently approved collection.

Affected Public: Masters, officers and crewmembers of U.S. ships.

Form(s): None.

Abstract: This collection of information provides a method of awarding merchant marine medals and decorations to masters, officers, and crew members of U.S. ships in recognition of their service in areas of danger during the operations by the Armed forces of the United States in World War II, Korea, Vietnam, Operation Desert Storm, Operation Enduring Freedom and Operation Iraqi Freedom.

Annual Estimated Burden Hours: 700 hours.

Addressee: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention MARAD Desk Officer.

Comments Are Invited On: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

(Authority: 49 CFR 1.66)

Issued in Washington, DC, on April 8, 2010.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–8674 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35338]

Winston-Salem Southbound Railway Company—Corporate Family Transaction Exemption—High Point, Thomasville & Denton Railroad Company

Winston-Salem Southbound Railway Company (WSSB) and High Point, Thomasville & Denton Railroad Company (HPTD), both Class III rail carriers, have filed a verified notice of exemption under 49 CFR 1180.2(d)(3) for a transaction within a corporate family. Applicants state that HPTD will merge into WSSB, with WSSB being the surviving corporate entity. According to applicants, WSSB controls HPTD and owns 100 percent of HPTD's stock, and Norfolk Southern Railway Company (NSRC) and CSX Transportation, Inc. (CSXT) each owns a 50 percent interest in WSSB.[1] The purpose of the transaction is to simplify the corporate structure of the carriers and to thereby reduce their costs.

The exemption will be effective on May 1, 2010.

This is a transaction within a corporate family of the type 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 changes in the competitive balance 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 is employees. Section 11326(c), however, does not provide for labor protection for transactions under §§ 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 rail carriers.

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 will be due no later than April 23, 2010 (at least 7 days before the effective date of the exemption).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35338 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 applicants' representatives, Louis E. Gitomer, 600 Baltimore Ave., Suite 301, Towson, MD 21204, and John V. Edwards, Three Commercial Place, Norfolk, VA 23510.

[1] Both WSSB and HPTD are operated as switching carriers for the owners of WSSB—NSRC and CSXT. WSSB owns 88 miles of main line from Winston-Salem, NC to Wadesboro, NC, and connects with: (a) NSRC at Winston-Salem, Whitney, and Lexington, NC, (b) CSXT at Wadesboro, (c) HPTD at High Rock, NC, and (d) Aberdeen, Carolina & Western Railway (ACWR) at Norwood, NC. HPTD owns 34 miles of main line from High Point, NC to High Rock and connects with: (a) WSSB at High Rock, and (b) NSRC at High Point. Applicants state that the proposed transaction will not affect the connection with ACWR, since only WSSB connects with ACWR today.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: April 13, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. 2010–8782 Filed 4–15–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Over-the-Road Bus Accessibility Program Grants: Corrections

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice; corrections and deadline extension.

SUMMARY: This notice corrects dollar thresholds and revenue classifications for large and small intercity fixed-route Class I carriers, and labor protection information, among other things, published in the January 15, 2010 Federal Transit Administration (FTA) Notice titled "Over-the-Road Bus Accessibility Program Grants," extends the application deadline, and allows applicants to submit a single application for Fiscal Year (FY) 2009 and FY 2010 funding.

FOR FURTHER INFORMATION: Contact the appropriate FTA Regional Office (Appendix A) or Blenda Younger, Office of Program Management, (202) 366–2053.

Corrections

On page 2584, in the second column, the text following "D. Vehicle and Service Definitions:" is revised to read: "The application includes six criteria factors that will be reviewed to determine eligibility for a portion of the funding available to operators that qualify under this definition."

On page 2584, in the third column, the text following 1. Eligible Applicants: is revised to read: "Intercity, fixed-route OTRB service providers may apply for the funds that were appropriated for intercity fixed-route providers in FY 2009 and FY 2010."

On page 2585, in the second column, the text following "Application Content," is revised to read, "For fixed-route carriers, whether you are a large (Class I, with gross annual transportation revenues of $8.6 million or more) or small (gross transportation revenues of less than $8.6 million annually) carrier."

On page 2586, in the first column, the text following III. Labor Information: is revised to read: "The Applicant agrees to comply with the terms and conditions of the Special Warranty for the Over-the-Road Bus Accessibility Program that is most current as of the date of execution of the Grant Agreement or Cooperative Agreement for the project, and any alternative comparable arrangements specified by U.S. DOL for application to the Applicant's project, in accordance with U.S. DOL guidelines, "Section 5333(b), Federal Transit Law," 29 CFR part 215, and any revisions thereto. Any U.S. DOL Special Warranty that may be provided and any documents cited therein are incorporated by reference and made part of the Grant Agreement."

Additional information regarding grants that require referral can be found on DOL's Web site: *https://www.dol.gov/esa/olms/regs/compliance/redesign_2006/redesign2006_transitemplprotect.htm.*

On page 2586, in the second column, the text following "Note:" is revised to read: "Applicants will not be considered for funding as intercity fixed-route operators unless they satisfy, at a minimum, the first two criteria and at least one of criteria three through six listed in the Project Information section of the application; these criteria are applicable to intercity fixed-route applicants."

On page 2587, in the first, second, and third columns, the text following "C. Labor Protection:" is revised to read: "Section 3013(h) of SAFETEA–LU amended 49 U.S.C. Section 5311(j)(1) to permit the Secretary of Labor to utilize a special warranty that provides a fair and equitable arrangement to protect the interest of employees as set forth in 49 U.S.C. 5333(b). Pursuant to this authorization, the Department of Labor (DOL) amended its implementing regulations at 29 CFR part 215 (73 FR 47046, Aug. 13, 2008). On October 1, 2008, DOL began using a revised special warranty for the Section 5311 program which is appropriate for use with OTRB grants. All OTRB grants awarded after October 1, 2008 will be subject to the special warranty for labor protective arrangements under the Section 5311 program, which will be incorporated by reference in the grant agreement."

On page 2588, in the first column, the text following "E. Standard Assurances" on page 2587: is revised to read: "Certifications and Assurances for grants to be awarded under this program in FY 2009 are included in the FTA Certifications and Assurances for FY 2010 which were published in the **Federal Register** of October 19, 2009, and made available for electronic signature in FTA's grants system."

On page 2588, in the second column, the text following "E. Intercity Fixed-Route Carriers:" is revised to read: "Large/Class I (gross annual transportation revenues of $8.6 million or more). Small (gross annual transportation revenues of less than $8.6 million)."

This Notice also extends the application deadline to May 10, 2010. FTA may use additional discretionary funding made available in FY 2010 for allocation under the OTRB program. Therefore applicants may apply for FY 2009 and FY 2010 funds in a single application.

Issued in Washington, DC, this 12th day of April 2010.

Peter Rogoff,

Administrator.

Appendix A

FTA Regional and Metropolitan Offices

Richard H. Doyle, Regional Administrator, Region 1-Boston, Kendall Square, 55 Broadway, Suite 920, Cambridge, MA 02142–1093, Tel. 617–494–2055.

States served: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

Robert C. Patrick, Regional Administrator, Region 6-Ft. Worth, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102, Tel. 817–978–0550.

States served: Arkansas, Louisiana, Oklahoma, New Mexico and Texas.

Brigid Hynes-Cherin, Regional Administrator, Region 2-New York, One Bowling Green, Room 429, New York, NY 10004–1415, Tel. 212–668–2170.

States served: New Jersey, New York.

New York Metropolitan Office, Region 2-New York, One Bowling Green, Room 428, New York, NY 10004–1415, Tel. 212–668–2202.

Mokhtee Ahmad, Regional Administrator, Region 7-Kansas City, MO, 901 Locust Street, Room 404, Kansas City, MO 64106, Tel. 816–329–3920.

States served: Iowa, Kansas, Missouri, and Nebraska.

Letitia Thompson, Regional Administrator, Region 3-Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. 215–656–7100. States served: Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and District of Columbia. Philadelphia Metropolitan Office, Region 3-Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. 215–656–7070. Washington, DC Metropolitan Office, 1990 K Street, NW., Room 510, Washington, DC 20006, Tel. 202–219–3562.	Terry Rosapep, Regional Administrator, Region 8-Denver, 12300 West Dakota Ave., Suite 310, Lakewood, CO 80228–2583, Tel. 720–963–3300. States served: Colorado, Montana, North Dakota, South Dakota, Utah, and, Wyoming.
Yvette Taylor, Regional Administrator, Region 4-Atlanta, 230 Peachtreet Street, NW., Suite 800, Atlanta, GA 30303, Tel. 404–865–5600. States served: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and the Virgin Islands.	Leslie T. Rogers, Regional Administrator, Region 9-San Francisco, 201 Mission Street, Room 1650, San Francisco, CA 94105–1926, Tel. 415–744–3133. States served: American Samoa, Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands. Los Angeles Metropolitan Office, Region 9-Los Angeles, 888 S. Figueroa Street, Suite 1850, Los Angeles, CA 90017–1850, Tel. 213–202–3952.
Marisol Simon, Regional Administrator, Region 5-Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312–353–2789. States served: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. Chicago Metropolitan Office, Region 5-Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312–353–2789.	Rick Krochalis, Regional Administrator, Region 10-Seattle, Jackson Federal Building, 915 Second Avenue, Suite 3142, Seattle, WA 98174–1002, Tel. 206–220–7954. States served: Alaska, Idaho, Oregon, and Washington.

[FR Doc. 2010–8963 Filed 4–14–10; 4:15 pm]
BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with part 211 of title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

City of Jasper, Indiana

[Docket Number FRA–2009–0112]

The City of Jasper, Indiana (Jasper) acquired a railroad passenger car, number XCJI 200, built in 1947, and offers it for use in tourist/excursion service over the Dubois County Railroad and the French Lick, West Baden & Southern Railway. The railroad distance between Jasper and French Lick, Indiana, is approximately 25 miles. The car is currently equipped with automotive-type laminated glazing, which is non-compliant with FRA safety requirements.

Jasper petitioned FRA for a waiver of compliance from certain provisions of the Safety Glazing Standards—Locomotives, Passenger Cars and Cabooses, as prescribed by 49 CFR 223.15(c) *Requirements for existing passenger cars.* Specifically, this waiver request applies to only passenger car number XCJI 200 because all other cars operating on the tourist/excursion train were built prior to 1946, and considered "antiquated" under § 223.3 *Application.*

Jasper states that the reason for the waiver request is the high cost of compliant FRA Types I & II glazing material, and that the automotive-type glass is similar to the glazing installed on other cars operating over the French Lick, West Baden & Southern Railway. Further, Jasper states in their petition, there have been no reported acts of vandalism to the refurbished passenger cars.

In summary, Jasper requests relief from the regulatory requirements of 49 CFR 223.15(c) *Requirements for existing passenger cars* (including the required four emergency windows) for one passenger car, built in 1947, used in tourist/excursion service at a maximum authorized speed of 15 mph.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2009–0112) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on April 13, 2010.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 2010–8756 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Northern Indiana Commuter Transportation District

[Waiver Petition Docket Number FRA–2006–24562]

The Northern Indiana Commuter Transportation District (NICTD) seeks approval to participate in a previously granted waiver of compliance with the requirements of the *Passenger Equipment Safety Standards* contained in 49 CFR 238.309(b)(3), *Periodic brake equipment maintenance,* which requires that brake equipment receive periodic maintenance at 736 days. The previously granted waiver was issued to the Northeast Illinois Regional Commuter Railroad Corporation (METRA) and authorized METRA to extend the time period from 736 days between inspections to 1,840 days for 26 new bi-level electric passenger MU's.

NICTD purchased 14 bi-level electric MU's that are equipped with identical braking systems as the 26 electric MU locomotives for which the relief was previously granted. The 14 NICTD cars are the subject of this waiver request. The 14 NICTD cars and the 26 METRA cars were built by Sumitomo Corporation of America/Nippon Sharyo and the air brake system was provided by Knorr Brake Corporation, Westminster, Maryland. NICTD explains in its petition that the brake application is transmitted electronically to each MU's Friction Brake Control Unit (FBCU). The FBCU then provides the requested brake application without drawing down brake pipe pressure. An Emergency Magnetic Valve is provided on each MU for an electronic emergency brake application.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2006–24562) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

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

Issued in Washington, DC, on April 12, 2010.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 2010–8691 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Association of American Railroads

[Waiver Petition Docket Number FRA–2010–0026]

The Association of American Railroads (AAR), on behalf of its member railroads, seek a waiver of compliance with the Locomotive Safety Standards, 49 CFR 229.129(b)(2), which requires that the sound level of locomotive horns manufactured before September 18, 2006, be tested before June 24, 2010. AAR member railroads own approximately 24,000 locomotives, most of which were manufactured before September 18, 2006. AAR estimates that over 50 percent of these locomotives have not yet been tested. AAR states that there are a number of reasons that the testing has not progressed as rapidly as needed to meet the requirement, site requirements, weather conditions, community noise complaints, and developing automated testing facilities. AAR requests that the requirement to complete testing of horns on locomotives built prior to September 18, 2006, be extended to December 30, 2012, for its membership.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2010–0026) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.

• *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.

• *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

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

Issued in Washington, DC, on April 12, 2010.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 2010–8694 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

National Railroad Passenger Corporation

[Docket Number FRA–2009–0104]

The National Railroad Passenger Corporation (Amtrak), has petitioned for a permanent waiver of compliance from the requirements of the Fire Safety Standard, 49 CFR 238.103, which requires materials used on the passenger car, meet the test performance criteria for flammability and smoke emission characteristics as specified in Appendix B of this section.

Amtrak stated that their current fleets of 205 operating diesel locomotives are the Genesis P42–8 model manufactured by General Electric (GE). These locomotives were manufactured between the years of 1996–2002. The Manufacturing and the material selection process at that time were based on the 49 CFR part 229 regulations. However, due to the inclusion of all locomotives on passenger trains under the 49 CFR part 238 regulations, some materials in the human occupied areas have since become non-compliant under Smoke and Flame Requirements (49 CFR 238.103).

Amtrak and GE have collectively sort out alternate manufactures and materials for eliminating the non-compliant materials from the locomotive cab. However due to the comparatively small fleet of passenger locomotives with freight locomotives, the cost and the manufacturing feasibility of these materials, Amtrak has been unable to obtain alternates for the components in question. Therefore, Amtrak seeks a waiver for use of these materials in the locomotive cab. Several of these materials need to be replenished in the locomotive cabs; however due to the non-compliance, Amtrak has not been able to order these items from vendors. Amtrak listed 13 items in its petition. Amtrak provided descriptions and analyses about these items in support of its petition.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2009–0104) and may be submitted by any of the following methods:

• *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.

• *Fax:* 202–493–2251.

• *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.

• *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on April 12, 2010.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 2010–8693 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with part 211 of title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

New York & Lake Erie Railroad

[Docket Number FRA–2004–19950]

The New York & Lake Erie Railroad (NYLE) of Gowanda, New York, has petitioned for a permanent waiver of compliance for two locomotives, numbered NYLE 1013 and NYLE 308,

from the requirements of the Railroad Safety Glazing Standards, Title 49 CFR Part 223, which requires certified glazing in all windows.

The types of glazing currently used in the two locomotives are as follows: NYLE 1013—Laminated Safety Glass AS–1, DOT 14M–220–ASI–030, and NYLE 308—Clear Laminated Safety Glass AS–2 101. NYLE is a short line freight carrier which travels 29.5 miles through rural countryside and small communities on an average of 1½ times per week. The number of cars hauled per train is five cars or less. NYLE operates on two line segments which are connected and extend from Cattaraugus, NY, to Dayton, NY (10.1 miles), and from Conewango Valley, NY, to Gowanda, NY (19.4 miles). All freight is interchanged in Gowanda, NY.

NYLE states that there has been no problem with window breakage due to vandalism and that they have not had to replace glass due to breakage from flying objects. Because of low risk of exposure to their crew in the area they serve to injury due to vandalism and the fairly substantial cost of the glazing materials involved, NYLE is requesting the waiver of this regulation for the two locomotives listed above.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2004–19950) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on April 13, 2010.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 2010–8760 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2010–005–N–5]

Railroad Safety Technology Grant Program

AGENCY: Federal Railroad Administration, Department of Transportation.

ACTION: Notice of Funds Availability, Railroad Safety Technology Program–Correction of Grant Application Guidance Number.

SUMMARY: The reference number is incorrect for the Notice of Funds Availability, Solicitation of Applications, published in the **Federal Register** (Volume 75, Number 59; March 29, 2010) for the Railroad Safety Technology Program, in the section, "Requirements and Conditions for Grant Applications." The grant application guidance can be found at *http://grants.gov,* under funding opportunity RS–TEC–10–001.

Issued in Washington, DC, on April 12, 2010.

Jo Strang,

Associate Administrator for Railroad Safety/Chief Safety Officer.

[FR Doc. 2010–8728 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2010 0040]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel PASSAGE WEST II.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2010–0040 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before May 17, 2010.

ADDRESSES: Comments should refer to docket number MARAD–2010–0041. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.govhttp://smses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through

Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel PASSAGE WEST II is:

Intended Commercial Use of Vessel: "use as a charter vessel locally."

Geographic Region: "California, Oregon, Washington."

Privacy Act

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

By Order of the Maritime Administrator.

Dated: April 8, 2010.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–8677 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2010 0039]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel KOKOMO.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2010–0039 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before May 17, 2010.

ADDRESSES: Comments should refer to docket number MARAD–2010–0039. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel KOKOMO is:

Intended Commercial Use of Vessel: "Captained charter day sailing."

Geographic Region: "New Jersey."

Privacy Act

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

By Order of the Maritime Administrator.

Dated: April 8, 2010.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–8671 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2010 0037]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel ALOFT.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2010–0037 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before May 17, 2010.

ADDRESSES: Comments should refer to docket number MARAD–2010–0037. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West

Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.govhttp://smses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel ALOFT is:

Intended Commercial Use Of Vessel: "Sailing tours and sightseeing under sail."

Geographic Region: "Maine and New Hampshire, primarily Piscataqua River and adjacent waters."

Privacy Act

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

By Order of the Maritime Administrator.

Dated: April 8, 2010.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–8676 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2010 0038]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel CAPE RACE.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2010–0038 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

DATES: Submit comments on or before May 17, 2010.

ADDRESSES: Comments should refer to docket number MARAD–2010–0038. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov http://smses.dot.gov/submit/.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel CAPE RACE is:

Intended Commercial Use of Vessel: "Small Passenger Expedition Vessel, engaging in both coastwise and international voyages and charters with environmental, educational and scientific emphasis."

Geographic Region: "(East Coast) Maine, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, Puerto Rico."

Privacy Act

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

By the order of the Maritime Administrator.

Dated: April 8, 2010.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2010–8669 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Waiver Extension Request

In accordance with Title 49 of the Code of Federal Regulations (CFR), Sections 211.9 and 211.41, notice is hereby given that the Federal Railroad Administration (FRA) has received a request for an extension of a waiver of compliance from certain requirements of Federal railroad safety regulations. The individual petition is described below, including the parties seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Alaska Railroad Corporation

[Docket Number FRA–2006–26029]

As part of the request for extension of limited field testing submitted February 8, 2010 (Docket FRA–2006–26029), a petition of regulatory relief from 49 CFR 217.9 (Program of Operational Tests and Inspections—Recordkeeping), 49 CFR 217.11 (Program of Instruction on Operating Rules—Recordkeeping, Electronic Recordkeeping), 49 CFR part 218 [subpart D] (Prohibition against tampering with safety devices), 49 CFR 229.7 (Prohibited Acts), 49 CFR 229.135

(Event recorders), 49 CFR 233.9 (Reports), 49 CFR 235.5 (Changes requiring filing of application), 49 CFR 240.127 (Criteria for examining Skill Performance), and 49 CFR 240.129 (Criteria for Monitoring Operational Performance of Certified Engineers) is requested by the Alaska Railroad Corporation (ARRC) for testing related to the Collision Avoidance System (CAS) on the Alaska Subdivision, from Seward to Fairbanks, and the Whittier Subdivision, from Whittier to Portage.

The regulatory relief requested is only for CAS related equipment and testing, commencing in the summer of 2011, for a period of 39 months, or approval of a Positive Train Control Safety Plan for CAS. The request for regulatory relief will not apply to non-CAS equipment and operations. Details of the specific relief requested and the associated rationale are specified in the ARRC letter of February 8, 2010 (Docket–FRA–2006–26029). FRA will accept comments for regulatory relief of these requirements.

As part of the same request for extension of limited field testing, ARRC also requests relief from various parts of 49 CFR part 236, subparts A–G. FRA will independently impose appropriate conditions necessary for the safety of train operations regarding such exemptions.

Interested parties are invited to participate in this safety review by providing written information or comments pertinent to FRA's consideration of the above request for waiver of compliance. All communications concerning this petition should identify the appropriate docket number (Docket Number FRA–2006–26029) and may be submitted by one of the following methods:

- *Web site: http://regulations.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., Room W12–140, Washington, DC 20590.
- *Hand Delivery:* Room W12–140 U.S. Department of Transportation Building, 1200 New Jersey Ave., SE., Room W12–140, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communication received within 30 days of the date of this notice will be considered by FRA prior to final action being taken. Comments received after that date will be considered to the extent practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the internet at the docket facility's Web site at *http://regulations.gov.*

Anyone is able to search the electronic form of all the comments received into any of our dockets by name of the individual submitting the comment (or signing the comment 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 (Volume 65, Number 70; Pages 19477–78) or at *http://dot.gov/privacy.html.*

Issued in Washington, DC, on April 12, 2010.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 2010–8695 Filed 4–15–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Deposits

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before June 15, 2010.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, and NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Josephine Battle (202) 906–6870, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Deposits.

OMB Number: 1550–0092.

Form Numbers: N/A.

Regulation requirement: 12 CFR 557.20, 230.3, 230.4, 230.5, and 230.6.

Description: Section 557.20 requires savings associations to establish and maintain deposit documentation practices and records. These records should include adequate evidence of ownership, balances, and all transactions involving the account. In addition, part 557 relies on the disclosure regulations applicable to savings associations under Regulation DD. Regulation DD implements the Truth in Savings Act, part of the Federal Deposit Insurance Corporation Improvement Act of 1991.

The regulations assist consumers in comparing deposit accounts offered by

depository institutions. Consumers receive disclosures about fees, annual percentage yield, interest rate, and other account terms whenever a consumer requests the information and before the consumer opens an account. The regulation also requires that savings associations provide fees and other information on any periodic statement the institution sends to the consumer. Regulation DD contains rules for advertisements of deposit accounts and advance notices to account holders of adverse changes in terms.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 759.

Estimated Burden Hours per Responses: 1 hour and 8 minutes.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 1,122,206 hours.

Dated: April 12, 2010.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2010–8817 Filed 4–15–10; 8:45 am]

BILLING CODE 6720–01–P

Federal Register

Friday,
April 16, 2010

Part II

Department of Agriculture

Rural Business-Cooperative Service

7 CFR Parts 4279, 4287 and 4288

Biorefinery Assistance Guaranteed Loans; Repowering Assistance Payments to Eligible Biorefineries; Subpart B—Advanced Biofuel Payment Program; Proposed Rules

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

7 CFR Parts 4279 and 4287

RIN 0570–AA73

Biorefinery Assistance Guaranteed Loans

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Proposed rule.

SUMMARY: Rural Business-Cooperative Service, a mission area within the U.S. Department of Agriculture, is proposing a guaranteed loan program for biorefineries. The proposed rule will establish guaranteed loan regulations for the development and construction of commercial-scale biorefineries and for the retrofitting of existing facilities using eligible technology for the development of advanced biofuels.

DATES: Comments on the proposed rule must be received on or before June 15, 2010. The comment period for the information collection under the Paperwork Reduction Act of 1995 continues through June 15, 2010.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.
- *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

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

FOR FURTHER INFORMATION CONTACT: Energy Branch, Biorefinery Assistance Program, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 3225, Washington, DC 20250–3201; telephone (202) 720–1400.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This proposed rule has been reviewed under Executive Order (EO) 12866 and has been determined to be economically significant by the Office of Management and Budget. The EO defines a "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this EO.

The Agency conducted a benefit-cost analysis to fulfill the requirements of Executive Order 12866. In this analysis, the Agency identifies potential benefits and costs of the Section 9003 program to lenders, borrowers, and the Agency. The analysis contains both quantitative estimates and qualitative descriptions of the expected benefits and costs of the Biorefinery Assistance guaranteed loan program. The environmental and energy impacts associated with the Section 9003 program were qualitatively assessed.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act 1995 (UMRA) of Public Law 104–4 establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, Rural Development generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or Tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires Rural Development to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and Tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Environmental Impact Statement

This renewable energy program under Title IX of the 2008 Farm Bill has been operated on an interim basis through the issuance of a Notice of Funds Availability (NOFA). During this initial round of applications, the Agency conducted National Environmental Policy Act (NEPA) reviews on each individual application for funding. No significant environmental impacts were reported, and Findings of No Significant Impact (FONSI) were issued for each approved application. Taken collectively, the applications show no potential for significant adverse cumulative effects.

The Agency is preparing a programmatic environmental assessment (PEA), pursuant to 7 CFR subpart 1940–G, to analyze the environmental effects to air, water, and biotic resources; land use; historic and cultural resources, and greenhouse gas emissions affected by the Section 9003 proposed rule. The purpose of the PEA is to assess the overall environmental impacts of the programs related to the goals of the Administration for advancing biofuels production for the purposes of energy independence and greenhouse gas emission reductions. The environmental analyses will be national in scope and will be supported by site by site analysis per each application to the program. Site-specific NEPA documents prepared for those facilities funded under Sections 9003 and 9004 in FY 2008 and/or 2009 will be utilized, to forecast likely environmental impacts under the proposed rules. The draft PEA will be made available to the public for comment on the USDA Rural Business Service's Web site by May 3, 2010, and all comments will be addressed as part of any revision of the PEA, or prior to the publication of any Finding of No Significant Impact (FONSI).

Executive Order 12988, Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. In accordance with this rule: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given this rule; and (3) administrative proceedings in accordance with the regulations of the Department of Agriculture's National Appeals Division (7 CFR part 11) must be exhausted before bringing suit in court challenging action taken under this rule unless those regulations specifically allow bringing suit at an earlier time.

Executive Order 13132, Federalism

It has been determined, under Executive Order 13132, Federalism, that this proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in the proposed rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–602) (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have an economically significant impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

In compliance with the RFA, Rural Development has determined that this action will not have an economically significant impact on a substantial number of small entities. The burden for applying for a Biorefinery Assistance Guaranteed loan to any one borrower is estimated to be less than 0.1 percent of the estimated cost of the average reconstruction project funded under this program. Further, this regulation only impacts those who choose to participate in the program.

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

The regulatory impact analysis conducted for this proposed rule meets the requirements for Actions Concerning Regulations That Significantly Affect Energy Supply Distribution and Use, Executive Order No. 13211, which states that an agency undertaking regulatory actions related to energy supply, distribution, or use is to prepare a Statement of Energy Effects. This analysis does not find that this proposed rule will have any adverse impacts on energy supply, distribution or use.

Executive Order 12372, Intergovernmental Review of Federal Programs

Rural Development guaranteed loans are subject to the Provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. Rural Development will conduct intergovernmental consultation in the manner delineated in RD Instruction 1940–J, "Intergovernmental Review of Rural Development Programs and Activities," available in any Rural Development office, on the Internet at *http://www.rurdev.usda.gov/regs,* and in 7 CFR part 3015, subpart V.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This executive order imposes requirements on Rural Development in the development of regulatory policies that have Tribal implications or preempt Tribal laws. Rural Development has determined that the proposed rule does not have a substantial direct effect on one or more Indian Tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and the Indian Tribes. Thus, the proposed rule is not subject to the requirements of Executive Order 13175.

Programs Affected

The Catalog of Federal Domestic Assistance Program numbers assigned to affected program is: 10.865, Biorefinery Assistance Program.

Paperwork Reduction Act

The collection of information requirements contained in the notice have received temporary emergency clearance by the Office of Management and Budget (OMB) under control Number 0570–0055. However, in accordance with the Paperwork Reduction Act of 1995, USDA Rural Development will seek OMB approval of the reporting and recordkeeping requirements contained in this Notice and hereby opens a 60-day public comment period.

Title: Biorefinery Assistance Guaranteed Loans.

Type of Request: New collection.

Abstract: Rural Development is providing guaranteed loans to assist in the development and construction of commercial-scale biorefineries and the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. Consistent with Congressional intent, preference will be given to projects where first-of-a-kind technology will be deployed at the commercial scale. To that end, the program will promote the development of the first commercial scale biorefineries that do not rely on corn kernel starch as the feedstock or standard biodiesel technology.

The collection of information is vital to Rural Development to make wise decisions regarding the eligibility of projects and borrowers in order to ensure compliance with the regulations and to ensure that the funds obtained from the Government are used appropriately (*i.e.,* being used for the purposes for which the guaranteed loans were awarded). Persons seeking loan guarantees under this program will have to submit applications that include specified information including, but not limited to, the lender's analysis and credit evaluation, financial statements on the borrower, a feasibility study, a business plan, a technical assessment, an economic analysis, and a description of the borrower's bioenergy experience. The information included in applications for loan guarantee will be used to determine applicant and project eligibility and to ensure that funds are used for projects that are likely to be financially sound.

Once a project has been approved and the loan has been guaranteed, lenders must submit certain reports. Some of these reports are associated with the performance of the lender's loan portfolio and include both periodic reports on the status of that portfolio and, when applicable monthly default reports. Other reports are associated with individual projects and include quarterly construction reports and, once a project has been completed, annual reports through the life of the guaranteed loan. In addition, lenders are required to conduct annual inspections of each completed project.

The following estimates are based on the average over the first three years the program is in place.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 4.6 hours per response.

Respondents: Individuals, entities, Indian Tribes, units of State or local government, corporations, farm cooperatives, farmer cooperative organizations, associations of agricultural producers, National Laboratories, institutions of higher education, rural electric cooperatives, public power entities, and consortia of any of these entities.

Estimated Number of Respondents: 23.

Estimated Number of Responses per Respondent: 27.4.

Estimated Number of Responses: 630.

Estimated Total Annual Burden (hours) on Respondents: 2,920.

Copies of this information collection may be obtained from Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services

Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250–0742 or by calling (202) 692–0043.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of Rural Development, including whether the information will have practical utility; (b) the accuracy of the new Rural Development estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Cheryl Thompson, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250. All responses to this proposed rule will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

E-Government Act Compliance

Rural Development is committed to complying with the E-Government Act, to 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.

I. Background

Rural Development administers a multitude of Federal programs for the benefit of rural America, ranging from housing and community facilities to infrastructure and business development. Its mission is to increase economic opportunity and improve the quality of life in rural communities by providing the leadership, infrastructure, venture capital, and technical support that enables rural communities to prosper.

To achieve its mission, Rural Development provides financial support (including direct loans, grants, and loan guarantees) and technical assistance to help enhance the quality of life and provide the foundation for economic development in rural areas. Section 9003 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) provides financial assistance in the form of grants and guaranteed loans to assist in the development of new and emerging technologies for the development of advanced biofuels.

The following types of financial assistance under section 9003 are authorized:

- Grants for the development and construction of demonstration-scale biorefineries to demonstrate the commercial availability of one or more processes for converting renewable biomass to advanced biofuels.
- Guaranteed loans for the development, construction or the retrofitting of commercial biorefineries using eligible technology, where eligible technology is defined as:

(a) Any technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel, and

(b) Any technology not described in paragraph (a) above that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

Overview of Section 9003. Section 9003 of the Farm Security and Rural Investment Act of 2002 as added by the Food Conservation and Energy Act of 2008, authorizes the Secretary of Agriculture to establish the Biorefineries Assistance Loan Guarantee Program to provide loan guarantees for the construction of biorefineries to "assist in the development of new and emerging technologies for the development of advanced biofuels".

Under the proposed rule, the Agency will establish a rolling process for the consideration of loan guarantee requests for the development and construction of commercial-scale biorefineries or for the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. Consistent with the authorizing legislation, the proposed rule defines the term "advanced biofuel" as a "fuel derived from renewable biomass, other than corn kernel starch." The Agency is proposing that the maximum percentage of the loan guarantee be 80 percent of loan and the maximum amount of the loan guarantee be $250 million.

Consistent with the authorizing legislation, the goal of this program is to encourage the development of commercial scale biorefineries that produce advanced biofuels. To help meet this goal, the program proposes to be open to all feasible technologies. At this stage in the development of biofuels industry, it is impossible to know what technologies will become the most effective. Further, the Agency believes that unlike other Rural Development renewable energy programs, this program should be conducted on a rolling application acceptance basis. The Agency's experiences with its Business and Industry Loan Guarantee Program has taught the Agency that the development of financing arrangements between lenders and borrowers frequently do not fit within pre-prescribed application windows. Once these arrangements are agreed upon, the Agency needs to be able to make a decision within a relatively short period of time or the deal will likely collapse. With respect to all of these points, the Agency welcomes feedback from the public during the comment period.

The Agency views this program in conjunction with its other renewable energy programs in the context of an overall Federal renewable energy strategy. The goal of this strategy is to foster the development of a strong, expanding, and economically sustainable group of renewable energy industries in the United States to supply an increasing share of the country's energy needs. The success of these industries will depend on their ability to produce energy sources that meet the demands of the country's energy markets. These markets are driven by a number of factors including the price of oil and other fossil fuels, developments in technologies, the acceptance of the public, the capacity of distribution systems, and the impact of government regulation such as the renewable fuels standard.

The Biorefinery Assistance Loan Guarantee Program is one part of Rural Development's contribution to the Department of Agriculture's renewable energy efforts that support the overall Federal renewable energy strategy. This program provides critical assistance to the development of biorefineries in the United States by facilitating the financing of a number of biorefineries through the leveraging of Federal government biorefinery assistance loan guarantees and private capital sources.

Over time, the Agency believes that these private capital sources will look at the Federal government investments in biorefineries under this program more generally as a sign that these facilities are worth financing, even without the Federal government, which will further support the development of the renewable energy industries of in the U.S. The Agency believes that this program will provide examples of how private capital can successfully invest in biorefineries that adopt new and more effective technologies that will enable energy from renewable sources to

supply an increasing share of the energy needs of the country.

Notice of Funds Availability. Rural Development published a Notice of Funds Availability (NOFA) for the section 9003 guaranteed loan program on November 20, 2008 [73 FR 70544] (referred to in this notice as the Section 9003 NOFA) and an Advanced Notice of Proposed Rulemaking (ANPRM) on the same day [73 FR 70542]. The ANPRM requested comments in several areas including definitions and terms (established a market, by-products, co-products, area, local market); oversight and monitoring (reporting requirements once the project is established and stabilized; evaluation of project performance); eligible borrowers (National laboratories); loan applications (technical reports, private sector credit rating); evaluation of guaranteed loan applications (scoring criteria); origination responsibilities (credit evaluation and equity); and basic guarantee and loan provisions (project costs and issuance of the loan note guarantee). The Agency received nine comment letters in response to the ANPRM, and has considered the comments in developing this proposed rule.

The following section describes the proposed Biorefinery Assistance program.

II. Discussion of Proposed Rule for Biorefinery Assistance Guaranteed Loans

In this section of the Notice, the proposed rule for Biorefinery Assistance Guaranteed loans is described. The Agency is adding a new subpart to 7 CFR part 4279, Guaranteed Loanmaking, and a new subpart to 7 CFR part 4287, Servicing, which taken together represent the regulatory provisions for the Biorefinery Assistance program. This approach is consistent with the Agency's intent to use the structure of its B&I program when the Agency withdrew 7 CFR part 5001 on September 21, 2009 (74 FR 48005).

A. Background

In developing the Biorefinery Assistance program, the Agency considered two primary factors:

- *Statutory requirements.* The authorizing statute requires the Agency to include certain provisions when implementing the Biorefinery Assistance program.
- *The nature of the program.* The Biorefinery Assistance program is a new program for the Agency. With the exception of the Rural Energy for America Program, the type of technologies associated with biorefineries will be very different than those associated with other Business Programs currently being run by Rural Development. This led the Agency to consider whether new and more detailed requirements than found in the B&I regulation were needed for biorefinery guaranteed loans. Furthermore, the size of the loans that will be involved (up to $250 million) is substantially larger than under other Business programs, including the Rural Energy for America Program. This also results in the Agency's consideration for additional requirements for Biorefinery Assistance Guaranteed loans.

A third factor considered by the Agency is comments submitted in response to the ANPRM. In the ANPRM, the Agency requested comments specific to several areas for consideration in developing the guaranteed loan program for biorefinery assistance. The Agency received nine public comment letters. The Agency reviewed each comment letter and, where the Agency determined it appropriate, incorporated recommendations into the proposed rule.

As noted above, the Agency is proposing to add new subparts to 7 CFR part 4279, Guaranteed Loanmaking, and 7 CFR part 4287, Servicing, as discussed in Section II.B of this preamble.

B. The Biorefinery Assistance Program

The following paragraphs discuss the proposed Biorefinery Assistance program. Conceptually, the Agency is proposing to add a new subpart C to 7 CFR part 4279 and a new subpart D to 7 CFR part 4287, with extensive incorporation of many of the B&I guaranteed loan provisions.

The new 7 CFR part 4279, subpart C, identifies the purpose and scope of the Biorefinery Assistance program, identifies the relationship of this program to the general B&I provisions found in 7 CFR part 4279, subpart A, and identifies the loan processing requirements for Biorefinery Assistance guaranteed loans. While many of the loan processing requirements are the same as for B&I guaranteed loans, there are significant loan processing provisions being proposed that are specific to Biorefinery Assistance Guaranteed loans.

The new 7 CFR part 4287, subpart D, identifies the servicing requirements for Biorefinery Assistance Guaranteed loans. Most of the servicing requirements being proposed are the same as found in the servicing regulation (7 CFR part 4287) for the B&I guaranteed loans.

Purpose and Scope (§ 4279.201)

This section describes the purpose and scope of the Biorefinery Assistance program.

Compliance With §§ 4279.1 Through 4279.99 (§ 4279.202)

In general, the B&I provisions found in §§ 4279.1 through 4279.99 will be applicable to Biorefinery Assistance Guaranteed loans. There are several areas where there are exceptions or additions. These areas are:

1. *Definitions.* This paragraph presents the definitions applicable to the Biorefinery Assistance program. Many of the applicable definitions are incorporated by reference from the B&I regulations (§ 4279.2). Other definitions are specific to the Biorefinery Assistance program. The following paragraphs present many of the definitions required for the implementation of the Biorefinery Assistance program. Two of these definitions are statutorily driven, while the others are being proposed by the Agency in order to implement the program more clearly.

Statutorily-driven terms. The 2008 Farm Bill defines "advanced biofuel" and "eligible technology." Because these two terms are statutorily defined, the Agency must use them as defined in the 2008 Farm Bill.

Other terms. The Agency identified a number of terms that are needed in order to implement the Biorefinery Assistance program. These terms are:

- Biofuel;
- Biorefinery;
- By-product;
- Farm cooperative;
- Farmer Cooperative Organization;
- Immediate family;
- Indian Tribe;
- Institution of higher education;
- Local owner;
- Offtake agreement;
- Regulated or supervised lender;
- Renewable biomass; and
- Total project costs.

The 2008 Farm Bill provides a definition for biorefinery, which is included in the proposed rule. With the exception of renewable energy and renewable energy system, these terms are being defined because they are associated with implementing the Biorefinery Assistance program.

With the exception of farm cooperative, farm cooperative organization, by-product, and local owner these terms and their definitions are the same, or essentially the same, as found in the Section 9003 NOFA. With regard to farm cooperative, the definition is being revised to reflect the

structure of the farm cooperative, rather than its operational aspects. Therefore, the Agency revised the definition to track the one used in the Value Added Producer Grant program, which requires the applicant to be incorporated as a cooperative. As a result, the program will require the cooperative to comply with State law. The NOFA did not state that the cooperative had to be incorporated as a cooperative.

With regard to farm cooperative organization, the definition is being revised to make it clearer as to what constitutes a farm cooperative organization.

With regard to by-product, a definition for by-product is being added in response to comments received on the ANPRM. The Section 9003 NOFA did not have a definition for by-product. The term biorefinery is defined in the statute, and includes language concerning products other than the biofuel. By-products are an important revenue source for many biorefineries. The definition requires that they be typical to the operation, and measurable. The Agency wanted to ensure for the technical and financial analysis, that a standard for a byproduct is established and that the applicant can document the same.

With regard to local owner, the Agency is proposing the method for determining local ownership under the scoring criteria by looking at the percent of local owners whose primary residence is within 20 miles of the area supplying feedstock to the biorefinery (*see* 4279.265(d)(9)). Thus, it is necessary to define "local owner."

The Agency also identified a number of terms associated with the definition of "eligible technology", with project eligibility, or with lender eligibility:

- Retrofitting;
- Semi-work scale;
- Technical and economic potential;
- Tier 1 capital;
- Tier 2 capital;
- Tier 1 leverage capital ratio;
- Tier 1 risk-based capital ratio;
- Total qualifying capital;
- Total risk-based capital ratio; and
- Viable commercial-scale operation.

The proposed definition for retrofitting is the same as found in the Section 9003 NOFA.

The definition of technical and economic potential is essentially the same as found in the Section 9003 NOFA, but has been modified, in paragraph (ii), to refer to the demonstration of the "potential success of the project" rather than to the demonstration of the "success of the project." In addition, to clarify paragraph (iii) of this definition, the Agency is adding a definition for "semi-work scale."

The Section 9003 NOFA provided a definition for "viable commercial-scale." The Agency believes that it is clearer to define "viable commercial-scale operation" and, thus, has revised the term being defined. The definition is the same as found in the Section 9003 NOFA for "viable commercial-scale," but with minor editing.

Two of the other terms are agricultural producer and association of agricultural producers. The definition of association of agricultural producer is very similar to the definition of the term as found in the Section 9003 NOFA. The Agency is adding the definition of "agricultural producer" to further clarify the term "association of agricultural producers."

Lastly, the Agency also identified a number of terms used in making guaranteed loans that have not been previously defined for the B&I Guaranteed Loan program and that will be applicable to the Biorefinery Assistance program. These terms are:

- Business plan;
- Default;
- Eligible project costs;
- Existing business;
- Feasibility study;
- Future recovery;
- Loan classification;
- Market value;
- Material adverse change;
- Negligent loan origination;
- Project;
- Protective advance;
- Startup business;
- Surety;
- Tangible net worth; and
- Working capital.

The Agency believes that providing definitions for these terms will be beneficial to the Section 9003 guaranteed loan program. Approximately one-half of these terms are based on the definitions found in the Section 9003 NOFA. Most of the other terms are based on the definitions found in the withdrawn Rural Development Guaranteed Loans rule.

2. *Exception authority (§ 4279.202(b)).* This section identifies those conditions under which the Administrator may make, on a case-by-case basis, exceptions to any requirement or provision of this subpart. The proposed provisions are the same as found in 7 CFR part 4280, subpart B, for the renewable energy systems and energy efficiency improvements program. These provisions are very similar to those currently found in § 4279.15.

3. *Lender eligibility requirements (§ 4279.202(c)).* This paragraph presents the requirements for lenders to participate in the Biorefinery Assistance program. Consistent with the Section 9003 NOFA, only lenders that are regulated or supervised will be eligible to originate and service Biorefinery Assistance Guaranteed loans. The Agency is not allowing lending entities that are not regulated or supervised to participate in order to manage Agency risk associated with this program.

Although the lenders eligible for participation in the Biorefinery Assistance program are regulated or supervised, the Agency is proposing additional requirements associated with minimum acceptable level of capital requirements that are not being required for lenders participating in other Rural Development guaranteed loan programs. The additional level of capital requirements, which are the same as found in the Section 9003 NOFA, are being proposed because of the size of projects under the Biorefinery Assistance program. The Agency believes these additional requirements are necessary to limit Agency risk.

Lastly, under this section, the Agency will approve loan guarantees under this subpart only for lenders with adequate experience (as determined by the Agency) with similar projects and the expertise to make, secure, service, and collect loans approved under this subpart. The Agency believes this provision is necessary to further limit Agency risk.

4. *Independent credit risk analysis (§ 4279.202(d)).* Under this paragraph, the Agency will require an independent credit risk analysis from a nationally-recognized rating agency for loans of $100 million or more. The threshold level for the independent credit risk analysis is less than found in the Section 9003 NOFA.

5. *Environmental responsibilities (§ 4279.202(e)).* The Agency is proposing that lenders comply with the environmental responsibilities in proposed § 4279.202(e) rather than with those requirements specified in § 4279.30(c) of the B&I regulation. The proposed provisions are very similar to those found in the Section 9003 NOFA.

6. *Additional lender functions and responsibilities § 4279.202(f)).* The Agency is proposing to add three new paragraphs to § 4279.30, Lenders' functions and responsibilities. These three paragraphs, which were part of the Section 9003 NOFA, address:

- *Agency action or inaction.* Any action or inaction on the part of the Agency does not relieve the lender of its responsibilities to originate and service the loan guaranteed under this subpart.
- *Lender files.* The lender must compile and maintain in its files a

complete application for each guaranteed loan for at least 3 years after the final loss has been paid.

• *Conflicts of interest.* The lender must report to the Agency all conflicts of interest and appearances of conflicts of interest.

7. *Certified lender program (§ 4279.202(g)).* The Agency is not including either a preferred or certified lender program because the Agency does not believe a preferred lender program, or a certified lender program as provided in § 4279.43, is appropriate for the biorefinery assistance program.

8. *Oversight and monitoring (§ 4279.202(h)).* This paragraph addresses the recording keeping, oversight, and monitoring requirements with which lenders would have to comply. These provisions are the same as found in the Section 9003 NOFA.

9. *Conditions of guarantee (§ 4279.202(i)).* The Agency is proposing that the guarantee for a biorefinery assistance loan will have to be secured by a first lien on all collateral necessary to run the project in the event of the borrower's default. The Agency is adding this requirement because of the size of the guaranteed loans under this section. The Section 9003 NOFA also required a first lien on all collateral.

The Agency is also proposing to include two other provisions, which are found in the Section 9003 NOFA: the rights of the holder of the guaranteed portion and the requirement to show the lender as an additional insured on insurance policies.

Lastly, the Agency is proposing that if a lender does not satisfactorily comply with the changes and cost overrun provisions found in § 4279.256(c) and such failure leads to losses, then such losses may not be recoverable under the guarantee. This provision was not found in the Section 9003 NOFA, but is being added to protect the Agency's interests.

10. *Sale or assignment of guaranteed loan § 4279.202(j)).* The Agency is proposing to supplement § 4279.75 by requiring the guaranteed portion of the loan to be fully transferable to any accredited investor and allowing the Agency to not guarantee a loan funded with the net proceeds of a bond described in section 142(a) of the Internal Revenue Code of 1986. These two provisions were part of the Section 9003 NOFA.

11. *Minimum retention (§ 4279.202(k)).* The Agency is proposing the same provisions for minimum retention as found in the Section 9003 NOFA. The Agency believes that these minimum retention provisions are better suited to the size of the loans that will be guaranteed under the Section 9003 program than those found in the corresponding B&I provisions for minimum retention at § 4279.77.

12. *Replacement of document 4279.202(l)).* The Agency is proposing to supplement § 4279.84(b)(1)(v) by identifying additional circumstances (defacement or mutilation) under which documents will be replaced.

Loan Processing (§ 4279.225)

This section states that Biorefinery Assistance Guaranteed loans will be processed in accordance with the B&I provisions found in §§ 4279.107 through 4279.199, subject to a number of important exceptions. These exceptions are identified in the proposed rule in §§ 4279.226 through 4279.299 and are discussed below.

Fees (§ 4279.226)

This section addresses guarantee fees and renewal fees. The B&I provisions for the guarantee and renewal fees, which are found at § 4279.107, apply to this program. The following paragraphs summarize differences from these B&I provisions.

Guarantee Fee. The guarantee fee rates, which are based on the size of the loan relative to total project costs, are the same as found in the Section 9003 NOFA.

Renewal Fee. As found in the Section 9003 NOFA, the annual renewal fee must be paid to the Agency for as long as the guaranteed loan is outstanding and is payable during the construction period. The renewal fee rates are also the same as found in the Section 9003 NOFA. The Agency notes that the Section 9003 NOFA allowed the guarantee fee to be passed on to the borrower, but did not address whether the renewal fee could be passed on to the borrower. Under the proposed rule, the renewal fee can be passed on to the borrower.

Borrower Eligibility (§ 4279.227)

This section identifies the eligible borrowers for a guaranteed loan under the Biorefinery Assistance program; the borrower eligibility requirements in § 4279.108 will not apply to this subpart. Instead, eligible borrowers, which are defined in the 2008 Farm Bill, must be one of the following:

• An individual;
• An entity;
• An Indian Tribe;
• A unit of State or local government;
• A corporation;
• A farm cooperative;
• A farmer cooperative organization;
• An association of agricultural producers;
• A National Laboratory;
• An institution of higher education;
• A rural electric cooperative;
• A public power entity; or
• A consortium of any of the above entities.

Because these entities, including units of State and local governments, National laboratories, and institutions of higher education, are statutorily defined, the Agency cannot make changes to this list. The Agency has defined several of the entities to clarify who will be eligible. Lastly, the Agency notes that "entity" was not included in the Section 9003 NOFA; this was an oversight.

In addition to being an eligible type of borrower, borrowers must also meet citizenship requirements and must possess the legal authority and responsibility necessary to construct, operate, and maintain the proposed facility and services and to obtain, give security for, and repay the proposed loan. The proposed citizenship requirements are very similar to those found in the Section 9003 NOFA, but with the following three additions:

• When an entity owns an interest in the borrower, its citizenship will be determined by the citizenship of the individuals who own an interest in the entity or any sub-entity based on their ownership interest;

• If an entity is composed solely of members of an immediate family, that entity is eligible to participate provided that at least one of the immediate family members meets the citizenship requirement for an individual; and

• Corporate borrowers traded on major United States stock exchanges will be presumed to have more than 51 percent of their owners as United States citizens.

This section also identifies conditions under which the borrower will be considered ineligible for a guarantee. Further, if an applicant does not meet the citizenship requirement, the applicant is not eligible for this program. While this citizenship requirement is not required by statute, it is consistent with the Agency's other programs. As found in Section III of this preamble, the Agency is seeking comment on this requirement.

Project Eligibility (§ 4279.228)

This section presents the requirements for a project to be eligible for a Biorefinery Assistance Guaranteed loan; the project eligibility requirements in § 4279.113 will not apply to this subpart. Instead, the Agency is proposing five specific project eligibility requirements, as discussed below.

The Agency is proposing that the project must be located in a rural area

in order to be eligible for this program. If the project is not located in a rural area, it is not eligible for this program. While not statutorily required, the Agency is proposing this rural area requirement for consistency with its other programs and its mission to improve the economic conditions of rural America. Lastly, as found in Section III of this preamble, the Agency is seeking comment on this requirement.

The second requirement (that the project must be for either the development and construction of commercial-scale biorefineries using eligible technology or the retrofitting of existing facilities) is statutorily-driven. Both of the first and second requirements are the same as found in the Section 9003 NOFA.

The third requirement, use of an eligible feedstock, is being proposed in response to comments on the ANPRM. These comments requested that the Agency clarify the various types of feedstocks that biorefineries could use to make advanced biofuels and still be eligible for funding under this program. The commenters referred to both the statutory language and the Manager's Report on the statute, pointing out that certain types of feedstocks were considered, but not clearly identified, as potential feedstocks for biorefineries. The Agency believes that the statute clearly defines eligible feedstock and no further clarification is needed in the proposed rule.

The Agency received a comment on the ANPRM that requested the Agency to consider excluding paper that is commonly recycled from the definition of "waste," thus excluding it as an eligible feedstock. The Agency has adopted this position in this rule and is seeking specific comments on this request and on any other feedstocks that should not be considered eligible under this program.

The fourth requirement, more than 70 percent of revenues from the sale of advanced biofuel, attempts to address the Agency's concern that loans guaranteed under this program go to projects at biorefineries whose primary purpose is the production of advanced biofuel. This provision was not included in the Section 9003 NOFA.

The fifth requirement is that the project must have cash equity injection of not less than 20 percent of eligible project costs not attributed to other Federal grant or loan programs such as the Department of Energy. By limiting the maximum loan guaranteed to 80 percent of eligible project costs, the statute requires that at least 20 percent of the project's costs come from sources other than loan proceeds. The Agency requested comment in the ANPRM as to:

- What should the equity requirements be?
- Should there be minimum equity requirements that may vary depending on the size of the project?
- Will it differ between construction and development versus retrofitting?

After considering the responses to these questions, the Agency believes that equity should be cash equity, because cash equity represents the best commitment of the borrower to the project and it can help reduce project risk by making cash available during construction and project startup. The Agency is proposing the same cash equity requirement for all biorefinery assistance projects.

Lastly, this section identifies what areas qualify as rural. The definition being proposed is the same as in the Section 9003 NOFA with the addition that projects that are located in areas determined to be "rural in character" will be eligible. When making a "rural in character" determination under the Section 9003 program, the Agency will do so in a manner that is consistent with making similar determinations under its Business and Industry Guaranteed Loan program.

Guaranteed Loan Funding (§ 4279.229)

Instead of complying with the B&I provisions for guaranteed loan funding found at § 4279.119, the Agency is proposing a separate set of provisions for Biorefinery Assistance Guaranteed loans. These provisions, which are the same as those found in the Section 9003 NOFA, address:

- Distribution of budget authority each fiscal year;
- Maximum amount of the loan;
- Maximum principal amount to one borrower;
- Maximum guarantee; and
- Eligible project costs.

As required by the 2008 Farm Bill, of the funds made available for loan guarantees for a fiscal year, 50 percent of the funds must be reserved for obligation during the second half of the fiscal year. To implement this provision, the Agency will allocate up to, but no more, than 50 percent of its budgetary authority to fund applications received by the end of the first application window. If any of this budgetary authority is not obligated by the end of the first application window, the Agency will carry it over into the second application window. Thus, the Agency will have at a minimum 50 percent of its budgetary authority available for the second application window.

As required by the 2008 Farm Bill, the amount of a guaranteed loan for a project under this section cannot exceed 80 percent of total eligible project costs, which are identified later in this preamble. In addition, total Federal participation for a biorefinery project will not exceed 80 percent of total eligible project costs. The project is the biorefinery or portion of the biorefinery that is producing eligible advanced biofuels and any eligible biobased by-products receiving funds under this program.

The Agency is proposing to limit the maximum principal amount of a loan guaranteed under this section to one borrower to $250 million; the Agency is not proposing a minimum amount. This is the same as found in the Section 9003 NOFA. The Agency notes that the 2008 Farm Bill provides for a maximum principal amount of a loan guaranteed under the Biorefinery Assistance program to $250 million on a loan basis. The Agency is proposing to apply the $250 million limit on a borrower basis in order to make funds available to more entities.

In addition, and as required by the 2008 Farm Bill, the amount of a loan guaranteed under this section will be reduced by the amount of other direct Federal funding (*i.e.,* direct loans and grants) that the eligible borrower receives for the same project. For example, an eligible borrower is applying for a loan guarantee on a $1 million project. The borrower provides the minimum matching requirement of 20 percent, or $200,000. This leaves $800,000 in other funding needed to implement the project. If the borrower receives no other direct Federal funding for this project and requests a guarantee for the $800,000, the Agency will consider a guarantee on the $800,000. However, if this borrower receives $100,000 in other direct Federal funding for this project, the Agency will only consider a guarantee on $700,000. These provisions are the same as those found in the Section 9003 NOFA.

This section also establishes the maximum percent guarantees for loans under this subpart, which are the same as found in the Section 9003 NOFA. The last paragraph in this section contains the list of items the Agency is proposing as eligible project costs, provided the items are an integral and necessary part of the total project. The list of eligible project costs are the same as found in the Section 9003 NOFA, except that professional service fees, feasibility studies, and business plans have been removed from this list. The Agency is deleting these three items because these are expenses that the applicant will

otherwise incur in evaluating project capability and suitability prior to seeking financial assistance.

Subordination of Lien Position (§ 4279.230)

In addition to complying with the provisions found in § 4279.123, a subordination must not extend the term of the guaranteed loan made under this subpart.

Interest Rates (§ 4279.231)

This section identifies the requirements for interest rates for loans that are guaranteed under this program, which are the same as found in the Section 9003 NOFA.

Terms of Loan (§ 4279.232)

As found in the Section 9003 NOFA, the repayment term for a loan guaranteed under this subpart will be for a maximum period of 20 years or 85 percent of the useful life of the project, whichever is less, as determined by the lender and confirmed by the Agency. In addition, the length of the loan term will be required to be the same for both the guaranteed and unguaranteed portion of the loan. Additional provisions, which are also found in the Section 9003 NOFA, address when guarantees can be provided and that all loans guaranteed must be financially sound and feasible with reasonable assurance of repayment.

Lastly, repayment of the loan will be subject to the B&I provisions found at § 4279.125(a) and § 4279.126(b), (c), and (d).

Credit Evaluation (§ 4279.233)

Instead of complying with the B&I provisions at § 4279.131 concerning credit quality, the Agency is proposing a separate set of provisions under this subpart.

As proposed, lenders must conduct a credit evaluation for each application submitted. The proposed rule identifies what the Agency considers to be an acceptable credit evaluation. Specifically, the lender must use credit documentation procedures and an underwriting process that are consistent with generally accepted commercial lending practices, and the lender must include an analysis of all credit factors associated with each guarantee application to ensure loan repayment.

In making this analysis, the proposed rule requires the lender to consider the following:

- *Credit worthiness.* This refers to those qualities that generally impel the prospective borrower to meet its obligations as demonstrated by its credit history.
- *Cash flow.* This refers to a prospective borrower's ability to produce sufficient cash to repay the loan as agreed.
- *Capital.* This refers to the financial resources that the prospective borrower currently has and those it is likely to have when payment is due. The prospective borrower must be adequately capitalized.
- *Collateral.* This refers to the assets, including the processing technology owned by the borrower, pledged by the prospective borrower in support of the loan.
- *Conditions.* This refers to the general business environment and status of the prospective borrower's industry.

When determining the credit quality of the borrower, the lender must include the following:

- Borrowers must demonstrate evidence of cash equity injection in the project of not less than 20 percent of eligible project costs. The fair market value of equity in real property that is to be pledged as collateral for the loan may be substituted in whole or in part to meet the cash equity requirement. However, the appraisal completed to establish the fair market value of the real property must not be more than 1 year old unless a more recent appraisal is requested by the Agency in order to reflect market conditions. The appraisal used to establish fair market value of the real property must conform to the requirements of § 4279.244. Otherwise, cash equity injection must be in the form of cash.
- The credit analysis must also include spreadsheets of the balance sheets and income statements of the borrower for the 3 previous years (for existing businesses), pro forma balance sheets at startup, and projected yearend balance sheets and income statements for a period of not less than 3 years of stabilized operation, with appropriate ratios and comparisons with industrial standards (such as Dun & Bradstreet or Robert Morris Associates) to the extent available.
- All data must be shown in total dollars and also in common size form, obtained by expressing all balance sheet items as a percentage of assets and all income and expense items as a percentage of sales.

The Agency is including these additional details because of the size and complexity of the anticipated biorefinery assistance projects.

Financial Statements (§ 4279.237)

Instead of complying with the B&I provisions for financial statements found at § 4279.137, the Agency is proposing that biorefinery assistance projects comply with the financial statement provisions found at § 4279.261(c), which are presented later in this preamble.

Appraisals (§ 4279.244)

In addition to complying with the B&I provisions for appraisals at § 4279.144, the appraisals for proposed biorefineries must be self-contained appraisals. Further, lenders will be required to complete, for all applications, a Phase I Environmental Site Assessment (ESA) in accordance with ASTM International standards, which should be provided to the appraiser for completion of the self-contained appraisal.

To conduct these appraisals, lenders are required to use specialized appraisers, unless a specialized appraiser does not exist, in which case the Agency may waive this requirement. This exception, that a specialized appraiser will not be required if such an appraiser does not exist for the technology required, is being proposed in recognition that one of the purposes of this program is to help push the technological envelop regarding the production of advanced biofuels and, as a result, specialized appraisers may not exist for all technologies under this program. Including this exception allows the Agency to avoid determining a project ineligible simply because the lender cannot find a specialized appraiser for a new technology.

Feasibility Studies (§ 4279.250)

Because the Agency is proposing feasibility studies specific to biorefinery assistance projects, which are found at § 4279.261(f), the B&I provisions for feasibility studies found at § 4279.150 do not apply to this subpart.

Loan Priorities (§ 4279.255)

Instead of complying with the B&I provisions for loan priorities found at § 4279.155, the Agency is proposing scoring criteria specific to biorefinery assistance projects, which are found at § 4279.265(c) and which are presented later in this preamble.

Construction Planning and Performing (§ 4279.256)

As proposed, the B&I provisions for construction planning and performing found at § 4279.156(a) and (b) will apply to Biorefinery Assistance Guaranteed loans. In addition, the Agency is proposing several additional requirements specific to Biorefinery Assistance Guaranteed loans, as discussed below.

Architectural and engineering practices. Similar to the Section 9003 NOFA, lenders would also be required

to ensure that all project facilities are designed utilizing accepted architectural and engineering practices that conform to the requirements of the proposed subpart.

Onsite inspectors. As proposed, lenders will be required to provide an onsite project inspector. Given the size and complexity of the anticipated biorefinery assistance projects, the Agency believes the presence of such inspectors is necessary to protect the interests of the lender and the Government.

Changes and cost overruns. As proposed, borrowers will be responsible for any changes or cost overruns. If any such change or cost overrun occurs, then any change order must be approved by the Agency, and neither the lender nor borrower will be allowed to divert funds from purposes identified in the guaranteed loan application approved by the Agency to pay for any such change or cost overrun. In no event will the current loan be modified or a subsequent guaranteed loan be approved to cover any such changes or costs. In the event of any of the aforementioned increases in costs or expenses, the borrower will be required to provide for such increases in a manner that does not diminish the borrower's operating capital. Failure to comply with the terms of this paragraph will be considered a material adverse change in the borrower's financial condition, and the lender will have to address this matter, in writing, to the Agency's satisfaction. If a lender does not satisfactorily address the matter and such failure leads to losses, then such losses may not be recoverable under the guarantee.

New draws. As proposed, the following three certifications will be required for each new draw:

- Certification by the project engineer to the lender that the work referred to in the draw has been successfully completed;
- Certification from the lender that all debts have been paid and all mechanics' liens have been waived; and
- Certification from the lender that the borrower is complying with the Davis-Bacon Act.

The Agency is proposing these "change or cost overruns" and new draw provisions to protect its interests. These requirements are the same as found in the Section 9003 NOFA, with one exception—the Section 9003 NOFA did not include the certification from the lender that the borrower is complying with the Davis-Bacon Act. The Agency believes such certification is appropriate to help ensure compliance with the statutory requirement for inclusion of the Davis-Bacon Act requirements in this program.

Surety. The Agency is proposing that surety be required in cases when the guarantee will be issued prior to completion of construction unless the contractor will receive a lump sum payment at the end of work. In addition, surety is to be made a part of the contract, if the borrower requests it or if the contractor requests partial payments for construction work. Finally a latent defects bond may be required to cover the work in instances where no surety is provided and the project involves precommercial technology, first of its type in the U.S., or new designs without sufficient operating hours to prove their merit.

Reporting during construction. As proposed, lenders will be required to submit quarterly construction reports during the construction of commercial-scale biorefineries or the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. These reports must contain, at a minimum, planned and completed construction milestones, loan advances, and personnel hiring, training, and retention. The Agency believes that such reports are necessary to provide better oversight on these large projects.

Borrower Responsibilities (§ 4279.259)

Under the proposed rule, the Agency has consolidated and simplified the responsibilities of borrowers under the Biorefinery Assistance program. These responsibilities, which are consistent with those associated with the B&I Guaranteed Loan program, address the following areas:

- Federal, State, and local regulations;
- Permits, agreements, and licenses;
- Insurance;
- Access to borrower's records; and
- Access to the project.

Guarantee Applications (§§ 4279.260 and 4279.261)

Instead of complying with the B&I provisions for applications found at § 4279.161, the Agency is proposing a self-contained set of requirements for guaranteed loan applications for biorefinery assistance projects. These requirements are found in two sections of the proposed rule, as described below.

1. Guarantee Applications—General (§ 4279.260)

This section of the proposed rule contains requirements associated with:

- Application submittal;
- Application deadline;
- Incomplete applications; and
- Application withdrawal.

Application submittal. Because of the size and complexity of the anticipated biorefinery assistance projects, the Agency proposes to manage this program out of the National Office. Lenders will be required to submit applications (one original and two copies) to the Agency.

Application deadline. As proposed, complete applications must be submitted to the Agency no later than June 1 of each fiscal year to be considered for funding in that fiscal year. If the Agency determines that a different application deadline is needed, it will publish a notice in the **Federal Register** identifying the new application deadline for that fiscal year. If the application deadline falls on a weekend or a federally-observed holiday, the deadline will be the next Federal business day.

Even though there is a single application deadline, to assist in the implementation of the program and to manage work flow, the Agency is proposing two competitions for funds each fiscal year. The first competition will be among those complete and eligible applications received by March 1. The Agency will then make awards to eligible applications in this first pool of applications. The second competition will be among those complete applications received by June 1. This second competition could contain any eligible applications from the first competition that were not selected for funding.

Incomplete applications. The Agency will reject all incomplete applications. For each incomplete application it receives, the Agency will notify the lender in writing of those elements that made the application incomplete. Lenders may resubmit such applications prior to the applicable application deadline. Applicants will be informed that the application was not processed and why.

Application withdrawal. Because a borrower's circumstances can change after submittal of the application, under this section, the lender must notify the Agency if the project is no longer viable or the borrower no longer is requesting financial assistance for the project. Upon receipt of such notification, the Agency will either withdraw the application or rescind the selection of project, as applicable.

2. Application of Loan Guarantee Content (§ 4279.261)

This section identifies the content for each application for loan guarantee

under this program. Each loan guarantee application must contain:

- A project summary;
- Lender's analysis and credit evaluation;
- Financial statements;
- Environmental information;
- Appraisal;
- Feasibility study;
- Business plan;
- Technical assessment;
- Economic analysis;
- Loan agreement;
- Lender certifications;
- Intergovernmental consultation;
- DUNS number;
- Bioenergy experience; and
- Any other information requested by the Agency or entities working on the Agency's behalf.

Much of the application content is based on the Agency's Rural Energy for America Program, which has similar projects. However, because of the size of projects under the Biorefinery Assistance program, the Agency has modified similar provisions to require more information. The following paragraphs discuss key portions of the application content.

Lender's analysis and credit evaluation (paragraph (b)). This paragraph requires the lender to provide a summary of the technology to be used in the project, the viability of such technology for the particular project application, and the development type (*e.g.,* installation, construction, retrofit).

Because of the size of the loans being guaranteed under the Biorefinery Assistance program, the Agency believes that it is necessary to provide more specific regulatory requirements for the submittal of credit reports by identifying the type of credit report (personal or commercial) that is to be submitted and on whom such credit reports are to be submitted. These additional requirements will help borrowers in preparing their applications and assist lenders during their due diligence process. The Agency is, therefore, proposing to require:

- Personal credit reports from an acceptable credit reporting company for those owning 20 percent or more interest in the borrower or any owner with more than 10 percent ownership interest in the borrower if there is no owner with more than 20 percent ownership interest in the borrower, including a proprietor (owner), each partner, officer, director, key employee, and stockholder, except for those corporations listed on a major stock exchange. Note that the 20 percent requirement is consistent with the Business and Industry Guaranteed Loan program. Credit reports are not required for elected and appointed officials when the borrower is a public body or non-profit corporation; and
- Commercial credit reports on the borrower and any parent, affiliate, and subsidiary firms.

The lender must also include its credit evaluation, as specified in § 4279.232.

As found in the Section 9003 NOFA, the Agency is also proposing that, for loans of $125 million or more, an evaluation and credit rating of the total project's indebtedness, without consideration for a government guarantee, from a nationally-recognized rating agency be obtained. The Agency is requiring this because of the size of the risk associated with these projects.

Financial statements (paragraph (c)). As proposed, financial statement will need to be submitted for all borrowers.

For businesses that have been in existence for one or more years, their most recent audited financial statements will be submitted if the guaranteed loan is $3 million or more, unless alternative financial statements are authorized by the Agency. If the guaranteed loan is less than $3 million, however, the borrower's most recent audited or Agency-acceptable financial statements of the borrower will be submitted. In proposing this $3 million threshold, the Agency reviewed the comments it received on a recently withdrawn guaranteed loan rule. For that rule, the Agency originally proposed a threshold of $1 million for requiring audited financial statements. Commenters were concerned that the expense of audited financial statements and the low threshold would be too punitive and the level should be left to the lender. After considering these comments, the Agency revised the $1 million to $3 million and added a provision that alternative financial statements could be submitted provided they were approved by the Agency. The Agency believes these provisions are suitable to the Section 9003 program.

For businesses that have been in existence for less than one year, their most recent Agency-authorized financial statements, regardless of the amount of the guaranteed loan request, will be submitted.

For all businesses, a current (not more than 90 days old) balance sheet; a *pro forma* balance sheet at startup; and projected balance sheets, income and expense statements, and cash flow statements for a period of not less than 3 years of stabilized operation will be submitted. Projections should be supported by a list of assumptions showing the basis for the projections.

Lastly, the Agency may find it necessary to request additional financial information from the borrower because of the complexity of the project and the financial condition of the borrower. Thus, the Agency is reserving the right to request additional financial information.

Environmental information (paragraph (d)). Lenders are required to submit with the application the environmental information specified in RD 1940–G, Exhibit H.

Appraisals (paragraph (e)). In complying with § 4279.244 (which was discussed early in this preamble), self-contained appraisals accompanied by a copy of a Phase I Environmental Site Assessment (ESA) in accordance with ASTM International standards must be submitted with the application if available.

Feasibility study (paragraph (f)). Lenders are required to submit a feasibility study with each application for guarantee. The Agency is identifying a detailed list of components for Biorefinery Assistance program feasibility studies. The basic elements of this study are:

- Executive Summary.
- Economic feasibility.
- Market feasibility.
- Technical feasibility (including technical assessment).
- Financial feasibility.
- Management feasibility.
- Qualifications.

Because of the size and complexity of these projects, and the loan amount being guaranteed under this program, the Agency is proposing very detailed and prescriptive requirements for the feasibility study. Each component specified for the feasibility study is generally found in other Agency programs, but in less detail.

The specific components are essentially the same as those identified in the Section 9003 NOFA. One of the specific components presented in Table 1, Feasibility Study Components, was relocated to § 4279.261(h), Technical Assessment, because it is more appropriate to that paragraph than in the table describing components of the feasibility study. In addition, the Agency has modified several of the components associated with management feasibility from those identified in the Section 9003 NOFA to more clearly articulate the type of management experience to be addressed.

Business plan (paragraph (g)). Each lender must submit a business plan with each application. The business plan must include the following:

- The borrower's experience and succession planning when discussing the borrower's ownership and management;
- The names and a description of the relationship when discussing the borrower's parent, affiliates, and subsidiaries;
- The borrower's business strategy;
- Possible vendors and models of major system components;
- The availability of the resources (*e.g.,* labor, raw materials, supplies) necessary to provide those products and services;
- Site location and its relation to product distribution (*e.g.,* rail lines or highways) and any land use or other permits necessary to operate the facility;
- The market for the product and its competition, including any and all competitive threats and advantages;
- Projected balance sheets, income and expense statements, and cash flow statements for a period of not less than 3 years of stabilized operation; and
- A description of the proposed use of funds.

If any of the information contained in the business plan is provided in the feasibility study, the lender will not be required to include such information in the business plan.

Technical assessment (paragraph (h)). Because of the technical challenges that confront the construction and development of biorefineries, the Agency is further detailing the type of technical assessment to be submitted with the application. The Agency modeled this technical assessment, which is similar to that found in the Section 9003 NOFA, after the current provisions for such assessments for projects under the REAP guaranteed loan program.

As noted earlier, one of the specific components from Table 1, Feasibility Study Components, was relocated to paragraph (h). This component states that the technical assessment must be based upon verifiable data and contain sufficient information and analysis so that a determination may be made on the technical feasibility of achieving the levels of income or production that are projected in the financial statements.

In addition, the Section 9003 NOFA stated that "All projects require the services of a professional engineer (PE)." In the proposed rule, the Agency has revised this to read "All projects require the services of an independent, third-party professional engineer." This change reflects a specific component, which had been in Table 1 in the Section 9003 NOFA, that discussed what constitutes an independent project engineer. The Agency believes that it is very important that technical feasibility be assessed by independent third-parties to ensure there is no conflict of interest in the preparation of the technical assessment.

Economic analysis (paragraph (i)). For the same reasons it is requiring a detailed, prescriptive technical assessment, the Agency is specifying a detailed economic analysis of the project to be included in the feasibility analysis. The provisions for the economic analysis are the same as found in the Section 9003 NOFA.

Loan Agreement (paragraph (j)). The Agency is requiring that the lender submit with the application a proposed loan agreement or a sample loan agreement with an attached list of the proposed loan agreement provisions, which will have to be executed by the lender and borrower before the Agency will issue a loan note guarantee. The list of loan agreement provisions to be included must conform to the list found in § 4279.161(b)(11).

Lender certification (paragraph (k)). Lenders will be required to submit certifications as specified in the B&I regulations at § 4279.161(b)(16). In addition, lenders will be required to certify that the project is also able to demonstrate technical merit.

Bioenergy experience (paragraph (n)). This paragraph identifies the information lenders will be required to submit concerning the borrower's prior experience in bioenergy projects.

Guarantee Application Evaluation (§ 4279.265)

Instead of evaluating biorefinery assistance applications for loan guarantees using the B&I procedures specified in § 4279.165, the Agency is proposing a self-contained set of application evaluation procedures, as described below, for Biorefinery Assistance Guaranteed loan applications.

General (paragraph (a)). When the Agency receives a complete application from an approved lender, it will review the application to determine if the borrower, lender, and project are eligible. The Agency will also review the application to determine whether the proposed project has technical merit, as determined by the Agency, and whether it has met each of three minimum financial metric criteria. Applications from lenders not approved by the Agency specifically for the Biorefinery Assistance program will not be processed.

If it determines that the borrower, lender, or project is ineligible, the Agency will notify the lender, in writing, of the reasons and provide any applicable appeal rights. The Agency will discontinue processing such applications.

Lastly, if the Agency determines it is unable to guarantee the loan at any time during the processing of the application and prior to issuance of the loan note guarantee, the Agency will inform the lender in writing. The Agency will include the reasons for denial of the guarantee in its notification to the lender. Because such a denial constitutes an adverse decision, the affected entities will have appeal rights.

Technical merit determination (paragraph (b)). The Agency will use the information provided in the application to determine a project's technical merit. Any project determined by the Agency to be without technical merit will not be selected for funding. In evaluating and rating Biorefinery Assistance Guaranteed loan applications, the Agency may, at its discretion, engage the services of other government agencies or recognized industry experts in the applicable technology field. The Agency may use this evaluation and rating to determine the level of technical merit of the proposed project.

Financial metric criteria (paragraph (c)). Using the information provided in the application, the Agency will determine if the project meets each of the following three financial metric criteria:

- A debt coverage ratio of 1.0 or higher;
- A debt-to-tangible net worth ratio of 4:1 or lower for startup businesses and of 9:1 or lower for existing businesses; and
- A discounted loan-to-value ratio of no more than 1.0.

These criteria are to be calculated from the realistic information in the pro forma statements or borrower financial statements of a typical operating year after the project is completed and stabilized. The Agency is requiring these minimum financial criteria to reduce the chances that loan guarantees are sought for high risk projects and that such projects, even if an application is submitted, are not guaranteed by the Agency.

Scoring applications (paragraph (d)). The Agency will score each eligible application that meets the minimum requirements for financial and technical feasibility using a set of evaluation criteria. The scoring criteria being proposed are specified in the 2008 Farm Bill.

For the most part, the scoring criteria are the same as found in the Section 9003 NOFA, but the Agency is proposing a few changes to the scoring criteria and points found in the Section

9003 NOFA. The changes made reflect reconsideration by the Agency on how to prioritize projects for funding. These changes are summarized below.

The Agency has revised how it will score whether the borrower is proposing to work with producer associations or cooperatives. As proposed, points will be awarded based on the dollar value of procurement or marketing agreements with producer associations and cooperatives obtained by the borrower relative to the dollar value of the project's feedstock, biofuel, and biobased by-product. In order to receive the points under this criterion, each of the following must be met:

- At least 60% of the dollar value of feedstock to be used by the proposed biorefinery will be supplied by producer associations and cooperatives;
- At least 60% of the dollar value of the advanced biofuel to be produced by the proposed biorefinery will be sold to producer associations and cooperatives; and
- At least 60% of the dollar value of the advanced biobased by-products to be produced by the proposed biorefinery will be sold to producer associations and cooperatives.

To illustrate this criterion, consider a proposed biorefinery that will purchase $1,000,000 of feedstock and produce $5,000,000 worth of biofuel and $2,000,000 worth of biobased by-products. In order to receive the 5 points under this criterion, at least $500,000 worth of feedstock purchases must be from producer associations or cooperatives, at least $2,500,000 worth of biofuel must be sold to producer associations or cooperatives, and at least $1,000,000 worth of biobased by-products must be sold to producer associations or cooperatives. If any one of these is not achieved, no points will be awarded.

The Agency has revised the method for awarding points under the level of financial participation by the borrower criterion. In the Section 9003 NOFA, points are awarded based on the percent tangible balance sheet equity that results from the borrower's cash equity injection plus other sources of funding. In the proposed rule, points will be awarded based on the debt-to-tangible net worth ratio that results from the borrower's cash equity injection plus other sources of funding.

The Agency has removed cellulosic feedstocks as a scoring criterion. The Agency has determined that specific feedstocks should not receive preference over other feedstocks when evaluating applications; however, the Agency has determined that feedstocks that can be used for human or animal consumption should not receive the same preference as other feedstocks. Thus, the Agency is proposing to deduct 5 points from applications that propose to use feedstocks that can be used for human or animal consumption.

The Agency is being more specific, compared to the Section 9003 NOFA, on how points will be awarded under the scoring criterion for local ownership. As proposed, points will be awarded on the basis of the percentage of local owners whose primary residence is within 20 miles of the area supplying feedstock to the biorefinery. The Agency believes this will provide an easier metric on which to score this criterion. The Agency is also seeking comment this proposed method for scoring this criterion.

The Agency has also revised the scoring criterion for "first-of-a-kind technology" from whether the project "is the first to use" a particular technology, system, or process to whether the project "uses a particular technology, system, or project that is not currently operating in the advanced biofuel market as of October 1 of the fiscal year for which funding is available."

The Agency adjusted the points that can be awarded for five of the scoring criteria, increasing the points for four criteria and decreasing the points for one criterion. The criteria for which the Agency has increased points are:

- Feedstock not previously used in the production of advanced biofuels (from 14 to 15 points);
- The potential for rural economic development (from 3 to 5 points);
- The level of local ownership (from 13 to 15 points); and
- First of a kind technology (from 10 points to 15 points).

The Agency has decreased the points that can be awarded, from 9 to 5, for the criterion that addresses whether the proposed biorefinery will have positive impact on resource conservation, public health, and the environment.

In response to the ANPRM, the Agency received a number of comments on the scoring criteria and points. After considering these comments, the Agency believes that the proposed criteria on which the Agency received comments are still appropriate for this program. In considering the comments, the Agency points out the following:

- Regarding the first scoring criterion, when determining whether a borrower has established a market, the Agency believes that it is important to have commitments and agreements on both the feedstock side of the project and on the sales side of the project. Thus, the Agency is continuing to require both supply and offtake commitments and agreements as part of the demonstration of whether a borrower has established a market.
- Regarding the second scoring criterion, it is the Agency's intent is to promote projects that will not compete for feedstocks that are already being used to supply another advanced biofuel facility. This criterion is designed to award points to such facilities. A comment was received that "area" (to assess whether the borrower proposes to place the biorefinery in an area that has other similar advanced biofuel facilities) should be broadly defined (State or region). For the proposed rule, the Agency has recast the wording associated with this criterion to make clearer how it will be applied. Beyond this change, the Agency does not believe it is necessary to revise this criterion based on this comment.
- Regarding the fifth criterion, level of financial participation, the proposed rule requires borrowers to provide at least 20 percent cash equity into the project. It is the Agency's intent to score applications higher that can demonstrate more than this 20 percent minimum (30 percent or more). Borrowers who meet the minimum 20 percent cash equity are still eligible, but will not receive points under this criterion. Further, of all the criteria used to score applications, the Agency continues to believe that this criterion is the most important because it represents the best commitment of the borrower to the project. Therefore, the Agency continues to assign the highest potential points to this criterion.

When demonstrating that a biofuels production technology will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, the Agency would expect applicants to be able to identify the location of the biorefinery and its feedstock relative to the other biorefineries and the feedstock being used by those plants. Such an analysis would be part of the applicant's market analysis and feasibility study.

Lastly, the Agency notes that, when it evaluates an application for the projects potential for rural economic development, it will be based on projections made by the applicant as reported in its application, including in the feasibility study and technical report.

Ranking of applications (paragraph (e)). The Agency will rank the applications according to their scores. The Agency is proposing to rank applications twice each fiscal year. The Agency will rank the first set of applications (those complete and

eligible applications received by March 1) on or before May 31 and the second set (those complete and eligible applications received by June 1) on or before August 31.

All applications that are ranked in a given fiscal year will be considered by the Agency for selection for funding for the entire fiscal year. For example, a complete and eligible application scored and ranked in the first set of applications, but not selected for funding, will be carried forward into the second set of applications. When an application scored in first set of applications is carried forward into the second set of applications, it will be competed against all of the applications in the second set using its score from the first set of applications.

Selection of applications for funding and for potential funding (paragraph (f)). In selecting applications for funding, the first criterion the Agency will use is the application's score, with higher scoring applications receiving first consideration for funding. A minimum score of 55 points is required in order to be considered for a guarantee.

Before selecting applications for funding, the Agency will consider the following two factors, which may result in the Agency selecting a lower scoring application. These two factors are:

- Availability of budgetary authority; and
- Availability of other funding sources.

In considering the availability of budgetary authority, the Agency will evaluate the size of the loan request relative to the budgetary authority that remains available to the program during the fiscal year in two ways:

- If sufficient budgetary authority remains to guarantee the higher scoring loan application and
- If the amount of the funding request is greater than 25 percent of the Agency's outstanding budgetary authority for the program.

If either case exists, the Agency may elect to select, after providing the applicant of the higher scoring application the opportunity to reduce its fund request, the next highest scoring application for further processing.

Ranked applications not funded (paragraph (g)). This paragraph identifies how the Agency will dispose of applications that have been ranked, but not funded, including such applications that have been selected for funding but are missing information. The Agency notes that such a situation would only occur in those situations where additional information not relevant to scoring may be needed to continue the approval process (*e.g.,* pending receipt of a particular certification). The Agency will not carry over into the next fiscal year a ranked application that is not funded in the fiscal year in which it was submitted. In such a situation, the Agency will notify the lender in writing.

Wage rates (paragraph (h)). This paragraph identifies requirements associated with the wages paid to laborers and mechanics working on the project. This provision is included because it is required by the 2008 Farm Bill.

Changes in Borrowers (§ 4279.280)

This section states the B&I provisions for changes in borrowers found at § 4279.180 apply except that the eligibility requirements of this program apply. Note that, as specified in § 4279.180, all changes in borrowers must be approved by the Agency.

Conditions Precedent to Issuance of Loan Note Guarantee (§ 4279.281)

As proposed, the B&I provisions for conditions precedent to the issuance of the loan note guarantee found at § 4279.181(a) through (o) will apply to this subpart, with several additions. The additions are as follows:

- For loans exceeding $150,000, the lender has certified its compliance with the Anti-Lobby Act (18 U.S.C. 1913). Also, if any funds have been, or will be, paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to guarantee a loan, the lender shall completely disclose such lobbying activities in accordance with 31 U.S.C. 1352.
- Where applicable, the lender must certify that the borrower has obtained:

(1) A legal opinion relative to the title to rights-of-way and easements. Lenders are responsible for ensuring that borrowers have obtained valid, continuous, and adequate rights-of-way and easements needed for the construction, operation and maintenance of a facility.

(2) A title opinion or title insurance showing ownership of the land and all mortgages or other lien defects, restriction or encumbrances, if any. It is the responsibility of the lender to ensure that the borrower has obtained and recorded such releases, consents, or subordinations to such property rights from holders of outstanding liens or other instruments as may be necessary for the construction, operation and maintenance of the facility and to provide the required security. For example, when a site is for major structures for utility-type facilities (such as a gas distribution system) and the lender and borrower are able to obtain only a right-of-way or easement on such site rather than a fee simple title, such a title opinion must be requested.

- The minimum financial criteria, including those financial criteria contained in the Conditional Commitment, have been maintained through the issuance of the loan note guarantee. Failure to maintain these financial criteria shall result in an ineligible application.
- The borrower is required to certify to the lender that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with guaranteed loan funds under this section shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 through 3144, 3146, and 3147 of title 40, U.S.C. This certification is being required because these referenced provisions are a project eligibility requirement and the Agency needs assurance that these conditions are or will be complied with prior to issuing the loan note guarantee.
- The lender must certify that it has reviewed all contract documents and verified compliance with sections 3141 through 3144, 3146, and 3147 of title 40, U.S.C., and title 29 of the Code of Federal Regulations. Further, the lender must certify that the same process will be completed for all future contracts and any changes to existing contracts.
- The lender must certify that the proposal for the facility seeking a guarantee under this subpart complies with all Federal, State, and local laws and regulatory rules that are in existence and that affect the project, the borrower, or lender activities.
- The lender must notify the Agency in writing whenever there has been a change in the classification of a loan within 15 calendar days of such change.

The Agency notes that one of the questions in the ANPRM was whether the Agency should issue the loan note guarantee prior to construction or whether the program should be limited to post-construction financing. One comment was received on this question, and it supported issuing the loan note guarantee prior to construction. The Section 9003 NOFA provided for the issuance of the loan note guarantee prior to construction and the Agency has retained this in the proposed rule.

Requirements After Construction (§ 4279.290)

Once the project has been constructed, the lender will be required to provide the Agency with annual reports from the borrower on the performance characteristics and results of the project and to conduct annual inspections of the project for the life of the guaranteed loan. The contents of the annual reports, which are identified in paragraphs (a)(1) through (8), are the same as those found in the Section 9003 NOFA with one exception. The one exception is the addition that these reports include the results of the inspections conducted under § 4279.290(b). These reports and inspections are being required to assist the Agency in monitoring Agency risk and to ensure that the Agency is meeting its goals in implementing this and other programs under Title IX of the 2008 Farm Bill.

Servicing Biorefinery Assistance Guaranteed Loans (7 CFR 4287, Subpart D)

The Agency is proposing to add a new subpart D to 7 CFR part 4287, Servicing, to address the servicing of Biorefinery Assistance Guaranteed loans. In general, the Agency is proposing to use the same procedures and provisions for servicing B&I guaranteed loans, as found in 7 CFR part 4287, subpart B, for servicing Biorefinery Assistance Guaranteed loans. There are, however, a number of additions and exceptions to the B&I provisions. These are described below.

Periodic reports (§ 4287.307(a)). The lender must submit periodic reports, on a quarterly basis, unless otherwise determined by the Agency to meet the financial interests of the United States, regarding the condition of its Agency guaranteed loan portfolio (including borrower status and loan classification) and any material change in the general financial condition of the borrower since the last periodic report was submitted. The Agency is proposing that these reports be submitted on a quarterly basis, rather than a semi-annual basis, because it believes that such reports are required more frequently in order to provide better oversight on these large projects. This requirement is the same as found in the Section 9003 NOFA.

Default reports (§ 4287.307(b)). Lenders must submit monthly default reports, including borrower payment history, for each loan in monetary default using a form approved by the Agency. The Agency is requiring the submittal of this history in order to evaluate the financial condition of the borrower.

Financial reports (§ 4287.307(c)). In addition to complying with the financial reports identified in § 4287.107(d), financial statements may also be specified in the Conditional Commitment, lenders would be required to submit quarterly financial statements within 45 days at the end of each quarter, and the annual financial statements must be audited financial statements. These provisions are the same as found in the Section 9003 NOFA.

Additional loans (§ 4287.307(d)). Instead of complying with the B&I provisions for additional expenditure identified in § 4287.107(e), lenders would be required to comply with the additional loan provisions specified in this paragraph. The additional loan provisions are the same as found in the Section 9003 NOFA.

Collateral inspection and release (§ 4287.307(e)). Instead of complying with the B&I provisions of § 4287.113, the Agency is proposing specific provisions for loans guaranteed under this program. These provisions, which are similar to those found in the Section 9003 NOFA, are being proposed by the Agency for Biorefinery Assistance Guaranteed loan projects because of the size of the loans being guaranteed under this section.

As proposed, lenders will be required to inspect the collateral as often as necessary to properly service the loan. Lenders must obtain Agency approval prior to the release of collateral, except in those instances where the proceeds are used to pay down debt in order of lien priority, or to acquire replacement equipment, or where the release of collateral is made under the abundance of collateral provision of the applicable security agreement. The sale or release of collateral must be based on an arm's length transaction, unless otherwise approved by the Agency in writing.

Lenders will be required to obtain appraisals on the collateral being released on all transactions exceeding $250,000. Such appraisals, which will be at the expense of the borrower, must meet the requirements specified in § 4279.244.

In addition, lenders will be allowed, over the life of the guaranteed loan, to release collateral with a cumulative value of up to 20 percent of the original loan amount without Agency concurrence if the proceeds generated are used to pay down secured debt in the order of lien priority or to buy replacement collateral. Release of collateral with a cumulative value in excess of 20 percent of the original loan or when the proceeds will not be used to pay down secured debt or to buy replacement collateral, will have to be requested, in writing, by the lender, and will have to be concurred by the Agency, in writing, in advance of the release. The lender will also be required to complete a written evaluation justifying the release. This is the same as found in the Section 9003 NOFA.

The Agency is proposing that under this program the value of collateral released at any one time and within any one calendar year cannot be more than 10 percent of the original loan amount.

Finally, the Agency is proposing that any release of collateral must not adversely affect the project's operation or financial condition.

Transfers and assumptions (§ 4287.307(f)). In addition to complying with the B&I provisions at § 4287.134, the Agency is proposing that it may charge the lender a nonrefundable transfer fee at the time of a transfer application. The Agency will set the amount of the transfer fee in an annual notice of funds availability. All transfers need to be approved by the Agency. Further, and consistent with the Section 9003 NOFA, the Agency is including provisions addressing changes in the control of a borrower and changes in terms that result in an increase in the cost of the loan guarantee.

Substitution of lender after issuance of the loan note guarantee (§ 4287.307(g)). Except for the provisions associated with Agency approval of a substitute lender, the provisions in § 4287.135 will apply. The requirements the Agency is proposing to approve the substitution of a new lender, which are very similar to those found in the Section 9003 NOFA, will be used instead of the provisions found in § 4287.135(a). In order to be approved by the Agency, the proposed substitute lender must:

- Be an eligible lender in accordance with § 4279.202(b);
- Be able to service the loan in accordance with the original loan documents; and
- Acquire title to the unguaranteed portion of the loan held by the original lender and assume all original loan requirements, including liabilities and servicing responsibilities.

Default by borrower (§ 4287.307(h)). This paragraph identifies that defaults by borrowers will be handled in accordance with the B&I provisions for default by borrowers found at § 4287.145, except with regard to when the lender must submit the notification to the Agency.

Protective advances (§ 4287.307(i)). In addition to complying with the B&I

provisions for protective advances found at § 4279.156, Agency written authorization will be required when cumulative protective advances exceed $100,000 (not $5,000 as found in the current B&I regulations) or 10 percent of the guaranteed loan, whichever is less.

Determination of loss and payment (§ 4287.307(j)). This paragraph identifies that determination of loss and payment will be made in accordance with the B&I provisions found at § 4279.158 and also requires the keeping of an annual report if the lender receives a final loss payment.

III. Request for Comments

The Agency is interested in receiving comments on all aspects of the proposed rule. Areas in which the Agency is seeking specific comments are identified below. All comments should be submitted as indicated in the **ADDRESSES** section of this preamble.

a. *Preapplications.* The Agency is requesting comment on whether or not a preapplication process for the Biorefinery Assistance program will provide sufficient benefit to lenders and borrowers. If you believe a preapplication process will be beneficial, please identify what elements you recommend for including in a preapplication. Please be sure to provide rationale for your position.

b. *Feedstocks.* The Agency is requesting comment on whether a specific type of material that could serve as a feedstock for the production of advanced biofuels, as it relates to project eligibility for this program, should not be an eligible feedstock. For example, should by-products from the pulp and paper production process which are commonly used for on-site energy production or recycled be an eligible feedstock for a biorefinery seeking a loan guarantee under this program? Please be sure to provide rationale for your position.

c. *Rural area requirement.* As proposed, only biorefineries located in rural areas will be eligible for loan guarantees. The Agency is requesting comment on whether biorefineries located in non-rural areas should also be eligible for a loan guarantee under this program. Please be sure to provide rationale for your position.

d. *Foreign ownership.* The Agency is requesting comment on whether biorefineries that do not meet the proposed citizenship requirements (§ 4279.227(a)(2)) of at least 51 percent domestic ownership, including those owned entirely by immediate family members where only one of the family members meets citizenship requirements, should be eligible for a loan guarantee under this program. Please be sure to provide rationale for your position.

e. *Program obstacles.* The Agency is requesting comments on any and all provisions for the proposed Biorefinery Assistance program and the Business and Industry Guaranteed Loan program that present an obstacle for stakeholders applying for assistance in either program. For each provision that you perceive as an obstacle, please be sure to provide your rationale and please identify potential alternatives that will improve participation in the program.

f. *Processing technology owned by the borrower.* The Agency is requesting comments on whether the processing technology owned by the borrower should be included as an eligible project cost. Examples of potential eligible project costs associated with the processing technology could include, but not be limited to: highly skilled labor, laboratory costs and testing, and equipment. If so, how should the value of such processing technology be determined? In addition, for collateral analysis, what discounting factor should be applied?

g. *Percent revenue from sale of advanced biofuel.* The Agency is requesting comments on the percentage of a biorefinery's sales that must come from the sale of eligible advanced biofuels in order to be eligible under this program. The Agency recognizes that other biobased products can potentially be a sizeable portion of a biorefinery's revenues and thus affect the viability of the biorefinery. However, the Agency's primary goal of this program is to encourage the production of advanced biofuels.

h. *Value of feedstock supplied by producer associations and cooperatives.* The Agency is requesting comments on the percentage of feedstocks that must be purchased from producer association and cooperatives in order to be awarded points in the scoring of applications (*see* § 4279.265(d)(4)). The Agency is proposing a 60 percent threshold for such purchases. The Agency is seeking to try to strike a balance between giving priority to the purchase of feedstocks from producer associations and cooperatives and encouraging new feedstocks and technologies.

i. *Measuring potential for rural economic development.* The Agency is requesting comments on metrics that can be used for measuring rural economic development. Please be sure to discuss the availability of data and how such data can be verified.

j. *Measuring positive impacts on resource conservation, public health, and the environment.* The Agency is requesting comments on metrics that can be used for measuring each of these three areas—resource conservation, public health, and the environment. The Agency is considering an approach that would award more points to facilities that produce biofuels that significantly reduce lifecycle GHGs by compared to conventional fuels they replace in the market; facilities that produce biofuels that do not demonstrate significant GHG reductions of would receive fewer points. For example, in the case of liquid biofuels, fuels that have been certified as advanced biofuels, cellulosic biofuels, or bio-based diesel under EPA's Renewable Fuels Standard achieve lifecycle GHG reductions of at least 50 percent relative to conventional liquid fuels, and so facilities that produce these fuels would receive higher points. We request comments on this approach as an alternative to the proposed rule text, including comments on how such an alternative should be drafted to best address the goal of lifecycle GHG reductions. We also request comment on specific metrics to promote positive impacts on air quality, water quality, and water quantity. Please be sure to be specific and, if proposing to measure data, to discuss the availability of data and how such data can be verified.

k. *Definition of agricultural producer.* The Agency is requesting comments on the definition of agricultural producer in which "50 percent or greater of their gross income is derived from the [agricultural] operations." This definition is consistent with the current definition from in 7 CFR part 4280, subpart B, for the renewable energy system and energy efficiency improvement program. The Agency is interested in receiving comments on whether the percentage of income should be higher and, if so, at what level it should be set. Please be sure to provide rationale for your suggestions.

l. *Local ownership.* The Agency is requesting comment on the definition of "local owner" in scoring applications under § 4279.265(d)(9) for determining the percent local ownership of the biorefinery. The Agency is seeking comment in particular on the relationship of an owner to the area supplying the feedstock to the biorefinery and whether the proposed distance of 20 miles beyond the feedstock area is reasonable. Please be sure to provide rationale for your suggestions.

List of Subjects in 7 CFR Parts 4279 and 4287

Loan programs-Business and Industry-Rural development assistance, Biorefinery assistance, Rural areas.

For the reasons set forth in the preamble, under the authority at 5 U.S.C. 301 and 7 U.S.C. 1989, Chapter XLII of title 7 of the Code of Federal Regulations is proposed to be amended as follows:

CHAPTER XLII—RURAL BUSINESS-COOPERATIVE SERVICE AND RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE

PART 4279—GUARANTEED LOANMAKING

1. The authority citation for part 4279 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989; and 7 U.S.C. 1932(a).

2. Part 4279 is amended by adding a new subpart C to read as follows:

Subpart C—Biorefinery Assistance Loans

Sec.

4279.201 Purpose and scope.
4279.202 Compliance with §§ 4279.1 through 4279.99.
4279.203–4279.224 [Reserved]
4279.225 Loan processing.
4279.226 Fees.
4279.227 Borrower eligibility.
4279.228 Project eligibility.
4279.229 Guaranteed loan funding.
4279.230 Subordination of lien position.
4279.231 Interest rates.
4279.232 Terms of loan.
4279.233 Credit evaluation.
4279.234–4279.236 [Reserved]
4279.237 Financial statements.
4279.238–4279.243 [Reserved]
4279.244 Appraisals.
4279.245–4279.249 [Reserved]
4279.250 Feasibility studies.
4279.251–4279.254 [Reserved]
4279.255 Loan priorities.
4279.256 Construction planning and performing development.
4279.257–4279.258 [Reserved]
4279.259 Borrower responsibilities.
4279.260 Guarantee applications—General.
4279.261 Application for loan guarantee content.
4279.262–4279.264 [Reserved]
4279.265 Guarantee application evaluation.
4279.266–4279.279 [Reserved]
4279.280 Changes in borrowers.
4279.281 Conditions precedent to issuance of loan note guarantee.
4279.282–4279.289 [Reserved]
4279.290 Requirements after project construction.
4279.291–4279.300 [Reserved]

Subpart C—Biorefinery Assistance Loans

§ 4279.201 Purpose and scope.

The purpose and scope of this subpart is to provide financial assistance for the development and construction of commercial-scale biorefineries or for the retrofitting of existing facilities using eligible technology for the development of advanced biofuels.

§ 4279.202 Compliance with §§ 4279.1 through 4279.99.

Except as specified in paragraphs (a) through (l) of this section, all loans guaranteed under this subpart shall comply with the provisions found in §§ 4279.1 through 4279.99 of this chapter.

(a) *Definitions.* The terms used in this subpart are defined in either § 4279.2 or in this paragraph. If a term is defined in both § 4279.2 and this paragraph, it will have, for purposes of this subpart only, the meaning given in this paragraph.

Advanced biofuel. Fuel derived from renewable biomass, other than corn kernel starch, to include:

(i) Biofuel derived from cellulose, hemicellulose, or lignin;

(ii) Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);

(iii) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;

(iv) Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat;

(v) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass;

(vi) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass; and

(vii) Other fuel derived from cellulosic biomass.

Agency. The Rural Business-Cooperative Service or successor Agency assigned by the Secretary of Agriculture to administer the Biorefinery Assistance program. References to the National Office, Finance Office, State Office or other Agency offices or officials should be read as prefaced by "Agency" or "Rural Development" as applicable.

Agricultural producer. An individual or entity directly engaged in the production of agricultural products, including crops (including farming); livestock (including ranching); forestry products; hydroponics; nursery stock; or aquaculture, whereby 50 percent or greater of their gross income is derived from the operations.

Association of agricultural producers. An organization that represents agricultural producers and whose mission includes working on behalf of such producers and the majority of whose membership and board of directors is comprised of agricultural producers.

Biofuel. A fuel derived from renewable biomass.

Biorefinery. A facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products and may produce electricity.

Borrower. Any party that borrows or seeks to borrow money from the lender, including any party or parties liable for the guaranteed loan except guarantors.

Business plan. A comprehensive document that clearly describes the borrower's ownership structure and management experience including, if applicable, discussion of a parent, affiliates, and subsidiaries; a discussion of how the borrower will operate the proposed project, including, at a minimum, a description of the business and project, the products and services to be provided, pro forma financial statements for a period of 2 years, including balance sheet, income and expense, and cash flows, and the availability of the resources necessary to provide those products and services.

By-product. Any and all biobased products generated under normal operations of the proposed project that can be reasonably measured and monitored. By-products may or may not have a readily identifiable commercial use or value.

Default. The condition that exists when a borrower is not in compliance with the promissory note, the loan agreement, or other related documents evidencing the loan.

Eligible project costs. Those expenses approved by the Agency for the project.

Eligible technology. Eligible technology is defined as either:

(i) A technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel; or

(ii) A technology not described in paragraph (i) of this definition that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

Existing business. A business that has been in operation for at least one full year. Mergers, changes in the business name, or legal type of entity of a currently operating business, or expansions of product lines are considered to be existing businesses as long as there is not a significant change in operations.

Farm cooperative. A business incorporated as a cooperative that is solely owned and controlled by agricultural producers.

Farmer Cooperative Organization. An organization whose membership is composed of farm cooperatives.

Feasibility study. An analysis by an independent qualified consultant of the economic, market, technical, financial, and management capabilities of a proposed project or business in terms of its expectation for success.

Future recovery. Funds collected by lender after final loss claim.

Immediate family. Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, domestic partner, parent, child, brother, sister, aunt, uncle, grandparent, grandchild, niece, or nephew.

Indian Tribe. This term has the meaning as defined in 25 U.S.C. 450b.

Institution of higher education. This term has the meaning as defined in 20 U.S.C. 1002(a).

Loan classification. The assigned score or metric reflecting the lender's analysis of the degree of potential loss in the event of default.

Local owner. An individual who owns any portion of an eligible advanced biofuel biorefinery and whose primary residence is located within 20 miles of the feedstock area supplying the advanced biofuel biorefinery.

Market value. The amount for which a property will sell for its highest and best use at a voluntary sale in an arm's length transaction.

Material adverse change. Any change in the purpose of the loan, the financial condition of the borrower, or the collateral, that might jeopardize loan performance.

Negligent loan origination. The failure of a lender to perform those services that a reasonably prudent lender will perform in originating its own portfolio of unguaranteed loans. The term includes the concepts of failure to act, not acting in a timely manner, or acting in a manner contrary to the manner in which a reasonably prudent lender will act.

Offtake agreement. The terms and conditions governing the sale and transportation of biofuels, biobased products, and electricity produced by the borrower to another party.

Project. The facility or portion of facility producing eligible advanced biofuels and any eligible biobased by-product receiving funding under this subpart.

Protective advances. Advances made by the lender for the purpose of preserving and protecting the collateral where the debtor has failed to, and will not or cannot, meet obligations to protect or preserve collateral.

Regulated or supervised lender. A lender that is subject to credit examination or supervision by an appropriate agency of the United States or a State that supervises or regulates credit institutions.

Renewable biomass.

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) that:

(i) Are by-products of preventive treatments that are removed to reduce hazardous fuels; to reduce or contain disease or insect infestation; or to restore ecosystem health;

(ii) Will not otherwise be used for higher-value products; and

(iii) Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of paragraphs (2), (3), and (4) of subsection (e) of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512) and large-tree retention of subsection (f) of that section; or

(2) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

(i) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

(ii) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and by-products (including fats, oils, greases, and manure); and food waste and yard waste.

Retrofitting. The modification of a building or equipment to incorporate functions not included in the original design that allow for the production of advanced biofuels.

Semi-work scale. A manufacturing plant operating on a limited commercial scale to provide final tests of a new product or process.

Startup business. A business that has been in operation for less than one full year. Startup businesses include newly formed entities leasing space or constructing facilities in a new market area, even if the owners of the startup business own affiliated businesses doing the same kind of business. Newly-formed entities that are buying existing businesses or facilities will be considered an existing business as long as the business or facility being bought remains in operation and there is no significant change in operations.

Surety. An entity that agrees to be primarily liable for the conduct, obligation, or performance of another.

Tangible net worth. Tangible assets minus liabilities.

Technical and economic potential. A technology not described in paragraph (i) of the definition of "eligible technology" is considered to have demonstrated "technical and economic potential" for commercial application in a biorefinery that produces an advanced biofuel if each of the following conditions is met:

(i) The advanced biofuel biorefinery's likely financial and production success is evidenced in a thorough evaluation including, but not limited to:

(A) Feedstocks;

(B) Process engineering;

(C) Siting;

(D) Technology;

(E) Energy production; and

(F) Financial and sensitivity review using a banking industry software analysis program with appropriate industry standards.

(ii) The evaluation in paragraph (i) of this definition is completed by an independent third-party expert in a feasibility study, technical report, or other analysis, each of which must be satisfactory to the Agency, that demonstrates the potential success of the project.

(iii) The advanced biofuel technology has at least a 12 month (four seasons) operating cycle at semi-work scale.

Tier 1 capital. This term has the meaning given it under 12 CFR Part 325 and as calculated under applicable Federal Deposit Insurance Corporation regulations.

Tier 2 capital. This term has the meaning given it under applicable Federal Deposit Insurance Corporation regulations.

Tier 1 leverage capital ratio. This term means the ratio of Tier 1 capital to total assets as defined and calculated in 7 CFR part 325 and its appendices.

Tier 1 risk-based capital ratio. This term has the meaning given it in 7 CFR part 325.

Total project costs. The sum of all costs associated with a completed project.

Total qualifying capital. This term has the meaning given to it under applicable Federal Deposit Insurance Corporation regulations.

Total risk-based capital ratio. This term has the meaning given to it in 7 CFR part 325.

Viable commercial-scale operation. An operation is considered to be a

viable commercial scale operation if it demonstrates that:

(i) Its revenue will be sufficient to recover the full cost of the project over the term of the loan and result in an anticipated annual rate of return sufficient to encourage investors or lenders to provide funding for the project;

(ii) It will be able to operate profitably without public and private sector subsidies upon completion of construction (volumetric excise tax is not included as a subsidy);

(iii) Contracts for feedstocks are adequate to address proposed off-take from the biorefinery;

(iv) The ability to achieve market entry, suitable infrastructure to transport the advanced biofuel to its market is available, and general market competitiveness of the advanced biofuel technology and related products;

(v) It can be easily replicated and that replications can be sited at multiple facilities across a wide geographic area based on the proposed deployment plan; and

(vi) The advanced biofuel technology has at least a 12 months (four seasons) operating history at semi-work scale, which demonstrates the ability to operate at a commercial scale.

Working capital. Current assets available to support a business' operations and growth. Working capital is calculated as current assets less current liabilities.

(b) *Exception authority.* The exception authority provisions of this paragraph apply to this subpart instead of those in § 4279.15. The Administrator may, on a case-by-case basis, make an exception to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the Administrator determines that application of the requirement or provision would adversely affect the USDA's interest.

(c) *Lender eligibility requirements.* The requirements specified in § 4279.29 do not apply to this subpart. Instead, a lender must meet the requirements specified in paragraphs (c)(1) through (4) of this section in order to be approved for participation in this program.

(1) The lender must be a regulated or supervised lender.

(2) The lender must maintain at all times the minimum acceptable levels of capital specified in paragraphs (c)(2)(i) through (iii) of this section. If the regulated or supervised lender is a commercial bank or thrift, these levels will be based on those reflected in Call Reports and Thrift Financial Reports.

(i) Total Risk-Based Capital ratio of 10 percent or higher;

(ii) Tier 1 Risk-Based Capital ratio of 6 percent or higher; and

(iii) Tier 1 Leverage Capital ratio of 5 percent or higher.

(3) The lender must not be otherwise debarred or suspended by the Federal government.

(4) The Agency will approve applications for loan guarantees only from lenders with adequate experience, as determined by the Agency, with similar projects and the expertise to make, secure, service, and collect loans approved under this subpart.

(d) *Independent credit risk analysis.* The Agency will require an independent credit risk analysis (*e.g.,* a credit rating or assessment) from a nationally-recognized rating agency for loans of $100,000 or more.

(e) *Environmental responsibilities.* The provisions of this paragraph shall be used instead of the provisions specified in § 4279.30(c) for determining a lender's environmental responsibilities under this subpart. Lenders have a responsibility to become familiar with Federal environmental requirements; to consider, in consultation with the prospective borrower, the potential environmental impacts of their proposals at the earliest planning stages; and to develop proposals that minimize the potential to adversely impact the environment.

(1) Lenders must alert the Agency to any controversial environmental issues related to a proposed project or items that may require extensive environmental review.

(2) Lenders must help the borrower prepare Form RD 1940–20, "Request for Environmental Information" (when required by subpart G of part 1940 of this title); assist in the collection of additional data when the Agency needs such data to complete its environmental review of the proposal; and assist in the resolution of environmental problems.

(3) Lenders must ensure that the borrower has:

(i) Provided the necessary environmental information to enable the Agency to undertake its environmental review process in accordance with subpart G of either 7 CFR part 1940 or successor regulations, including the provision of all required Federal, State, and local permits;

(ii) Complied with any mitigation measures required by the Agency; and

(iii) Not taken any actions or incurred any obligations with respect to the proposed project that will either limit the range of alternatives to be considered during the Agency's environmental review process or which will have an adverse effect on the environment.

(f) *Additional lender functions and responsibilities.* In addition to the requirements in § 4279.30, the requirements specified in paragraphs (f)(1) through (3) apply.

(1) Any action or inaction on the part of the Agency does not relieve the lender of its responsibilities to originate and service the loan guaranteed under this subpart.

(2) The lender must compile and maintain in its files a complete application for each guaranteed loan for at least 3 years after the final loss has been paid.

(3) The lender must report to the Agency all conflicts of interest and appearances of conflicts of interest.

(g) *Certified lender program.* Section 4279.43 does not apply to this subpart.

(h) *Oversight and monitoring.* In addition to complying with requirements specified in § 4279.44, the lender will cooperate fully with Agency oversight and monitoring of all lenders involved in any manner with any guarantee under the Biorefinery Assistance programs to ensure compliance with this subpart. Such oversight and monitoring will include, but is not limited to, reviewing lender records and meeting with lenders (in accordance with § 4287.107(c)).

(i) *Conditions of guarantee.* All loan guarantees under this subpart are subject to the provisions of § 4279.72 and as specified in paragraphs (i)(1) through (4) of this section.

(1) The guarantee under this section will be secured by a first lien on all collateral necessary to run the project in the event of the borrower's default.

(2) The holder of a guaranteed portion shall have all rights of payment, as defined in the loan note guarantee, to the extent of the portion purchased. The lender will remain bound by all obligations under the loan note guarantee, Lender's Agreement, and Agency program regulations.

(3) The lender must be shown as an additional insured on insurance policies (or other risk sharing instruments) that benefit the project and must be able to assume any contracts that are material to running the project including any feedstock or offtake agreements, as may be applicable.

(4) If a lender does not satisfactorily comply with the provision found in § 4279.256(c) and such failure leads to losses, then such losses may not be recoverable under the guarantee.

(j) *Sale or assignment of guaranteed loan.* In addition to complying with the provisions of § 4279.75, the guaranteed portion of the loan shall be fully

transferable to any accredited investor and the Agency may not guarantee a loan funded with the net proceeds of a bond described in section 142(a) of the Internal Revenue Code of 1986.

(k) *Minimum retention.* The provisions of § 4279.77 do not apply to this subpart. Instead, lenders may syndicate a portion of its risk position to other eligible lenders provided that at no time during the life of the guarantee may the original lender hold less than 50 percent of their original unguaranteed position in the loan.

(l) *Replacement of document.* Documents must be replaced in accordance with § 4279.84, except, in § 4279.84(b)(1)(v), a full statement of the circumstances of any defacement or mutilation of the Loan Note Guarantee or Assignment Guarantee Agreement would also need to be provided.

§§ 4279.203–4279.224 [Reserved]

§ 4279.225 Loan processing.

Processing Biorefinery Assistance Guaranteed loans under this subpart shall comply with the provisions found in §§ 4279.107 through 4279.199 of this chapter, except as provided in the following sections.

§ 4279.226 Fees.

Except as specified in paragraphs (a) and (b) of this section, the fee provisions specified in § 4279.107 apply to guaranteed loans under this subpart.

(a) *Guarantee fee.* The guarantee fee shall be as follows:

(1) Two percent for guarantees on loans greater than 75 percent of total project costs.

(2) One and one-half percent for guarantees on loans of greater than 65 percent but less than or equal to 75 percent of total project costs.

(3) One percent for guarantees on loans of 65 percent or less of total project costs.

(b) *Annual renewal fee.* The annual renewal fee, which may be passed on to the borrower, will be paid to the Agency for as long as the guaranteed loan is outstanding and is payable during the construction period. The annual renewal fee shall be as follows:

(1) One hundred basis points (1 percent) for guarantees on loans that were originally greater than 75 percent of total project costs.

(2) Seventy five basis points (0.75 percent) for guarantees on loans that were originally greater than 65 percent but less than or equal to 75 percent of total project costs.

(3) Fifty basis points (0.50 percent) for guarantees on loans that were originally for 65 percent or less of total project costs.

§ 4279.227 Borrower eligibility.

Borrower eligibility will be determined according to the provisions of this section in lieu of § 4279.108.

(a) *Eligible entities.* To be eligible, a borrower must meet the requirements specified in paragraphs (a)(1) through (3) of this section, as applicable.

(1) *Type of borrower.* The borrower must be one of the following:

(i) An individual;

(ii) An entity;

(iii) An Indian Tribe;

(iv) A unit of State or local government;

(v) A corporation;

(vi) A farm cooperative;

(vii) A farmer cooperative organization;

(viii) An association of agricultural producers;

(ix) A National Laboratory;

(x) An institution of higher education;

(xi) A rural electric cooperative;

(xii) A public power entity; or

(xiii) A consortium of any of the above entities.

(2) *Citizenship.* Citizenship requirements are as follows:

(i) Individual borrowers must be citizens of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or reside in the U.S. after legal admittance for permanent residence.

(ii) Entities other than individuals must be at least 51 percent owned or controlled by individuals who are either citizens as identified under paragraph (a)(2)(i) of this section or legally admitted permanent residents residing in the U.S. When an entity owns an interest in the borrower, its citizenship will be determined by the citizenship of the individuals who own an interest in the entity or any sub-entity based on their ownership interest. This paragraph is not applicable if the entity is owned solely by members of an immediate family. In such instance, if at least 51 percent of the immediate family members are citizens or nationals, as defined in paragraph (a)(2)(i) of this section, then the entity is eligible.

(iii) If the borrower is a subsidiary, the parent entity or the entities that have an ownership interest in that borrower must also be at least 51 percent owned by individuals who are either citizens or nationals of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S.

(iv) Corporate borrowers traded on major United States stock exchanges will be presumed to have more than 51 percent of their owners as United States citizens.

(3) *Legal authority and responsibility.* Each borrower must have, or obtain, the legal authority necessary to construct, operate, and maintain the proposed facility and services and to obtain, give security for, and repay the proposed loan.

(b) *Ineligible entities.* A borrower will be considered ineligible for a guarantee if the borrower, any owner with more than 20 percent ownership interest in the borrower, or any owner with more than 3 percent ownership interest in the borrower if there is no owner with more than 20 percent ownership interest in the borrower:

(1) Has an outstanding judgment obtained by the U.S. in a Federal Court (other than U.S. Tax Court),

(2) Is delinquent on the payment of Federal income taxes,

(3) Is delinquent on a Federal debt, or

(4) Is debarred or suspended from receiving Federal assistance.

§ 4279.228 Project eligibility.

In lieu of the requirements specified in § 4279.113, to be eligible for a guaranteed loan under this subpart, at a minimum, a borrower and project, as applicable, must meet each of the requirements specified in paragraphs (a) through (f) of this section.

(a) The project must be located in a rural area (as defined in paragraph (f) of this section).

(b) The project must be for either:

(1) The development and construction of commercial-scale biorefineries using eligible technology or

(2) The retrofitting of existing facilities, including, but not limited to, wood products facilities and sugar mills, with eligible technology.

(c) The project must use an eligible feedstock for the production of an advanced biofuel. Eligible feedstocks include, but are not limited to, renewable biomass, primarily organic biodegradable components (by weight) of municipal solid waste, and by-products of the pulping process. For the purposes of this subpart, recycled paper is not an eligible feedstock.

(d) More than 70 percent of the revenue generated by the biorefinery must be from the sale of advanced biofuel.

(e) The project must have cash equity injection of not less than 20 percent of eligible project costs.

(f) For the purposes of this subpart, the term "Rural or rural area" means any area of a State not in a city or town that has a population of more than 50,000 inhabitants, according to the latest decennial census of the United States,

and the contiguous and adjacent urbanized area. In determining which census blocks in an urbanized area are not in a rural area, the Agency shall exclude any cluster of census blocks that will otherwise be considered not in a rural area only because the cluster is adjacent to not more than 2 census blocks that are otherwise considered not in a rural area under this definition.

(1) For the purposes of this definition, cities and towns are incorporated population centers with definite boundaries, local self government, and legal powers set forth in a charter granted by the State.

(2) For the Commonwealth of Puerto Rico, the island is considered rural and eligible for Business Programs assistance, except for the San Juan Census Designated Place (CDP) and any other CDP with greater than 50,000 inhabitants. CDPs with greater than 50,000 inhabitants, other than the San Juan CDP, may be determined to be eligible if they are "not urban in character." Any such requests must be forwarded to the National Office, Business and Industry Division, with supporting documentation as to why the area is "not urban in character" for review, analysis, and decision by the Under Secretary of Rural Development.

(3) For the State of Hawaii, all areas within the State are considered rural and eligible for Business Programs assistance, except for the Honolulu CDP within the County of Honolulu.

(4) For the purpose of defining a Rural Area in the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, the Agency shall determine what constitutes Rural and Rural Area based on available population data.

§ 4279.229 Guaranteed loan funding.

Instead of the provisions found in § 4279.119, the provisions of this section apply to loans guaranteed under this subpart.

(a) In administering this program's budgetary authority each fiscal year, the Agency will allocate up to, but no more, than 50 percent of its budgetary authority to fund applications received by the end of the first application window. Any funds not obligated to support applications submitted during the first application window will be available to support applications received during the second window. The Agency, therefore, will have a minimum of 50 percent of each fiscal year's budgetary authority for this program available to support applications received during the second application window.

(b) The amount of a loan guaranteed for a project under this subpart will not exceed 80 percent of total eligible project costs. Total Federal participation will not exceed 80 percent of total eligible project costs. Eligible project costs are specified in paragraph (d) of this section.

(c) The maximum principal amount of a loan guaranteed under this subpart is $250 million to one borrower; there is no minimum amount. If an eligible borrower receives other direct Federal funding (*i.e.,* direct loans and grants) for a project, the amount of the loan that the Agency will guarantee under this subpart must be reduced by the same amount of the other direct Federal funding that the eligible borrower received for the project. For example, an eligible borrower is applying for a loan guarantee on a $1 million project. The borrower provides the minimum matching requirement of 20 percent, or $200,000. This leaves $800,000 in other funding needed to implement the project. If the borrower receives no other direct Federal funding for this project and requests a guarantee for the $800,000, the Agency will consider a guarantee on the $800,000. However, if this borrower receives $100,000 in other direct Federal funding for this project, the Agency will only consider a guarantee on $700,000.

(d) The maximum guarantee on the principal and interest due on a loan guaranteed under this subpart will be determined as specified in paragraphs (d)(1) through (3) of this section.

(1) If the loan amount is equal to or less than $80 million, 80 percent.

(2) If the loan amount is more than $80 million and less than $125 million, 80 percent on the first $80 million and 70 percent on the loan amount that is greater than $80 million.

(3) If the loan amount is equal to or more than $125 million, 60 percent on the entire loan amount.

(e) Eligible project costs are only those costs associated with the items listed in paragraphs (e)(1) through (7) of this section, as long as the items are an integral and necessary part of the total project, as determined by the Agency.

(1) Purchase and installation of equipment (new, refurbished, or remanufactured), except agricultural tillage equipment, used equipment, and vehicles.

(2) Construction or retrofitting.

(3) Permit and license fees.

(4) Working capital.

(5) Land acquisition.

(6) Cost of financing, excluding guarantee and renewal fees.

(7) Any other item identified by the Agency in a notice published in the **Federal Register**.

§ 4279.230 Subordination of lien position.

In addition to complying with the provisions found in § 4279.123, a subordination must not extend the term of the guaranteed loan.

§ 4279.231 Interest rates.

Instead of the provisions found in § 4279.125, the interest rate provisions of this section apply to loans guaranteed under this subpart.

(a) *General.* The interest rate for the guaranteed loan will be negotiated between the lender and the applicant. The interest rate charged must be in line with interest rates on other similar government guaranteed loan programs, and is subject to Agency review and approval.

(1) The interest rate may be either fixed or variable, as long as it is a legal rate, and shall be fully amortizing.

(2) The interest rate for both the guaranteed and unguaranteed portions of the loan must be of the same type (*i.e.,* both fixed or both variable).

(3) The guaranteed and unguaranteed portions of the loan can bear interest at different rates, provided that the blended rate on the entire guaranteed loan shall not exceed the rate on the guaranteed portion of the loan by more than one (1) percent.

(4) Both portions of the loan must amortize at the same rate.

(b) *Variable rates.* A variable interest rate agreed to by the lender and borrower must be based on published indices, such as the Prime Rate, applicable Treasury rate, or the London Inter Bank Offering Rate (LIBOR), and agreed to by the lender and the Agency. Variable rates should have either an internal or external interest rate cap.

(1) The variable interest rate may be adjusted at different intervals during the term of the loan, but the adjustments may not be more often than quarterly and no less than yearly to prevent negative amortization, and must be specified in the loan agreement.

(2) Variable rate loans will not provide for negative amortization nor will they give the borrower the ability to choose its payment among various options.

(3) The lender must incorporate, within the variable rate Promissory Note at loan closing, the provision for adjustment of payment installments coincident with an interest-rate adjustment.

(4) The lender will ensure that the outstanding principal balance is properly amortized within the

prescribed loan maturity to eliminate the possibility of a balloon payment at the end of the loan.

(c) *Interest changes.* Any change in the interest rate between the date of issuance of the Conditional Commitment and before the issuance of the Loan Note Guarantee must be approved, in writing, by the Agency approval official. Approval of such a change will be shown as an amendment to the Conditional Commitment. Such changes are subject to the restrictions set forth in the following paragraphs.

(1) *Reductions.* The borrower, lender, and holder (if any) may collectively initiate a permanent or temporary reduction in the interest rate of the guaranteed loan at any time during the life of the loan upon written agreement among these parties. The Agency must be notified by the lender, in writing, within 15 days of the change. If any of the guaranteed portion has been purchased by the Agency, then the Agency will affirm or reject interest rate change proposals in writing. The Agency will concur in such interest-rate changes only when it is demonstrated to the Agency that the change is a more viable alternative than initiating or proceeding with liquidation of the loan or continuing with the loan in its present state.

(i) Fixed rates can be changed to variable rates to reduce the borrower's interest rate only when the variable rate has a ceiling for the life of the guaranteed loan that is less than or equal to the original fixed rate.

(ii) The interest rates, after adjustments, must comply with the requirements for interest rates on new loans as established under this Notice.

(iii) The lender is responsible for the legal documentation of interest-rate changes by an endorsement or any other legally effective amendment to the promissory note; however, no new notes may be issued. Copies of all legal documents must be provided to the Agency.

(2) *Increases.* Increases in interest rates are not permitted beyond what is provided in the loan documents. Increases from a variable interest rate to a higher interest rate that is a fixed rate are allowed, subject to concurrence by the Agency.

§ 4279.232 Terms of loan.

Instead of the provisions found in § 4279.126, the provisions of this section apply to loans guaranteed under this subpart, except as provided in § 4279.232(d).

(a) The repayment term for a loan under this subpart will be for a maximum period of 20 years or 85 percent of the useful life of the project, as determined by the lender and confirmed by the Agency, whichever is less. The length of the loan term shall be the same for both the guaranteed and unguaranteed portions of the loan.

(b) Guarantees must be provided only after consideration is given to the borrower's overall credit quality and to the terms and conditions of any applicable subsidies, tax credits, and other such incentives.

(c) All loans guaranteed under this subpart must be financially sound and feasible, with reasonable assurance of repayment.

(d) Repayment of the loan shall be in accordance with § 4279.125(a) and § 4279.126(b), (c), and (d).

§ 4279.233 Credit evaluation.

Instead of the provisions found in § 4279.131, the provisions of this section apply to loans guaranteed under this subpart. For all applications for guarantee, the lender must prepare a credit evaluation. An acceptable credit evaluation must:

(a) Use credit documentation procedures and an underwriting process that are consistent with generally accepted commercial lending practices, and

(b) Include an analysis of the credit factors associated with each guarantee application to ensure loan repayment, including consideration of each of the following five elements.

(1) *Credit worthiness.* Those financial qualities that generally impel the borrower to meet its obligations as demonstrated by its credit history.

(2) *Cash flow.* A borrower's ability to produce sufficient cash to repay the loan as agreed.

(3) *Capital.* The financial resources that the borrower currently has and those it is likely to have when payments are due. The borrower must be adequately capitalized.

(4) *Collateral.* The assets, including processing technology owned by the borrower, less those acquired with other Federal funds pledged by the borrower in support of the loan. Collateral must have documented value sufficient to protect the interest of the lender and the Agency and the discounted collateral value must be at least equal to the loan amount. Lenders will discount collateral consistent with sound loan-to-value policy.

(5) *Conditions.* The general business environment and status of the borrower's industry.

(c) When determining the credit quality of the borrower, the lender must include the following in its analysis:

(1) Borrowers shall demonstrate evidence of cash equity injection in the project of not less than 20 percent of eligible project costs. The fair market value of equity in real property that is to be pledged as collateral for the loan may be substituted in whole or in part to meet the cash equity requirement. However, the appraisal completed to establish the fair market value of the real property must not be more than 1 year old unless a more recent appraisal is requested by the Agency in order to reflect market conditions. The appraisal used to establish fair market value of the real property must conform to the requirements of § 4279.244. Otherwise, cash equity injection must be in the form of cash.

(2) The credit analysis must also include spreadsheets of the balance sheets and income statements of the borrower for the 3 previous years (for existing businesses), pro forma balance sheets at startup, and projected yearend balance sheets and income statements for a period of not less than 3 years of stabilized operation, with appropriate ratios and comparisons with industrial standards (such as Dun & Bradstreet or Robert Morris Associates) to the extent industrial standards are available.

(3) All data must be shown in total dollars and also in common size form, obtained by expressing all balance sheet items as a percentage of assets and all income and expense items as a percentage of sales.

§§ 4279.234–4279.236 [Reserved]

§ 4279.237 Financial statements.

The provisions of § 4279.137 do not apply to this subpart. Instead, the submittal of financial statements with the loan guarantee application must meet the requirements specified in § 4279.261(c).

§§ 4279.238–4279.243 [Reserved]

§ 4279.244 Appraisals.

All appraisals must be in accordance with § 4279.144 and each appraisal must be a complete self-contained appraisal. Lenders must complete at least a Transaction Screen Questionnaire for any undeveloped sites and a Phase I Environmental Site Assessment in accordance with ASTM International Standards on existing business sites, which should be provided to the appraiser for completion of the self-contained appraisal. Specialized appraisers will be required to complete appraisals under this section. The Agency may approve a waiver of this requirement only if a specialized appraiser does not exist in a specific industry or hiring one will cause an undue financial burden to the borrower.

§§ 4279.245–4279.249 [Reserved]

§ 4279.250 Feasibility studies.

The provisions of § 4279.150 do not apply to this subpart. Instead, feasibility studies must meet the requirements specified in § 4279.261(f).

§§ 4279.251–4279.254 [Reserved]

§ 4279.255 Loan priorities.

The provisions of § 4279.155 do not apply to this subpart.

§ 4279.256 Construction planning and performing development.

The lender must comply with § 4279.156(a) through (c), except as otherwise provided in paragraphs (a) through (f) of this section.

(a) *Architectural and engineering practices.* Under paragraph § 4279.156(a), the lender must also ensure that all project facilities are designed utilizing accepted architectural and engineering practices that conform to the requirements of this subpart.

(b) *Onsite inspector.* The lender must provide an onsite project inspector.

(c) *Changes and cost overruns.* The borrower shall be responsible for any changes or cost overruns. If any such change or cost overrun occurs, then any change order must be expressly approved by the Agency which approval shall not be unreasonably withheld, and neither the lender nor borrower will divert funds from purposes identified in the guaranteed loan application approved by the Agency to pay for any such change or cost overrun without the express written approval of the Agency. In no event will the current loan be modified or a subsequent guaranteed loan be approved to cover any such changes or costs. In the event of any of the aforementioned increases in cost or expenses, the borrower must provide for such increases in a manner that does not diminish the borrower's operating capital. Failure to comply with the terms of this paragraph will be considered a material adverse change in the borrower's financial condition, and the lender must address this matter, in writing, to the Agency's satisfaction.

(d) *New draw certifications.* The following three certifications are required for each new draw:

(1) Certification by the project engineer to the lender that the work referred to in the draw has been successfully completed;

(2) Certification from the lender that all debts have been paid and all mechanics' liens have been waived; and

(3) Certification from the lender that the borrower is complying with the Davis-Bacon Act.

(e) *Surety.* Surety will be required in cases when the guarantee will be issued prior to completion of construction unless the contractor will receive a lump sum payment at the end of work. Surety will be made a part of the contract, if the borrower requests it or if the contractor requests partial payments for construction work. In such cases where no surety is provided and the project involves pre-commercial technology, first of its type in the U.S., or new designs without sufficient operating hours to prove their merit, a latent defects bond may be required by the Agency to cover the work.

(f) *Reporting during construction.* During the construction of the project, lenders shall submit quarterly construction progress reports to the Agency. These reports must contain, at a minimum, planned and completed construction milestones, loan advances, and personnel hiring, training, and retention. This requirement applies to both the development and construction of commercial-scale biorefineries and to the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. The lender must expeditiously report any problems in project development to the Agency.

§§ 4279.257–4279.258 [Reserved]

§ 4279.259 Borrower responsibilities.

(a) *Federal, State, and local regulations.* Borrowers must comply with all Federal, State, and local laws and rules that are in existence and that affect the project including, but not limited to:

(1) Land use zoning;

(2) Health, safety, and sanitation standards as well as design and installation standards; and

(3) Protection of the environment and consumer affairs.

(b) *Permits, agreements, and licenses.* Borrowers must obtain all permits, agreements, and licenses that are applicable to the project.

(c) *Insurance.* The borrower is responsible for maintaining all hazard, flood, liability, worker compensation, and personal life insurance, when required, on the project.

(d) *Access to borrower's records.* Except as provided by law, upon request by the Agency, the borrower will permit representatives of the Agency (or other agencies of the U.S. Department of Agriculture or Federal Departments as authorized by the U.S. Department of Agriculture) to inspect and make copies of any of the records of the borrower pertaining to any Agency guaranteed loan. Such inspection and copying may be made during regular office hours of the borrower or at any other time agreed upon between the borrower and the Agency.

(e) *Access to the project.* The borrower must allow the Agency access to the project and its performance information until the loan is repaid in full and permit periodic inspection of the project by a representative of the Agency.

§ 4279.260 Guarantee applications-General.

The provisions of § 4279.161 do not apply to this subpart. Instead, the application provisions of this section and § 4279.261 apply to the preparation of Biorefinery Assistance Guaranteed loan applications.

(a) *Application submittal.* For each guarantee request, the lender must submit to the Agency an application that is in conformance with § 4279.261. One original completed application and two hard copies of the complete application, including all attachments, are to be submitted to the Agency.

(b) *Application deadline.* Unless otherwise specified by the Agency in a notice published in the **Federal Register**, complete applications must be received by the Agency on or before by June 1 of each year to be considered for funding for that fiscal year. If the application deadline falls on a weekend or a Federally-observed holiday, the deadline will be the next Federal business day.

(c) *Incomplete applications.* Incomplete applications will be rejected. Lenders will be informed of the elements that made the application incomplete. If a resubmitted application is received by the applicable application deadline, the Agency will reconsider the application.

(d) *Application withdrawal.* During the period between the submission of an application and the execution of documents, the lender must notify the Agency, in writing, if the project is no longer viable or the borrower is no longer requesting financial assistance for the project. When the lender so notifies the Agency, the selection will be rescinded or the application withdrawn.

§ 4279.261 Application for loan guarantee content.

Approved lenders must submit an Agency-approved application form for each loan guarantee sought under this subpart. Loan guarantee applications from approved lenders must contain the information specified in paragraphs (a) through (n) of this section, organized pursuant to a Table of contents in a

chapter format, and in paragraph (o) of this section as applicable.

(a) *Project Summary.* Provide a concise summary of the proposed project and application information, project purpose and need, and project goals, including the following:

(1) *Title.* Provide a descriptive title of the project.

(2) *Borrower eligibility.* Describe how the borrower meets the eligibility criteria identified in § 4279.227.

(3) *Project eligibility.* Describe how the project meets the eligibility criteria identified in paragraph (c) of this section. Clearly state whether the application is for the construction and development of a biorefinery or for the retrofitting of an existing facility. Provide results from demonstration or pilot facilities that prove the technology proposed to be used meets the definition of eligible technology. Additional project description information will be needed later in the application process.

(4) *Matching funds.* Submit a spreadsheet identifying sources, amounts, and availability of matching funds. The spreadsheet must also include a directory of matching funds source contact information. Attach any applications, correspondence, or other written communication between borrower and matching fund source.

(b) *Lender's analysis and credit evaluation* (conforming to § 4279.232(b)). This analysis shall include:

(1) A summary of the technology to be used in the project;

(2) The viability of such technology for the particular project application;

(3) The development type (*e.g.,* installation, construction, retrofit);

(4) The credit reports of the borrower, its principals, and any parent, affiliate, or subsidiary as follows:

(i) A personal credit report from an acceptable credit reporting company for individuals owning 20 percent or more interest in the borrower or any owner with more than 10 percent ownership interest in the borrower if there is no owner with more than 20 percent ownership interest in the borrower, including a proprietor (owner), each partner, officer, director, key employee, and stockholder, except for when the borrower is a corporation listed on a major stock exchange. Credit reports are not required for elected and appointed officials when the borrower is a public body or non-profit corporation; and

(ii) Commercial credit reports on the borrower and any parent, affiliate, and subsidiary firms;

(5) The credit analysis specified in § 4279.232(b); and

(6) For loans of $125 million or more, an evaluation and credit rating of the total project's indebtedness, without consideration for a government guarantee, from a nationally-recognized rating agency.

(c) *Financial statements.* Financial statements as follows:

(1) For businesses that have been in existence for one or more years,

(i) The most recent audited financial statements of the borrower if the guaranteed loan is $3 million or more, unless alternative financial statements are authorized by the Agency; or

(ii) The most recent audited or Agency-acceptable financial statements of the borrower if the guaranteed loan is less than $3 million.

(2) For businesses that have been in existence for less than one year, the most recent Agency-authorized financial statements of the borrower regardless of the amount of the guaranteed loan request.

(3) For all businesses, a current (not more than 90 days old) balance sheet; a *pro forma* balance sheet at startup; and projected balance sheets, income and expense statements, and cash flow statements for a period of not less than 3 years of stabilized operation. Projections should be supported by a list of assumptions showing the basis for the projections.

(4) Depending on the complexity of the project and the financial condition of the borrower, the Agency may request additional financial statements and additional related information.

(d) *Environmental information.* Environmental information required by the Agency to conduct its environmental reviews (as specified in RD 1940–G, Exhibit H).

(e) *Appraisals.* An appraisal conducted as specified under § 4279.244.

(f) *Feasibility study.* Elements in an acceptable feasibility study include, but are not limited to, the elements outlined in Table 1. In addition, as part of the feasibility study, both a technical assessment and economic analysis of the project are required, as specified in paragraphs (h) and (i) of this section.

TABLE 1—FEASIBILITY STUDY COMPONENTS

(A) Executive Summary
Introduction/Project Overview (Brief general overview of project location, size, *etc.*)
Economic feasibility determination.
Market feasibility determination.
Technical feasibility determination.
Financial feasibility determination.
Management feasibility determination.
Recommendations for implementation.
(B) Economic Feasibility
Information regarding project site;
Availability of trained or trainable labor;
Availability of infrastructure, including utilities, and rail, air and road service to the site.
Feedstock:
Feedstock source management
Estimates of feedstock volumes and costs
Collection, Pre-Treatment, Transportation, and Storage
Document that any and all woody biomass feedstock cannot be used as a higher value wood-based product.
Impacts on existing manufacturing plants or other facilities that use similar feedstock if the borrower's proposed biofuel production technology is adopted.
Project impact on resource conservation, public health, and the environment.
Overall economic impact of the project including any additional markets created for agricultural and forestry products and agricultural waste material and potential for rural economic development.

TABLE 1—FEASIBILITY STUDY COMPONENTS—Continued

Feasibility/plans of project to work with producer associations or cooperatives including estimated amount of annual feedstock and biofuel and biobased by-product dollars from producer associations and cooperatives.
(C) Market Feasibility
Information on the sales organization and management; Nature and extent of market and market area; Marketing plans for sale of projected output—principle products and by-products; Extent of competition including other similar facilities in the market area; Commitments from customers or brokers—principle products and by-products; Risks Related to the Advanced Biofuel Industry, including industry status.
(D) Technical Feasibility
Suitability of the selected site for the intended use. Scale of development for which the process technology has been proven (*i.e.,* lab or bench, pilot, demonstration, or semi-work scale). Specific volume of the process (expressed either as volume of feedstock processed—tons per unit of time, or as product—gallons per unit of time). Any constraints or limitations in the financial projections and any other facility or design-related factors that might affect the success of the enterprise. Identification and estimation of project operation and development costs. Specify the level of accuracy of these estimates and the assumptions on which these estimates have been based. Ability of the proposed system to be commercially replicated. Identify how the project assists in meeting or reaching the goals identified in the Renewable Fuel Standard established in the Energy Independence and Security Act of 2007 and subsequent laws. Risks Related to: Construction of the Advanced Biofuel Plant; Advanced Biofuel Production; and Regulation and Governmental Action.
(E) Financial Feasibility
Reliability of the financial projections and assumptions on which the financial statements are based including all sources of project capital both private or public, such as Federal funds. Three years (minimum) projected Balance Sheets, Income and Expense Statements, and Cash Flow statements. Ability of the business to achieve the projected income and cash flow. Assessment of the cost accounting system. Availability of short-term credit or other means to meet seasonal business costs. Adequacy of raw materials and supplies. Sensitivity Analysis—including feedstock and energy costs, product and by-product prices. Risks Related to: The Project; Borrower Financing Plan; The operational units; and Tax Issues.
(F) Management Feasibility
Identify borrower and/or management's previous experience concerning: Biofuel production; Acquisition of feedstock; Marketing and sale of offtake; and The receipt of Federal financial assistance, including amount of funding, date received, purpose, and outcome. Management plan for procurement of feedstock and labor, marketing of the offtake, and management succession. Risks Related to: Borrower as a Company (*i.e.,* Development-Stage); and Conflicts of Interest.
(G) Qualifications
A resume or statement of qualifications of the author of the feasibility study, including prior experience, should be submitted.

(g) *Business plan.* The lender must submit a business plan that includes the information specified in paragraphs (g)(1) through (10) of this section. Any or all of this information may be omitted if it is included in the feasibility study specified in paragraph (f) of this section.

(1) The borrower's experience;

(2) The borrower's succession planning addressing both ownership and management;

(3) The names and a description of the relationship of the borrower's parent, affiliates, and subsidiaries;

(4) The borrower's business strategy;

(5) Possible vendors and models of major system components;

(6) The availability of the resources (*e.g.,* labor, raw materials, supplies) necessary to provide those products and services;

(7) Site location and its relation to product distribution (*e.g.,* rail lines or highways) and any land use or other permits necessary to operate the facility;

(8) The market for the product and its competition, including any and all competitive threats and advantages;

(9) Projected balance sheets, income and expense statements, and cash flow statements for a period of not less than 3 years of stabilized operation; and

(10) A description of the proposed use of funds.

(h) *Technical Assessment.* As part of the feasibility study required under paragraph (f) of this section, a detailed technical assessment is required for each project. The technical assessment must demonstrate that the design, procurement, installation, startup, operation and maintenance of the project will permit it to operate or perform as specified over its useful life in a reliable and a cost effective manner, and must identify what the useful life of the project is. The technical assessment must also identify all necessary project agreements, demonstrate that those agreements will be in place at or before the time of loan closing, and demonstrate that necessary project equipment and services will be available over the useful life of the project. The technical assessment must be based upon verifiable data and contain sufficient information and analysis so that a determination can be made on the technical feasibility of achieving the levels of income or production that are projected in the financial statements. All technical information provided must follow the format specified in paragraphs (h)(1) through (9) of this section. Supporting information may be submitted in other formats. Design drawings and process flow charts are required as exhibits. A discussion of each topic identified in paragraphs (h)(1) through (9) of this section is not necessary if the topic is not applicable to the specific project. Questions identified in the Agency's technical review of the project must be answered to the Agency's satisfaction before the application will be approved. All projects require the services of an independent, third-party professional engineer.

(1) *Qualifications of project team.* The project team will vary according to the complexity and scale of the project. The project team must have demonstrated expertise in similar advanced biofuel technology development, engineering, installation, and maintenance. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services for the development, construction, and retrofitting, as applicable, of technology for producing advanced biofuels must be provided. In addition, authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the biorefinery to operate over its useful life must be provided. The application must:

(i) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the borrower's risk, and a design build method, often referred to as turnkey, where the borrower establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(ii) Discuss the advanced biofuels technology equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(iii) Discuss the project team members' qualifications for engineering, designing, and installing advanced biofuels refineries including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available; and

(iv) Describe the advanced biofuels refinery operator's qualifications and experience for servicing, operating, and maintaining such equipment or projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating, with references if available.

(2) *Agreements and permits.* All necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (h)(2)(i) through (vi) of this section, must be identified in the application.

(i) Advanced biofuels refineries must be installed in accordance with applicable local, State, and national codes and regulations. Identify zoning and code issues, and required permits and the schedule for meeting those requirements and securing those permits.

(ii) Identify licenses where required and the schedule for obtaining those licenses.

(iii) Identify land use agreements required for the project and the schedule for securing the agreements and the term of those agreements.

(iv) Identify any permits or agreements required for solid, liquid, and gaseous emissions or effluents and the schedule for securing those permits and agreements.

(v) Identify available component warranties for the specific project location and size.

(vi) Identify all environmental issues, including environmental compliance issues, associated with the project.

(3) *Resource assessment.* Adequate and appropriate evidence of the availability of the feedstocks required for the advanced biofuels refinery to operate as designed must be provided in the application. Indicate the type and quantity of the feedstock, including storage, where applicable, and competing uses for the feedstock. Indicate shipping or receiving methods and required infrastructure for shipping, and other appropriate transportation mechanisms. For proposed projects with an established resource, provide a summary of the resource.

(4) *Design and engineering.* Authoritative evidence that the advanced biofuels refinery will be designed and engineered so as to meet its intended purposes, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards must be provided in the application. Projects shall be engineered by a qualified entity. Each biorefinery must be engineered as a complete, integrated facility. The engineering must be comprehensive, including site selection, systems and component selection, and systems monitoring equipment. Biorefineries must be constructed by a qualified entity.

(i) The application must include a concise but complete description of the project including location of the project; resource characteristics, including the kind and amount of feedstocks; biorefinery specifications; kind, amount, and quality of the output; and monitoring equipment. Address performance on a monthly and annual basis. Describe the uses of or the market for the advanced biofuels produced by the biorefinery. Discuss the impact of reduced or interrupted feedstock availability on the biorefinery's operations.

(ii) The application must include a description of the project site and address issues such as site access, foundations, backup equipment when applicable, and the environmental information documents Form RD 1940–20 and required narrative in the 7 CFR part 1940, subpart G, Exhibit H format. Identify any unique construction and installation issues.

(iii) Sites must be controlled by the eligible borrower for at least the

financing term of any associated Federal loans or loan guarantees.

(5) *Project development schedule.* Each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown must be provided in the application. Provide a detailed description of the project timeline including resource assessment, project and site design, permits and agreements, equipment procurement, and project construction from excavation through startup and shakedown.

(6) *Equipment procurement.* A demonstration that equipment required by the biorefinery is available and can be procured and delivered within the proposed project development schedule must be provided in the application. Biorefineries may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory.

(7) *Equipment installation.* A full description of the management of and plan for site development and systems installation, details regarding the scheduling of major installation equipment needed for project construction, and a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the biorefinery as a whole must be provided in the application.

(8) *Operations and maintenance.* The operations and maintenance requirements of the biorefinery necessary for the biorefinery to operate as designed over the useful life must be provided in the application. The application must also include:

(i) Information regarding available biorefinery and component warranties and availability of spare parts;

(ii) A description of the routine operations and maintenance requirements of the proposed biorefinery, including maintenance schedules for the mechanical, piping, and electrical systems and system monitoring and control requirements, as well as provision of information that supports expected useful life of the biorefinery and timing of major component replacement or rebuilds;

(iii) A discussion of the costs and labor associated with operating and maintaining the biorefinery and plans for in-sourcing or outsourcing. A description of the opportunities for technology transfer for long term project operations and maintenance by a local entity or owner/operator; and

(iv) Provision and discussion of the risk management plan for handling large, unanticipated failures of major components.

(9) *Decommissioning.* A description of the decommissioning process, when the project must be uninstalled or removed. A description of any issues, requirements, and costs for removal and disposal of the biorefinery.

(i) *Economic Analysis.* The feasibility study required under paragraph (f) of this section must contain a detailed economic analysis of the project. The economic analysis must describe the costs and revenues of the proposed project to demonstrate the financial performance of the project by:

(1) Providing a detailed analysis and description of project costs including project management, resource assessment, project design, project permitting, land agreements, equipment, site preparation, systems installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs;

(2) Providing a detailed analysis and description of annual project revenues and expenses over the useful life of the project;

(3) Providing a detailed description of applicable investment incentives, productivity incentives, loans, and grants; and

(4) Identifying any other project authorities and subsidies that affect the project.

(j) *Loan Agreement.* A proposed loan agreement or a sample loan agreement with an attached list of the proposed loan agreement provisions as specified in § 4279.161(b)(11).

(k) *Lender certifications.* The lender must provide certification in accordance with § 4279.161(b)(16). In addition, the lender must certify that the project is able to demonstrate technical merit.

(l) *Intergovernmental consultation.* Intergovernmental consultation comments in accordance with RD Instruction 1940–J and 7 CFR, part 3015, subpart V.

(m) *DUNS Number.* For borrowers other than individuals, a Dun and Bradstreet Universal Numbering System (DUNS) number.

(n) *Bioenergy experience.* Identify borrower's, including its principals', prior experience in bioenergy projects and the receipt of Federal financial assistance, including the amount of funding, date received, purpose, and outcome, for such projects.

(o) *Other information.* Any other information determined by the Agency to be necessary to evaluate the application.

§§ 4279.262–4279.264 [Reserved]

§ 4279.265 Guarantee application evaluation.

Instead of evaluating applications using the provisions of § 4279.165, the Agency will evaluate and award applications according to the provisions specified in paragraphs (a) through (h) of this section.

(a) *Application processing.* Upon receipt of a complete application, the Agency will conduct a review to determine if the borrower, lender, and project are eligible; if the project has technical merit as determined under paragraph (b) of this section; and if the minimum financial metric criteria under paragraph (c) of this section are met.

(1) If the borrower, lender, or the project is determined to be ineligible for any reason, the Agency will inform the lender, in writing, of the reasons. No further evaluation of the application will occur.

(2) If the Agency determines it is unable to guarantee the loan, the lender will be informed in writing. Such notification will include the reasons for denial of the guarantee.

(b) *Technical merit determination.* The Agency's determination of a project's technical merit will be based on the information in the application. Projects determined by the Agency to be without technical merit will not be selected for funding.

(c) *Financial metric criteria.* The borrower must meet the financial metric criteria specified in paragraphs (c)(1) through (3) of this section. These financial metric criteria shall be calculated from the realistic information in the pro forma statements or borrower financial statements, submitted in accordance with § 4279.261(c), of a typical operating year after the project is completed and stabilized.

(1) A debt coverage ratio of 1.0 or higher.

(2) A debt-to-tangible net worth ratio of 4:1 or lower for startup businesses and of 9:1 or lower for existing businesses.

(3) A discounted loan-to-value ratio of no more than 1.0.

(d) *Scoring applications.* The Agency will score each complete and eligible application it receives on or before June 1 in the fiscal year in which it was received. The Agency will score each eligible application that meets the minimum requirements for financial and technical feasibility using the

evaluation criteria identified below. A maximum of 100 points is possible.

(1) Whether the borrower has established a market for the advanced biofuel and the by-products produced. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the business has less than or equal to a 60 percent commitment for feedstocks, marketing agreements for the advanced biofuel, and the biobased by-products produced, 0 points will be awarded.

(ii) If the business has a greater than 60 percent commitment for feedstocks, marketing agreements for the advanced biofuel, and the biobased by-products produced, 5 points will be awarded.

(2) Whether the area in which the borrower proposes to place the biorefinery, defined as the area that will supply the feedstock to the proposed biorefinery, has other similar advanced biofuel facilities. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the area that will supply the feedstock to the proposed biorefinery does not have any other advanced biofuel biorefineries, 5 points will be awarded.

(ii) If there are other advanced biofuel biorefineries located within the area that will supply the feedstock to the proposed biorefinery, 0 points will be awarded.

(3) Whether the borrower is proposing to use a feedstock not previously used in the production of advanced biofuels. A maximum of 15 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower proposes to use a feedstock previously used in the production of advanced biofuels in a commercial facility, 0 points will be awarded.

(ii) If the borrower proposes to use a feedstock not previously used in production of advanced biofuels in a commercial facility, 15 points will be awarded.

(4) Whether the borrower is proposing to work with producer associations or cooperatives. A maximum of 5 points can be awarded. Five (5) points will be awarded if all of the conditions specified in paragraphs (d)(4)(i) through (iii) of this section are met. If any one of these conditions is not met, 0 points will be awarded. For example, consider a proposed biorefinery that will purchase $1,000,000 of feedstock and produce $5,000,000 worth of biofuel and $2,000,000 worth of biobased by-products. In order to receive the 5 points under this criterion, at least $500,000 worth of feedstock purchases must be from producer associations or cooperatives, at least $2,500,000 worth of biofuel must be sold to producer associations or cooperatives, and at least $1,000,000 worth of biobased by-products must be sold to producer associations or cooperatives.

(i) At least 60 percent of the dollar value of feedstock to be used by the proposed biorefinery will be supplied by producer associations and cooperatives;

(ii) At least 60 percent of the dollar value of the advanced biofuel to be produced by the proposed biorefinery will be sold to producer associations and cooperatives; and

(iii) At least 60 percent of the dollar value of the advanced biobased by-products to be produced by the proposed biorefinery will be sold to producer associations and cooperatives.

(5) The level of financial participation by the borrower, including support from non-Federal and other private sources. Other Direct Federal funding (*i.e.,* direct loans and grants) will not be considered as part of the borrower's cash equity participation. A maximum of 20 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower's cash equity injection plus other resources results in a debt-to-tangible net worth ratio equal to or less than 3 to 1, but greater than 2.5 to 1, 10 points will be awarded.

(ii) If the borrower's cash equity injection plus other resources results in a debt-to-tangible net worth ratio equal to or less than 2.5 to 1, 20 points will be awarded.

(iii) If a project uses other Federal direct funding, 10 points will be deducted.

(6) Whether the borrower has established that the adoption of the process proposed in the application will have a positive effect on three impact areas: resource conservation, public health, and the environment. A maximum of 5 points can be awarded. Based on what the borrower has provided in either the application or the feasibility study, points to be awarded will be determined as follows:

(i) If process adoption will have a positive impact on any one of the three impact areas (resource conservation, public health, or the environment), 1 point will be awarded.

(ii) If process adoption will have a positive impact on two of the three impact areas, 3 points will be awarded.

(iii) If process adoption will have a positive impact on all three impact areas, 5 points will be awarded.

(7) Whether the borrower can establish that, if adopted, the biofuels production technology proposed in the application will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower has not established, through an independent third party (*i.e.,* feasibility study), that the biofuels production technology proposed in the application, if adopted, will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, 0 points will be awarded.

(ii) If the borrower has established, through an independent third party (*i.e.,* feasibility study), that the biofuels production technology proposed in the application, if adopted, will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, 5 points will be awarded.

(8) The potential for rural economic development. If the business creates jobs with an average wage that exceeds both the State and County median household wages where the biorefinery will be located, 5 points will be awarded.

(9) The level of local ownership of the biorefinery proposed in the application. A maximum of 15 points can be awarded. Points to be awarded will be determined as follows:

(i) If more than 20 but less than or equal to 50 percent of the biorefinery's owners are local owners, 9 points will be awarded.

(ii) If more than 50 percent of the biorefinery's owners are local owners, 15 points will be awarded.

(10) Whether the project can be replicated. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the project can be commercially replicated regionally (*e.g.,* Northeast, Southwest, *etc.*), 2 points will be awarded.

(ii) If the project can be commercially replicated nationally, up to 5 points will be awarded.

(11) If the project uses a particular technology, system, or process that is not currently operating in the advanced biofuel market as of October 1 of the fiscal year for which the funding is available, 15 points will be awarded.

(12) If the project proposes to use a feedstock that can be used for human or animal consumption, 5 points will be deducted from the score.

(e) *Ranking of applications.* The Agency will rank all scored applications to create a priority list of scored applications for that program. Unless

otherwise specified in a notice published in the **Federal Register**, the Agency will rank applications on or before May 31 for complete and eligible applications received by March 1 and on or before August 31 for complete and eligible applications received on or before June 1.

(1) All applications that are ranked in a given fiscal year will be considered for selection for funding for that entire fiscal year.

(2) When an application scored in first set of applications is carried forward into the second set of applications, it will be competed against all of the applications in the second set using its score from the first set of applications.

(f) *Selection of applications for funding.* Using the priority list created under paragraph (e) of this section, the Agency will select applications for funding based on the criteria specified in paragraphs (f)(1) through (3) of this section. The Agency will notify, in writing, lenders whose applications have been selected for funding.

(1) *Ranking.* The Agency will consider the score an application has received compared to the scores of other applications in the priority list, with higher scoring applications receiving first consideration for funding. A minimum score of 55 points is required in order to be considered for a guarantee.

(2) *Availability of budgetary authority.* The Agency will consider the size of the request relative to the budgetary authority that remains available to the program during the fiscal year.

(i) If there is insufficient budgetary authority during a particular funding period to select a higher scoring application, the Agency may elect to select the next highest scoring application for further processing. Before this occurs, the Agency will provide the borrower of the higher scoring application the opportunity to reduce the amount of its request to the amount of budgetary authority available. If the borrower agrees to lower its request, it must certify that the purposes of the project can be met, and the Agency must determine the project is financially feasible at the lower amount.

(ii) If the amount of funding required is greater than 25 percent of the program's outstanding budgetary authority, the Agency may elect to select the next highest scoring application for further processing, provided the higher scoring borrower is notified of this action and given an opportunity to revise their application and resubmit it.

(3) *Availability of other funding sources.* If other financial assistance is needed for the project, the Agency will consider the availability of other funding sources. If the lender cannot demonstrate that funds from these sources are available at the time of selecting applications for funding or potential funding, the Agency may instead select the next highest scoring application for further processing ahead of the higher scoring application.

(g) *Ranked applications not funded.* A ranked application that is not funded in the fiscal year in which it was submitted will not be carried forward into the next fiscal year. The Agency will notify the lender in writing. If an application has been selected for funding, but has not been funded because additional information is needed, the Agency will notify the lender of what information is needed, including a timeframe for the lender to provide the information. If the lender does not provide the information within the specified timeframe, the Agency will remove the application from further consideration and will so notify the lender.

(h) *Wage rates.* As a condition of receiving a loan guaranteed under this subpart, each borrower shall ensure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with guaranteed loan funds under this subpart shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 through 3144, 3146, and 3147 of title 40, U.S.C. Awards under this subpart are further subject to the relevant regulations contained in title 29 of the Code of Federal Regulations.

§§ 4279.266–4279.279 [Reserved]

§ 4279.280 Changes in borrowers.

All changes in borrowers must be in accordance with § 4279.180, but the eligibility requirements of this program apply.

§ 4279.281 Conditions precedent to issuance of loan note guarantee.

The loan note guarantee will not be issued until the lender certifies to the conditions identified in § 4279.181(a) through (o) and paragraphs (a) through (g) of this section. If the lender is unable to provide any of the certifications required under this section, the lender must provide an explanation satisfactory to the Agency as to why the lender is unable to provide the certification.

(a) For loans exceeding $150,000, the lender has certified its compliance with the Anti-Lobby Act (18 U.S.C. 1913). Also, if any funds have been, or will be, paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to guarantee a loan, the lender shall completely disclose such lobbying activities in accordance with 31 U.S.C. 1352.

(b) Where applicable, the lender must certify that the borrower has obtained:

(1) A legal opinion relative to the title to rights-of-way and easements. Lenders are responsible for ensuring that borrowers have obtained valid, continuous, and adequate rights-of-way and easements needed for the construction, operation and maintenance of a facility.

(2) A title opinion or title insurance showing ownership of the land and all mortgages or other lien defects, restriction or encumbrances, if any. It is the responsibility of the lender to ensure that the borrower has obtained and recorded such releases, consents, or subordinations to such property rights from holders of outstanding liens or other instruments as may be necessary for the construction, operation and maintenance of the facility and to provide the required security. For example, when a site is for major structures for utility-type facilities (such as a gas distribution system) and the lender and borrower are able to obtain only a right-of-way or easement on such site rather than a fee simple title, such a title opinion must be requested.

(c) The minimum financial criteria, including those financial criteria contained in the Conditional Commitment, have been maintained through the issuance of the loan note guarantee. Failure to maintain these financial criteria shall result in an ineligible application.

(d) Each borrower shall certify to the lender that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with guaranteed loan funds under this subpart shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 through 3144, 3146, and 3147 of title 40 U.S.C. Awards under this subpart are further subject to the relevant regulations contained in title 29 of the Code of Federal Regulations.

(e) The lender certifies that it has reviewed all contract documents and verified compliance with Sections 3141

through 3144, 3146, and 3147 of title 40 U.S.C., and title 29 of the Code of Federal Regulations. The lender will certify the same process will be completed for all future contracts and any changes to existing contracts.

(f) The lender certifies that the proposed facility complies with all Federal, State, and local laws and regulatory rules that are in existence and that affect the project, the borrower, or lender activities.

(g) The lender will notify the Agency in writing whenever there has been a change in the classification of a loan within 15 calendar days of such change.

§§ 4279.282–4279.289 [Reserved]

§ 4279.290 Requirements after project construction.

Once the project has been constructed, the lender must:

(a) Provide the Agency annual reports from the borrower commencing the first full calendar year following the year in which project construction was completed and continuing for the life of the guaranteed loan. The borrower's reports will include, but not be limited to, the information specified in the following paragraphs, as applicable.

(1) The actual amount of advanced biofuels produced to assess whether project goals are being met.

(2) If applicable, documentation that identified health and/or sanitation problems have been solved.

(3) A summary of the cost of operating and maintaining the facility.

(4) Description of any maintenance or operational problems associated with the facility.

(5) Certification that the project is and has been in compliance with all applicable State and Federal environmental laws and regulations.

(6) The number of jobs created.

(7) A description of the status of the project's feedstock including, but not limited to, the feedstock being used, outstanding feedstock contracts, feedstock changes and interruptions, and quality of the feedstock;

(8) The results of the annual inspections conducted under paragraph (b) of this section; and

(b) For the life of the guaranteed loan, conduct annual inspections.

§§ 4279.291–4279.300 [Reserved]

PART 4287—SERVICING

3. The authority citation for part 4287 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989.

4. Part 4287 is amended by adding a new subpart D to read as follows:

Subpart D—Servicing Biorefinery Assistance Guaranteed Loans

Sec.

4287.301 Introduction.
4287.302 Definitions.
4287.303 Exception authority.
4287.304–4287.305 [Reserved]
4287.306 Appeals.
4287.307 Servicing.
4287.308–4287.400 [Reserved]

Subpart D—Servicing Biorefinery Assistance Guaranteed Loans

§ 4287.301 Introduction.

(a) This subpart supplements part 4279, subparts A and C of this chapter by providing additional requirements and instructions for servicing and liquidating all Biorefinery Assistance Guaranteed Loans.

(b) The lender will be responsible for servicing the entire loan and will remain mortgagee and secured party of record notwithstanding the fact that another party may hold a portion of the loan. The entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan. The unguaranteed portion of a loan will neither be paid first nor given any preference or priority over the guaranteed portion of the loan.

(c) Copies of all forms, regulations, and Instructions referenced in this subpart are available in any Agency office. Whenever a form is designated in this subpart, that designation includes predecessor and successor forms, if applicable, as specified by the field or National Office.

§ 4287.302 Definitions.

The definitions and abbreviations contained in § 4279.2 subpart A and in § 4279.202 of subpart C of part 4279 of this chapter apply to this subpart.

§ 4287.303 Exception authority.

Section 4279.15 of subpart A of part 4279 of this chapter applies to this subpart.

§§ 4287.304–4287.305 [Reserved]

§ 4287.306 Appeals.

Section 4279.16 of subpart A of part 4279 of this chapter applies to this subpart.

§ 4287.307 Servicing.

Except as specified in paragraphs (a) through (k) of this section, all loans guaranteed under this subpart shall comply with the provisions found in §§ 4287.101 through 4287.199 of this chapter. If the Agency determines that the lender is not in compliance with its servicing responsibilities, the Agency reserves the right to take any action the Agency determines necessary to protect the Agency's interests with respect to the loan. If the Agency exercises this right, the lender must cooperate with the Agency. Any cost to the Agency associated with such action will be assessed against the lender.

(a) *Periodic reports.* Each lender shall submit periodic reports, on a quarterly basis, unless otherwise determined by the Agency to meet the financial interests of the United States, regarding the condition of its Agency guaranteed loan portfolio (including borrower status and loan classification) and any material adverse change in the general financial condition of the borrower since the last periodic report was submitted.

(b) *Default reports.* Lenders shall submit monthly default reports, including borrower payment history, for each loan in monetary default using a form approved by the Agency.

(c) *Financial reports.* In addition to complying with the financial reports specified in § 4287.107(d),

(1) The financial reports required under 4287.107(d) may be specified in either the loan agreement or the Conditional Commitment;

(2) The lender must submit to the Agency quarterly financial statements within 45 days of the end of each quarter; and

(3) The annual financial statements required under § 4287.107(d)(1)(ii) must be audited financial statements.

(d) *Additional loans.* Instead of complying with the additional expenditures provisions specified in § 4287.107(e), the lender may make additional expenditures or new loans to a borrower with an outstanding loan guaranteed under this Notice only with prior written Agency approval. The Agency will only approve additional expenditures or new loans to the extent such actions where the expenditure or loan will not violate one or more of the loan covenants of the borrower's loan agreement. In all instances, the lender must notify the Agency when they make any additional expenditures or new loans. In all cases, any additional expenditure or loan made by the lender must be junior in priority to the loan guaranteed hereunder.

(e) *Collateral inspection and release.* In lieu of complying with § 4287.113, lenders must comply with the provisions of this paragraph. The lender must inspect the collateral as often as necessary to properly service the loan. The Agency will require prior approval of the release of collateral, except in those instances where the proceeds are used to pay down debt in order of lien priority, or to acquire replacement

equipment, or where the release of collateral is made under the abundance of collateral provision of the applicable security agreement. Appraisals on the collateral being released will be required on all transactions exceeding $250,000 and will be at the expense of the borrower. The appraisal must meet the requirements of § 4279.244. The sale or release of collateral must be based on an arm's length transaction, unless otherwise approved by the Agency in writing.

(1) Lenders may, over the life of the guaranteed loan, release collateral with a cumulative value of up to 20 percent of the original loan amount without Agency concurrence if the proceeds generated are used to pay down secured debt in order of lien priority or to buy replacement collateral.

(2) Release of collateral with a cumulative value in excess of 20 percent of the original loan or when the proceeds will not be used to pay down secured debt or to buy replacement collateral, must be requested, in writing, by the lender and concurred by the Agency, in writing, in advance of the release. A written evaluation will be completed by the lender to justify the release.

(3) Lenders may not release collateral with a value of more than 10 percent of the original loan amount at any one time and within any one calendar year without Agency concurrence.

(4) Any release of collateral must not adversely affect the project's operation or financial condition.

(f) *Transfers and assumptions.* Transfers and assumptions shall comply with § 4287.134 and with paragraphs (f)(1) through (3) of this section.

(1) The Agency may charge the lender a nonrefundable transfer fee at the time of a transfer application. The Agency will set the amount of the transfer fee in an annual notice of funds availability.

(2) Assumption shall be deemed to occur in the event of a change in the control of the borrower. For purposes of the loan, change of control means the merger, sale of all or substantially all of the assets of the borrower, or the sale of more than 25 percent of the stock or other equity interest of either the borrower or its corporate parent.

(3) The Agency will not approve any change in terms that results in an increase in the cost of the loan guarantee, unless the Agency can secure any additional budget authority that would be required.

(g) *Substitution of lender after issuance of the Loan Note Guarantee.* All substitutions of lenders must comply with § 4287.135 except that, instead of approving a new lender as a substitute lender using the provisions of § 4287.135(a), the Agency may approve the substitution of a new lender if the proposed substitute lender:

(1) Is an eligible lender in accordance with § 4279.202(b);

(2) Is able to service the loan in accordance with the original loan documents; and

(3) Acquires title to the unguaranteed portion of the loan held by the original lender and assumes all original loan requirements, including liabilities and servicing responsibilities.

(h) *Default by borrower.* In addition to complying with § 4287.145, if a loan goes into default, the lender must provide the notification required under § 4287.145(a) to the Agency within 15 calendar days of when a borrower is 30 days past due on a payment or is otherwise in default of the Loan Agreement.

(i) *Protective advances.* All protective advances made by the lender must comply with § 4287.156 and the provisions of paragraphs (i)(1) and (2) of this section.

(1) Instead of the $5,000 specified in § 4279.156(c), Agency written authorization is required when cumulative protective advances exceed $100,000, unless otherwise specified by the Agency at a lesser amount.

(2) The lender must obtain written Agency approval for any protective advance that will singularly or cumulatively amount to more than $100,000 or 10% of the guaranteed loan, whichever is less.

(j) *Determination of loss and payment.* In addition to complying with § 4279.158, if a lender receives a final loss payment, the lender must submit to the Agency an annual report on its collection activities for each unsatisfied account for 3 years following payment of the final loss claim.

§§ 4287.308–4287.400 [Reserved]

Dated: April 5, 2010.

Judith A. Canales,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 2010–8274 Filed 4–15–10; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

7 CFR Part 4288

RIN 0570–AA74

Repowering Assistance Payments to Eligible Biorefineries

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Business-Cooperative Service, an agency of the U.S. Department of Agriculture, proposes a program to make payments to eligible biorefineries. These payments would be to encourage the use of renewable biomass as a replacement fuel source for fossil fuels used to provide process heat or power in the operation of these eligible biorefineries. This program is authorized under Title IX, Section 9001, of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246).

DATES: Comments on the proposed rule must be received on or before June 15, 2010. The comment period for the information collection under the Paperwork Reduction Act of 1995 continues through June 15, 2010.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* For paper, disk, or CD–ROM submissions, mail comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Stop 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.
- *Hand Delivery/Courier:* Submit your comments via Federal Express mail, or other courier service requiring a street address, to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

Instructions: All submissions received must include the agency name and the docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, *see* the "Public Comments" heading of the

SUPPLEMENTARY INFORMATION section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov,* and/or Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: USDA, Rural Development-Energy Division, Program Branch, Attention: Frederick Petok, Stop 3225, Room 6870, 1400 Independence Avenue, SW., Washington, DC 20250–3225. Telephone: (202) 690–0784.

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

I. Administrative Requirements
A. Executive Order 12866: Regulatory Planning and Review
B. Unfunded Mandates Reform Act
C. Environmental Impact Statement
D. Executive Order 13132: Federalism
E. Regulatory Flexibility Act
F. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
G. Executive Order 12372: Intergovernmental Review of Federal Programs
H. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
I. Executive Order 12988, Civil Justice Reform
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M. Application Review and Scoring
N. Ranking of Applications
O. Program Payment Provisions
P. Succession and Control of Facilities and Production
IV. Request for Comments

I. Administrative Requirements

A. Executive Order 12866: Regulatory Planning and Review

This proposed rule has been reviewed under Executive Order (EO) 12866 and has been determined to be economically significant by the Office of Management and Budget. The EO defines a "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this EO.

The Agency conducted a benefit-cost analysis to fulfill the requirements of Executive Order 12866. While unable to quantify any costs or benefits associated with this rulemaking, the Agency believes that the overall effect of the rule may be beneficial.

B. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act 1995 (UMRA) of Public Law 104–4 establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, Rural Development generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or Tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires Rural Development to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and Tribal governments or the private sector. Thus, this proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA.

C. Environmental Impact Statement

This renewable energy program under Title IX of the 2008 Farm Bill has been operated on an interim basis through the issuance of a Notice of Funds Availability (NOFA). During this initial round of applications, the Agency conducted National Environmental Policy Act (NEPA) reviews on each individual application for funding. No significant environmental impacts were reported, and Findings of No Significant Impact (FONSI) were issued for each approved application. Taken collectively, the applications show no potential for significant adverse cumulative effects.

The Agency is preparing a programmatic environmental assessment (PEA), pursuant to 7 CFR subpart 1940–G, to analyze the environmental effects to air, water, and biotic resources; land use; historic and cultural resources, and greenhouse gas emissions affected by the Section 9004 proposed rule. The purpose of the PEA is to assess the overall environmental impacts of the programs related to the goals of the Administration for advancing biofuels production for the purposes of energy independence and green house gas emission reductions. The environmental analyses will be national in scope and will be supported by site by site analysis per each application to the program. Site-specific NEPA documents prepared for those facilities funded under Sections 9003 and 9004 in FY 2008 and/or 2009 will be utilized, to forecast likely environmental impacts under the proposed rules. The draft PEA will be made available to the public for comment on the USDA Rural Business Service's Web site by May 3, 2010, and all comments will be addressed as part of any revision of the PEA, or prior to the publication of any Finding of No Significant Impact (FONSI).

D. Executive Order 13132: Federalism

It has been determined, under Executive Order 13132, Federalism, that this proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in the proposed rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–602) (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have an economically significant impact on a substantial number of small entities. Small entities include small businesses,

small organizations, and small governmental jurisdictions.

In accordance with the RFA, Rural Development has determined that this action will not have an economically significant impact on a substantial number of small entities for the reasons discussed below. Regardless of whether the participating biorefinery is a small or large business, the average cost to a biorefinery to participate is estimated to be approximately $16,400. Because the major factor in determining whether a biorefinery, small or large, will participate in this program is likely to be whether the biorefinery has the capital, or access to the capital, for the repowering project, the Agency does not believe that the cost of applying and participating will dissuade a small business from seeking to participate in this program. For example, this average cost represents less than 0.5 percent of the maximum $5 million that a biorefinery could receive under this program. Further, biorefineries are expected to realize a reduction in the costs to power their operations once the repowering project is in place. Thus, participating biorefineries will be able to recoup this expense, although small biorefineries are likely to take longer to recoup the expense because they are likely to have smaller power usage than large biorefineries. Finally, this regulation only affects biorefineries that choose to participate in the program.

F. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

The regulatory impact analysis conducted for this proposed rule meets the requirements for Actions Concerning Regulations That Significantly Affect Energy Supply Distribution and Use, Executive Order No. 13211, which states that an agency undertaking regulatory actions related to energy supply, distribution, or use is to prepare a Statement of Energy Effects. This analysis does not find that this proposed rule will have any adverse impacts on energy supply, distribution, or use.

G. Executive Order 12372: Intergovernmental Review of Federal Programs

This Program is not subject to Executive Order 12372, Intergovernmental Review of Federal Programs, because the Program is not listed as a covered program on the Intergovernmental Consultation list.

H. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This executive order imposes requirements on Rural Development in the development of regulatory policies that have Tribal implications or preempt Tribal laws. Rural Development has determined that the proposed rule does not have a substantial direct effect on one or more Indian Tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and the Indian Tribes. Thus, the proposed rule is not subject to the requirements of Executive Order 13175.

I. Executive Order 12988: Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. In accordance with this rule: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given this rule; and (3) administrative proceedings in accordance with the regulations of the Department of Agriculture's National Appeals Division (7 CFR part 11) must be exhausted before bringing suit in court challenging action taken under this rule unless those regulations specifically allow bringing suit at an earlier time.

J. Programs Affected

This Program is listed in the Catalog of Federal Domestic Assistance under Number 10.866.

K. Paperwork Reduction Act

The information collection requirements contained in the Notice of Funding Availability (NOFA) for the Section 9004 Repowering Assistance Payments to Eligible Biorefineries program published on June 12, 2009, were approved by the Office of Management and Budget (OMB) under emergency clearance procedures and assigned OMB Control Number 0570–0058. As discussed in the associated "Request for Emergency Review and Approval for a New Information Collection Request," expedited publication of the NOFA was mandated by Congress under the 2008 Farm Bill. Further, the Agency has made the 9004 program and the other Farm Bill energy titles a top priority for implementation as soon as possible, in order to implement all of the similar biorefinery programs at or very near the same time. Therefore, Rural Development requested emergency approval of the information collection so that the Agency could begin accepting applications and making payments. In accordance with the Paperwork Reduction Act of 1995, the Agency is now seeking standard OMB approval of the reporting requirements contained in this proposed rule and hereby opens a 60-day public comment period.

Title: Repowering Assistance.

Type of Request: New collection.

Abstract: Under this proposed rule, the Agency is providing payments to eligible biorefineries to support and encourage the use of renewable biomass to replace fossil fuels in the production of heat or power that fuel the energy requirements of these biorefineries.

The collection of information is vital to the Agency to make decisions regarding the eligibility of biorefineries to participate in this program, to ensure compliance with the provisions of this proposed rule and to ensure that the payments are made to eligible biorefineries.

Biorefineries seeking funding under this program will have to submit applications that include specified information, certifications, and agreements. This information will be used to determine applicant eligibility, to prioritize applications for award, and to determine the amount of payments for which the applicants are eligible.

Applicants must submit an application that includes relevant data to allow for technical analysis of the existing facility to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies. Applicants must also submit evidence that the biorefinery was in existence on or before June 18, 2008. In addition to the information specified on the standard application form, applicants must submit a feasibility study, performed by an independent qualified consultant, that demonstrates that the renewable biomass system of the biorefinery is feasible, taking into account the economic, technical and environmental aspects of the system.

Once a biorefinery has been accepted into the repowering program and the repowering project has been completed, the biorefinery must submit a request for initial payment. Subsequent payments will be made on a semiannual basis and each will require a request for payment supported by data documenting the actual displacement of fossil fuel use from the conversion to renewable biomass.

Participating biorefineries must keep records, and make them available to USDA upon request, documenting the ongoing displacement of fossil fuel usage resulting from the repowering project. The biorefinery must provide

for the metering of all power and heat producing boilers, containment vessels, generators and any other equipment related to the production of heat or power required to displace fossil fuel loads with renewable biomass.

In summary, the collection of information is necessary in order to implement this program.

The following estimates are based on the average over the first three years the program is in place.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 18.4 hours per response.

Respondents: Liquid transportation biofuel producers.

Estimated Number of Respondents: 15.

Estimated Number of Responses per Respondent: 15.9.

Estimated Number of Responses: 238.

Estimated Total Annual Burden (hours) on Respondents: 4,390.

Copies of this information collection can be obtained from Cheryl Thompson, Regulations and Paperwork Management Branch, at (202) 692–0043.

Comments

Comments are invited regarding: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of Rural Development, including whether the information will have practical utility; (b) the accuracy of Rural Development's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services Division, USDA, Rural Development, Stop 0742, 1400 Independence Ave., SW., Washington, DC 20250–0742. All responses to this proposed rule will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

L. E-Government Act Compliance

Rural Development 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.

II. Background

Rural Development administers a multitude of programs, ranging from housing and community facilities to infrastructure and business development. Its mission is to increase economic opportunity and improve the quality of life in rural communities by providing leadership, infrastructure, venture capital, and technical support that can support rural communities, helping them to prosper.

To achieve its mission, Rural Development provides financial support (including direct loans, grants, loan guarantees, and direct payments) and technical assistance to help enhance the quality of life and provide support for economic development in rural areas. The Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) contains several sections under which Rural Development provides financial assistance for the production and use of biofuels. This proposed rule addresses Section 9004 of the 2008 Farm Bill, which authorizes the Secretary of Agriculture to "carry out a program to encourage biorefineries in existence on the date of enactment of the Food, Conservation, and Energy Act of 2008 to replace fossil fuels used to produce heat or power to operate the biorefineries" by making payments to assist in the installation of new systems that use renewable biomass.

Section 9004 of the Farm Security and Rural Investment Act of 2002, as added by the Food Conservation and Energy Act of 2008, authorizes the Secretary of Agriculture to carry out the Repowering Assistance Payments to Eligible Biorefineries Program to encourage biorefineries to replace fossil fuels used to produce heat or power to operate the biorefineries with new systems that use renewable biomass or the new production of energy from renewable biomass.

Under the proposed rule, the Agency will establish an annual sign-up period for biorefineries. Under this program a biorefinery will be eligible to receive a payment equal to 50 percent of the costs of installing eligible systems up to $5 million. The first payment to a biorefinery awardee will be equal to 20 percent of the total amount of the award. The remainder of the award will be paid to the awardee at a rate of $0.50 per million British thermal units of energy produced from renewable biomass.

Consistent with the authorizing legislation, the primary goal of this program is to replace fossil fuels with energy derived from renewable biomass for the operation of biorefineries. To help meet this goal, the program proposes to provide awardees with an incentive to use their own renewable biomass energy systems by tying the payment of 80 percent of the award to the actual production of energy from renewable biomass. The more energy from renewable biomass the awardee produces for use in the biorefinery, the faster the awardee will receive the remaining 80 percent of the award. With respect to all of these points, the Agency welcomes feedback from the public during the comment period.

The Agency views this program in conjunction with its other renewable energy programs in the context of an overall Federal renewable energy strategy. The goal of this strategy is to foster the development of a strong, expanding, and economically sustainable group of renewable energy industries in the United States to supply an increasing share of the country's energy needs. The success of these industries will depend on their ability to produce energy sources that meet the demands of the country's energy markets. These markets are driven by a number of factors including the price of oil and other fossil fuels, developments in technologies, the acceptance of the public, the capacity of distribution systems, and the impact of government regulation such as the renewable fuels standard.

The Repowering Assistance Payments to Eligible Biorefineries Program is one part of Rural Development's contribution to the Department of Agriculture's renewable energy efforts that support the overall Federal renewable energy strategy. This program will encourage biorefineries to reduce their reliance on fossil fuels in their operations. This will help these biorefineries by reducing the carbon attributed to the bioenergy and biobased products they produce. Such reductions could improve the marketability of their bioenergy and biobased products. This program will help the overall development of bioenergy industries in the United States by encouraging the use of development of biomass energy systems. The Agency believes that systems designed for biorefineries could be easily adapted for use by a wide variety of other industries and thus could further encourage the replacement of fossil fuels for renewable energy across the U.S. economy.

The development of the renewable energy industries will take a strong partnership between the Federal government and the private sector to generate the capital needed. This

program provides incentives for more carbon efficient biorefineries and for the development of more effective renewable biomass based energy systems that could be adapted for use in a wide variety of industries.

III. Discussion of the Proposed Rule

On June 12, 2009, the Agency published a Notice of Funding Availability (NOFA) for Repowering Assistance Payments to Eligible Biorefineries (74 FR 28009). (This Notice is referred to in this preamble as the Section 9004 NOFA.) While the Section 9004 NOFA provided requirements for participation in Fiscal Year 2009, most of its provisions are applicable to fiscal year 2010 and beyond and, thus, have been carried forward into this proposed rule.

This section of this preamble discusses the proposed Repowering Assistance payment program in detail. This discussion follows the order of the proposed rule. Where needed, the Agency discusses the provision of each paragraph and why it is being proposed.

A. Purpose and Scope (§ 4288.1)

This section describes the purpose, scope and applicability of the program and includes a brief description of the criteria to be used to select biorefineries for assistance and the limits of the assistance that USDA will provide under the program.

B. Definitions (§ 4288.2)

This section presents the definitions specific to the Repowering Assistance program as they are being used in the proposed rule in order to implement the program more clearly. Definitions are provided for the following terms:

- Application period.
- Base energy use.
- Biobased products.
- Biofuel.
- Biorefinery.
- Eligible biorefinery.
- Eligible renewable biomass.
- Energy Information Agency.
- Feasibility study.
- Feedstock unit.
- Financial interest.
- Fiscal year.
- Fossil fuel.
- Renewable biomass.
- Rural or rural area.

C. Review or Appeal Rights (§ 4288.3)

This paragraph provides the legal basis by which an unsuccessful applicant may request an Agency review or file an appeal with the USDA National Appeals Division, in accordance with 7 CFR part 11.

D. Compliance With Other Laws and Regulations (§ 4288.4)

This section states that applicants must comply with other applicable Federal laws including, but not limited to, Equal Employment Opportunities, Equal Credit Opportunity Act, and the Civil Rights Act of 1964.

E. Oversight and Monitoring (§ 4288.5)

This section states that the Agency reserves the right to verify all payment requests and subsequent payments made under this program, including conducting field visits, as frequently as necessary to ensure the integrity of the program. The documentation required to verify, reconcile, and enforce the payment terms of the agreement along with any potential refunds that the recipient will be required to make should they fail to adequately document their request is presented in this section.

Additionally, reporting requirements and supporting documentation which each biorefinery must make available and provide to the Agency is explained in this section. Records must be held and made available for Agency examination for a period of not less than three years from each payment date.

F. Forms, Regulations, and Instructions (§ 4288.6)

This section describes how copies of all forms, regulations, instructions, and other materials related to this program may be obtained.

G. Exception Authority (§ 4288.7)

This section identifies that condition under which the Administrator may make, on a case-by-case basis, exceptions to any requirement or provision of this subpart. The proposed provisions are the same as found in 7 CFR 4280, subpart B, for the renewable energy systems and energy efficiency improvements program.

H. Applicant Eligibility (§ 4288.10)

This section states the eligibility requirements that an applicant must meet to participate in the program. All applicants must be an eligible biorefinery, as defined in § 4288.2 of this subpart, and must meet the citizenship requirements specified in this section, which are:

- If the applicant is an individual, the applicant must be a citizen or national of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or must reside in the U.S. after legal admittance for permanent residence.
- If the applicant is an entity other than an individual, the applicant must be at least 51 percent owned by persons who are either citizens or nationals of the U.S., the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S. However, this requirement is not applicable if the entity is composed solely of members of an immediate family. In such instances, if at least one of the immediate family members is a citizen or national as described above, then the entity is eligible to participate in this program. Immediate family is being defined as: Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, domestic partner, parent, child, brother, sister, aunt, uncle, grandparent, grandchild, niece, or nephew.

If an applicant does not meet the citizenship requirement, the applicant is not eligible for this program. While this citizenship requirement is not required by statute, it is consistent with the Agency's other programs. As found in Section IV of this preamble, the Agency is seeking comment on this requirement.

In addition, to be eligible for program payments, a biorefinery must be located in a rural area. If the biorefinery is not located in a rural area, such biorefinery is not eligible for this program. While not statutorily required, the Agency is proposing this rural area requirement for consistency with its other programs and its mission to improve the economic conditions of rural America. Lastly, as found in Section IV of this preamble, the Agency is seeking comment on this requirement.

Corporations and entities with more than one biorefinery location may not submit multiple applications. However, a project that serves multiple biorefineries located at the same location is an eligible project provided the heat and power are centrally produced.

I. Eligible Project Costs (§ 4288.11)

This section describes eligible project costs. Eligible project costs are only those incurred in the construction of program repowering improvements associated with the equipment, installation, engineering, design, site plans, associated professional fees, permits and financing fees.

J. Ineligible Project Costs (§ 4288.12)

This section states that project costs not directly associated with the repowering project and system incurred by the applicant prior to application for payment assistance under this program will be ineligible for payment

assistance. Project costs for projects for repowering using feedstocks that are feed grain commodities that received benefits under Title I of the Food, Conservation, and Energy Act of 2008, are not eligible. For example, gas that was produced from the waste product from corn milling fermentation would be eligible under section 9004 as it is also a secondary product and not the underlying commodity that received a benefit under Title I.

K. Payment Information (§ 4288.13)

This section describes the number and amount of payments that will be made to eligible applicants. Payments will be based on the number of applicants selected for award in the program in addition to other award criteria. These criteria will include the amount of fossil fuel replaced, the cost-effectiveness of the system, and the percentage reduction in fossil fuel use. The maximum payment an applicant may receive will be 50 percent of total eligible project costs up to $5 million. As proposed, there is no minimum payment that an applicant may receive.

L. Submittal of Applications (§ 4288.20)

This section describes where and how to make application for the Repowering Assistance program. The applicant must furnish the Agency the required forms and documentation identified in this section. Applicants are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number (unless the applicant is an individual). In addition to a feasibility study, applicants must submit to the Agency the documents specified in this section and furnish the Agency all required certifications before acceptance into the program, and furnish access to records required by the Agency to verify compliance with program provisions.

Applicants are required to provide relevant data to allow for technical analysis of their facilities to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies and, where applicable, to document that woody biomass feedstock cannot be used as a higher value wood-based product. Applicants in existence on or before June 18, 2008 with more than 24 months of actual operating data must provide data for the most recent 24-month period. Applicants in existence on or before June 18, 2008 with less than 24 months of actual operating data must provide 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

M. Application Review and Scoring (§ 4288.21)

This section describes the Application review process and presents the scoring criteria and point values assigned to each of the criteria. The Agency will evaluate projects based on the cost-effectiveness, capacity of projects to reduce fossil fuel usage, and whether the biorefinery primarily produces liquid transportation fuels. The focus of this program on liquid transportation fuels is a reflection of the intent of Congress as stated in the Managers Report for this program. The cost of the project will be taken into consideration in the context of each project's ability to economically produce energy from renewable biomass to replace its dependence on fossil fuels. Projects with higher costs that are less efficient will not score well. The scoring criteria are designed to evaluate projects on simple payback as well as the percentage of fossil fuel reduction.

Submission of an application neither reserves payments nor ensures payments. The Agency will evaluate each application and make a determination as to whether the applicant is eligible, whether the proposed project is eligible, and whether the proposed payment request complies with all applicable statutes and regulations. This evaluation will be based on the information provided by the applicant and on other sources of information, such as recognized industry experts. The Agency will score each application in order to prioritize each proposed project. The maximum number of points awardable to any applicant will be 100. The evaluation criteria that the Agency will use to score these projects are cost, cost-effectiveness, reduction of fossil fuel use, type of fossil fuel displaced, renewable biomass factors, and technical review factors.

N. Ranking of Applications (§ 4288.22)

This section describes the process by which the Agency will rank scored applications for determination of eligibility and consideration for payment. The Agency will consider the score an application has received compared to the scores of other applications in the priority list, with higher scoring applications receiving first consideration for payments. The Agency will notify all applicants of their decision on each application. It is possible that a lower scoring application may receive funding before a higher scoring application if insufficient funds remain to pay the higher scoring application and the higher scoring application chooses not to accept the lower funding level. The higher scoring applicant will have the opportunity to reduce the amount of its payment request to the amount of funds available. If the applicant agrees to lower its payment request, it must certify that the purposes of the project can be met, and the Agency must determine the project is feasible at the lower amount.

O. Program Payment Provisions (§ 4288.23)

This section describes the procedure the Agency will use to make payments to eligible biorefineries. To request payments under this program during a FY, an eligible biorefinery must submit the required application form. Upon completion of the project or project improvements, the first payment will not exceed 20 percent of the project award. Subsequent semiannual payments will be paid based on actual measured renewable biomass energy production at a rate of 50 cents per million British thermal units (MMBTUs), up to the limit of the award.

In developing the proposed payment rate of 50 cents per MMBTUs, the Agency considered what payment rate should be used to pay out the remaining funds once the upfront payment was made. In general, a lower payout rate means that it would take longer for the total award to be paid, which would be less attractive to the facility. A higher payout rate means that a biorefinery would receive the total award amount sooner, which could put Agency funding more at risk. That is, if a biorefinery received a large award, collected all of the money within a short period of time, and then the repowering project was discontinued (*e.g.,* the biorefinery closed), Agency funds were much less productively used than intended. Spreading these payments out over a reasonably long period should help ensure that facilities continue to operate and to use biomass to replace fossil fuels. Given these considerations, the Agency is proposing a payment rate of $0.50 per MMBTU of fossil fuel energy use that is replaced with biomass derived energy. Based on what it expects to be the average total payout, the Agency believes that this rate is reasonable in that a typical biorefinery should be able to collect all of the payment within 3 to 5 years.

Biorefineries will be required to furnish the Agency such certifications and access to records that verify compliance with program provisions and provide documentation, as requested by the Agency, regarding the production of usable energy at the

biorefinery during the relevant payment period. After semiannual payment applications are submitted, eligible biorefineries may be required to submit additional supporting clarification if their original submittal is not sufficient to verify eligibility for payment. Biorefineries will be notified in writing whenever the Agency determines that a payment application is ineligible and why the application was determined ineligible. Adjustments to payments otherwise payable to the biorefinery will be made if the Agency finds there is a difference between the quantity of fossil fuel actually replaced by renewable biomass and the quantity certified to in a payment application. An eligible biorefinery that has received a payment under this program may be required to refund such payment if the Agency determines the producer has made any material fraudulent representation; or misrepresented any material fact affecting a program determination. Late payment interest will be assessed on each refund in accordance with provisions and rates as determined by the Agency. Interest will accrue from the date payments were received by the biorefinery to the date of repayment, or the date of an interest increase, as determined in accordance with applicable regulations. However, the Agency may waive the accrual of interest and/or damages if the Agency determines that the cause of the erroneous determination was not due to any improper action of the biorefinery. Any biorefinery or person receiving payment under this program will be jointly and severally liable for any refund or related charges due under this program.

P. Succession and Control of Facilities and Production (§ 4288.24)

In this section, the Agency states the conditions under which any party obtaining a biorefinery that is under this program must request permission to participate in this program as a successor. The Agency may grant such request if it determines that the party is eligible and permitting such succession would serve the purposes of the program. The Agency may require the consent of the previous party to such succession. Additionally, the Agency may terminate payments and demand full refund of payments made if a party loses control of a biorefinery whose production of heat or power from renewable biomass is the basis of a program payment, or otherwise fails to retain the ability to assure that all program obligations and requirements will be met.

IV. Request for Comments

The Agency is requesting comments on the overall program being proposed. The Agency is especially interested in comments on the following areas:

1. Whether the proposed eligibility requirements are reasonable and appropriate.

2. Ways in which the application process could be simplified or streamlined.

3. Whether the proposed scoring criteria will result in fair and equitable distribution of funds.

4. The appropriateness of the proposed payment rate and term.

5. Whether the payment amount is aligned with the estimated fossil fuel reduction in terms of incentives and enforcement mechanisms.

6. Should the program allow entities that do not meet the proposed citizenship requirement (§ 4288.10(a)) of at least 51 percent domestic ownership to participate, including those entities owned entirely by immediate family members where only one of the family members meets citizenship requirements? Please be sure to provide rationale for your position.

7. As proposed, only biorefineries located in rural areas will be eligible for payments. The Agency is requesting comment on whether biorefineries located in non-rural areas should also be eligible for a payment under this program. Please be sure to provide rationale for your position.

8. As proposed, the scoring criterion on renewable biomass requires an applicant to demonstrate control of the feedstock for the repowering project for at least 3 years in order to receive points. The Agency is requesting comment on the appropriate timeframe that the applicant must demonstrate access to the feedstock for the project. Please be sure to provide rationale for your position.

9. The Agency is requesting comment on whether a scoring criterion should be developed to give preference to biorefineries that have closed systems or that can use their own waste streams in the repowering project. Please be sure to provide rationale for your position.

10. The Agency is considering an approach to score applications on not only the percentage, but also the type of fossil fuel displaced. Under this approach, applicants would receive a higher score if they reduce a larger amount of fossil fuels. They would also receive a higher score for reducing the amount of higher GHG emitting fuels. The agency requests comment on this or other approaches to incentivize GHG reductions within the scope of this program.

The Agency is particularly interested in the views of program applicants and interested stakeholders.

Submit comments as indicated in the **DATES** and **ADDRESSES** sections above.

List of Subjects in 7 CFR Part 4288

Administrative practice and procedure, Energy—biofuel, Renewable biomass, Reporting and recordkeeping.

For the reasons set forth in the preamble, under the authority at 5 U.S.C. 301 and 7 U.S.C. 8105, Chapter XLII is proposed to be amended by adding a new part 4288 to read as follows:

CHAPTER XLII—RURAL BUSINESS-COOPERATIVE SERVICE AND RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE

PART 4288—PAYMENT PROGRAMS

Subpart A—Repowering Assistance Payments to Eligible Biorefineries

Sec.

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Authority: 7 U.S.C. 1989.

Subpart A—Repowering Assistance Payments to Eligible Biorefineries

§ 4288.1 Purpose and scope.

(a) *Purpose.* The purpose of this program is to provide financial incentives to biorefineries in existence on June 18, 2008, the date of the enactment of the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill) (Pub. L. 110–246), to replace the use of fossil fuels used to produce heat or power at their facilities by installing new systems that use renewable biomass, or to produce new energy from renewable biomass.

(b) *Scope.* The Agency may make payments under this program to any biorefinery that meets the requirements of the program up to the limits established for the program. Based on our research and survey of medium-

sized project costs, the Agency has determined that the dollar amount identified will provide adequate incentive for biorefineries to apply.

(1) The Agency will determine the amount of payments to be made to a biorefinery based on the quantity of fossil fuel a renewable biomass system is replacing, the percentage reduction in fossil fuel used by the biorefinery, and the cost and cost-effectiveness of the renewable biomass system.

(2) The Agency will determine who receives payment under this program based on the percentage reduction in fossil fuel used by the biorefinery that will result from the installation of the renewable biomass system; the cost and cost-effectiveness of the renewable biomass system; and other scoring criteria identified in § 4288.21 "Application review and scoring." The above criteria will be used to determine priority for awards of 50 percent of total eligible project costs up to $5 million.

§ 4288.2 Definitions.

The definitions set forth in this section are applicable for all purposes of program administration under this subpart.

Agency means the USDA Rural Development, Rural Business-Cooperative Service or its successor organization.

Application period means the time period announced by the Agency during which the Agency will accept applications.

Base energy use means the amount of documented fossil fuel energy use over an extended operating period.

(1) The extended operating period must be at least 24 months of recorded usage, and requires metered utility records for electric energy, natural gas consumption, fuel oil, coal shipments and propane use, as applicable for providing heat or power for the operation of the biorefinery.

(2) Utility billing, oil and coal shipments must be actual bills, with meter readings, applicable rates and tariffs, costs and usage. Billing must be complete, without gaps and arranged in chronological order. Drop shipments of coal or oil can be substituted for metered readings, provided the biorefinery documents the usage and its relationship to providing heat or power to the biorefinery.

(3) A biorefinery in existence on or before June 18, 2008 with less than 24 months of actual operating data must provide at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

Biobased products means products determined by the Secretary to be commercial or industrial products (other than food or feed) that are:

(1) Composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or

(2) Intermediate ingredients or feedstocks.

Biofuel means fuel derived from renewable biomass.

Biorefinery means a facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products, and may produce electricity.

Eligible biorefinery means a biorefinery that has been in existence on or before June 18, 2008.

Eligible renewable biomass means renewable biomass as defined in this proposed rule.

Energy Information Agency (EIA) means the statistical agency of the Department of Energy and source of official energy statistics from the U.S. Government.

Feasibility study means an Agency-acceptable analysis of the economic, environmental, technical, financial, and management capabilities of a proposed project or business in terms of its expected success. A list of items that must be included in a feasibility study is presented in § 4288.20(c)(9) of this subpart.

Feedstock unit means a bushel, hundredweight, pound, or other unit of measure, as applicable, for the renewable biomass feedstock used in liquid transportation biofuel production.

Financial interest means, for the purposes of this notice, any ownership, creditor, or management interest in the biorefinery.

Fiscal year means the 12-month period beginning each October 1 and ending September 30 of the following calendar year.

Fossil fuel means fuels derived from coal, oil, propane, and natural gas.

Immediate family. Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, domestic partner, parent, child, brother, sister, aunt, uncle, grandparent, grandchild, niece, or nephew.

Renewable biomass means:

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) that:

(i) Are byproducts of preventive treatments that are removed to reduce hazardous fuels; to reduce or contain disease or insect infestation; or to restore ecosystem health; and

(ii) Would not otherwise be used for higher value products; and

(iii) Are harvested in accordance with applicable law and land management plans and the requirements for old growth maintenance, restoration, and management direction as per paragraphs (e)(2), (e)(3), and (e)(4), and large tree retention as per paragraph (f), of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512); or

(2) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

(i) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

(ii) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and byproducts (including fats, oils, greases, and manure); and food waste and yard waste.

Rural or rural area means any area of a State not in a city or town that has a population of more than 50,000 inhabitants, according to the latest decennial census of the United States, and the contiguous and adjacent urbanized area, and any area that has been determined to be "rural in character" by the Under Secretary for Rural Development, or as otherwise identified in this definition. In determining which census blocks in an urbanized area are not in a rural area, the Agency will exclude any cluster of census blocks that would otherwise be considered not in a Rural Area only because the cluster is adjacent to not more than two census blocks that are otherwise considered not in a rural area under this definition.

(1) For the purposes of this definition, cities and towns are incorporated population centers with definite boundaries, local self government, and legal powers set forth in a charter granted by the State.

(2) For the Commonwealth of Puerto Rico, the island is considered rural and eligible for Business Programs assistance, except for the San Juan Census Designated Place (CDP) and any other CDP with greater than 50,000 inhabitants. CDPs with greater than 50,000 inhabitants, other than the San Juan CDP, may be determined to be eligible if they are "not urban in

character." Any such requests must be forwarded to the National Office, Business and Industry Division, with supporting documentation as to why the area is "not urban in character" for review, analysis, and decision by the Rural Development Under Secretary.

(3) For the State of Hawaii, all areas within the State are considered rural and eligible for Business Programs assistance, except for the Honolulu CDP within the County of Honolulu.

(4) For the purpose of defining a rural area in the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, the Agency shall determine what constitutes rural and rural area based on available population data.

(5) The determination that an area is "rural in character" under this definition will be to areas that are within:

(i) An urbanized area that has two points on its boundary that are at least 40 miles apart, which is not contiguous or adjacent to a city or town that has a population of greater than 150,000 inhabitants or the urbanized area of such a city town; or

(ii) An urbanized area contiguous and adjacent to a city or town of greater than 50,000 population that is within one-quarter mile of a rural area.

§ 4288.3 Review or appeal rights.

A person may seek a review of an Agency decision under this subpart from the appropriate Agency official that oversees the program in question or appeal to the National Appeals Division in accordance with 7 CFR part 11 of this title.

§ 4288.4 Compliance with other laws and regulations.

Participating biorefineries must comply with other applicable Federal, State, and local laws, including, but not limited to, the Equal Employment Opportunities Act, the Equal Credit Opportunity Act, Title VI of the Civil Rights Act of 1964, 7 CFR Part 1901 Subpart E, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. Applicants must submit and will be subject to pre-award and post award compliance reviews with the terms and conditions set forth in RD Form 400–1, "Equal Opportunity Agreement" and RD Form 400–4," Assurance Agreement."

§ 4288.5 Oversight and monitoring.

(a) *Verification.* The Agency reserves the right to verify all payment requests and subsequent payments made under this program, including field visits, as frequently as necessary to ensure the integrity of the program. Documentation provided will be used to verify, reconcile, and enforce the payment terms of the agreement along with any potential refunds that the recipient will be required to make should they fail to adequately document their request. The required documentation is given in RD Form 4288–6, the Repowering Program Payment Request, which details and provides that the requester demonstrate a reduction in fossil fuel use by providing concurrent readings from their previously metered usage, along with the readings from the metered, measured, and verifiable production of renewable energy from renewable biomass.

(b) *Records.* For the purpose of verifying compliance with the requirements of this proposed rule, each biorefinery must make available and provide for the metering of all power and heat producing boilers, containment vessels, generators and any other equipment related to the production of heat or power required to displace fossil fuel loads with renewable biomass. These records must be held in one place and be available at all reasonable times for examination by the Agency. Such records include all books, papers, contracts, scale tickets, settlement sheets, invoices, written price quotations, and any other documents related to the program that are within the control of the biorefinery. These records must be held and made available for Agency examination for a period of not less than three years from each payment date.

§ 4288.6 Forms, regulations, and instructions.

Copies of all forms, regulations, instructions, and other materials related to this program may be obtained from the USDA Rural Development State Office, Renewable Energy Coordinator and the USDA Rural Development Web site at *http://www.rurdev.usda.gov/regs/formstoc.html#9.*

§ 4288.7 Exception authority.

The Administrator may, on a case-by-case basis, make an exception to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the Administrator determines that application of the requirement or provision would adversely affect the USDA's interest.

§§ 4288.8–4288.9 [Reserved]

§ 4288.10 Applicant eligibility.

To be eligible for this program, the applicant must be an eligible biorefinery, as defined in § 4288.2 of this subpart, and must meet the requirements specified in paragraphs (a) through (d) of this section.

(a) *Citizenship requirement.* The applicant must meet the requirements in paragraphs (a)(1) or (2), as applicable, of this section.

(1) If the applicant is an individual, the applicant must be a citizen or national of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or must reside in the U.S. after legal admittance for permanent residence.

(2) If the applicant is an entity other than an individual, the applicant must be at least 51 percent owned by persons who are either citizens or nationals of the U.S., the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S. This paragraph is not applicable if the entity is owned solely by members of an immediate family. In such instance, if at least one of the immediate family members is a citizen or national, as defined in paragraph (a)(1) of this section, then the entity is eligible.

(b) *Rural area requirement.* To be eligible for program payments, biorefinery must be located in a rural area.

(c) *Multiple submissions.* Only one application from corporations and entities with more than one biorefinery location will be eligible. A project that serves multiple biorefineries located at the same location is an eligible project provided the heat and power are centrally produced.

(d) *Payment eligibility.* To be eligible for program payments, an applicant must submit a complete application for consideration of payment. Payments will be made based on ranking of applicants in relation to project cost, cost-effectiveness, the quantity of fossil fuels the renewable biomass system is replacing, and the reduction of fossil fuel usage resulting from the installation of a renewable biomass system.

§ 4288.11 Eligible project costs.

Eligible project costs will be only for project related construction costs for repowering improvements associated with the equipment, installation, engineering, design, site plans, associated professional fees, permits and financing fees.

§ 4288.12 Ineligible project costs.

(a) Any project costs incurred by the applicant prior to application for payment assistance under this program will be ineligible for payment assistance.

(b) A project is not eligible under this program if it is using feedstocks for repowering that are feed grain commodities that received benefits under Title I of the Food, Conservation, and Energy Act of 2008.

§ 4288.13 Payment information.

(a) At the time the project is built and commissioned, the applicant can request payment for 20 percent of eligible project cost. Subsequent payments shall be based on the measurable and verifiable production of energy from renewable biomass produced from the Repowering Project, and will be paid semiannually when submitted on form RD 4288–6.

(b) *Payment limitations.* For the purposes of this program, the maximum payment an applicant may receive will be 50 percent of total eligible project costs up to $5 million. There is no minimum payment to an applicant.

(c) *Type of instrument.* Payments to an eligible biorefinery will be made through a signed Payment Agreement.

§§ 4288.14–4288.19 [Reserved]

§ 4288.20 Submittal of applications.

(a) *Address to make application.* Application must be made to USDA, Rural Development-Energy Division, Program Branch, Attention: Repowering Assistance Program, 1400 Independence Avenue, SW., Stop 3225, Washington, DC 20250–3225.

(b) *Content and form of submission.* Applicants must submit a signed original and one copy of an application containing the information specified in this section. The applicant must also furnish the Agency the required documentation identified in Form RD 4288–4 to verify compliance with program provisions before acceptance into the program. Note that applicants are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number (unless the applicant is an individual). The DUNS number is a nine-digit identification number, which uniquely identifies business entities. A DUNS number can be obtained at no cost via a toll-free request line at 1–866–705–5711, or online at *http://fedgov.dnb.com/webform.* Applicants must submit to the Agency the documents specified in paragraphs (b)(1) through (7) of this section.

(1) Form RD 4288–4, "Repowering Assistance Program Application." Applicants must submit this form and all necessary attachments providing project information on the biorefinery; the facility at which the biorefinery operates, including location and products produced; and the types and quantities of renewable biomass feedstock being proposed to produce heat or power. This form requires the applicant to provide relevant data to allow for technical analysis of their existing facility to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies. Applicant must also submit evidence that the biorefinery was in existence on or before June 18, 2008. The applicant is required to certify the information provided.

(2) Form RD 4288–5, "Repowering Assistance Program Agreement". A signed copy of this form will be required prior to receiving payments under this program.

(3) RD Instruction 1940–Q, Exhibit A–1, "Restriction on Lobbying (if over $100,000)".

(4) Form RD 400–1, "Equal Opportunity Agreement".

(5) Form RD 400–4, "Assurance Agreement".

(6) Form RD 1940–20, "Request for Environmental Information" (first page only). Note, however, that applicants must substitute the narrative outlined in RD Instruction 1940–G, Exhibit H in place of the narrative attachment specified in the instructions to Form RD 1940–20.

(7) *Certifications.* The applicant must furnish the Agency all required certifications before acceptance into the program, and furnish access to records required by the Agency to verify compliance with program provisions. Applicant must submit forms or other written documentation certifying to the following:

(i) AD–1047, "Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions" or other written documentation.

(ii) AD–1048, "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions" or other written documentation.

(iii) SF–LLL, "Disclosure of Lobbying Activities".

(c) *Application package contents.* Applicants are required to provide relevant data to allow for technical analysis of their existing facilities to demonstrate replacement of fossil fuel by renewable biomass with reasonable costs and maximum efficiencies. Applicants in existence on or before June 18, 2008 with more than 24 months of actual operating data must provide data for the most recent 24-month period. Applicants in existence on or before June 18, 2008 with less than 24 months of actual operating data must provide 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm. All applicants must submit the information specified in paragraphs (c)(1) through (9) of this section as part of their application package.

(1) *Contact data.* Contact information for the primary technical contact for the biorefinery.

(2) *Biorefinery data.* Basic information on facility operations over time (hours/day, days/year).

(3) *Electric use data.* Information on existing electric service to the facility, data on consumption, peak and average demand, and monthly/seasonal use patterns.

(4) *Fuel use data.* Information on natural gas and current fuel use for boilers and heaters, including fuel type, costs, and use patterns.

(5) *Thermal loads.* Information on existing thermal loads, including type (steam, hot water, direct heat), conditions (temperature, pressure) and use patterns.

(6) *Existing equipment.* Information on existing heating and cooling equipment, including type, capacities, efficiencies and emissions.

(7) *Site-specific data.* Information on other site-specific issues, such as expansion plans or neighborhood considerations that might impact the proposed new system design or operation; or environmental impacts.

(8) *Biofuel production.* Information on liquid biofuel production (gallons/year).

(9) *Feasibility study.* The applicant must submit a feasibility study by an independent qualified consultant, which has no financial interest in the biorefinery, and demonstrates that the renewable biomass system of the biorefinery is feasible, taking into account the economic, technical and environmental aspects of the system. The feasibility study must include the components specified in paragraphs (c)(9)(i) through (x) of this section.

(i) An executive summary, including resume of the consultant, and an introduction/project overview (brief general overview of project location, size, *etc.*).

(ii) An economic feasibility determination, including:

(A) Information regarding the project site;

(B) Information on the availability of trained or trainable labor; and

(C) Information on the availability of infrastructure and rail and road service to the site.

(iii) A technical feasibility determination, including a report that:

(A) Is based upon verifiable data and contains sufficient information and

analysis so that a determination may be made on the technical feasibility of achieving the levels of energy production that are projected in the statements. The report must provide the information in a format that is responsive to the scoring criteria specified in § 4288.21(b)(1) through (5) and applicants should identify in their report the information that corresponds to each of the scoring criteria; and

(B) Identifies and estimates project operation and development costs and specifies the level of accuracy of these estimates and the assumptions on which these estimates have been based.

(iv) A financial feasibility determination that discusses the following:

(A) The reliability of the financial projections and assumptions on which the project is based including all sources of project capital, both private and public, such as Federal funds;

(B) Projected balance sheets and costs associated with project operations;

(C) Cash flow projections for 3 years;

(D) The adequacy of raw materials and supplies;

(E) A sensitivity analysis, including feedstock and energy costs, product/co-product prices;

(F) Risks related to the project; and

(G) The continuity, maintenance and availability of records.

(v) A management feasibility determination.

(vi) Recommendations for implementation.

(vii) The environmental concerns and issues of the system.

(viii) The availability of feedstock, including discussions of:

(A) Feedstock source management;

(B) Estimates of feedstock volumes and costs;

(C) Collection, pre-treatment, transportation, and storage; and

(D) Impacts on existing manufacturing plants or other facilities that use similar feedstock.

(ix) The feasibility/plans of project to work with producer associations or cooperatives including estimated amount of annual feedstock from those entities.

(x) Documentation that any and all woody biomass feedstock cannot be used as a higher value wood-based product.

§ 4288.21 Application review and scoring.

The Agency will evaluate projects based on the cost, cost-effectiveness, and capacity of projects to reduce fossil fuels. The cost of the project will be taken into consideration in the context of each project's ability to economically produce energy from renewable biomass to replace its dependence on fossil fuels. Projects with higher costs that are less efficient will not score well. The scoring criteria are designed to evaluate projects on simple payback as well as the percentage of fossil fuel reduction.

(a) *Review.* The Agency will evaluate each application and make a determination as to whether the applicant is eligible, whether the proposed project is eligible, and whether the proposed payment request complies with all applicable statutes and regulations. This evaluation will be conducted by experts in the Agency and other Federal agencies, including the U.S. Department of Energy based on the information provided by the applicant. Submission of an application neither reserves nor ensures payments.

(b) *Scoring.* The Agency will score each application in order to prioritize each proposed project. The maximum number of points awardable to any applicant will be 100. The evaluation criteria that the Agency will use to score these projects are specified in paragraphs (b)(1) through (5) of this section.

(1) *Cost-effectiveness.* Cost-effectiveness will be scored based on the anticipated return on investment (ROI). Anticipated ROI will be demonstrated by calculating documented base energy use costs for the 24-month period prior to submission of the application or at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

(i) ROI is equal to the simple payback period.

- ROI = C/S; where C = capital expenses; and S = savings in annual operating costs.

Example: Capital expenses, including handling equipment, biomass boiler, piping improvements and plant modifications, are equal to $5,300,500. The annual difference in fossil fuel cost versus the cost for renewable biomass is $990,500. Assume these costs and uses are based on a yearly operating cycle, which may include handling, storage and treatment costs. In this example, C = $5,300,500; S = $990,500; ROI = 5.35 years (C/S = ROI).

(ii) A maximum of 20 points will be awarded as follows:

(A) If the anticipated ROI is more than two years, but less than or equal to four years, award up to 20 points.

(B) If the anticipated ROI is greater than four years but less than or equal to six years, award up to 10 points.

(C) If the anticipated ROI will be greater than six years, award 0 points.

(2) *Percentage of reduction of fossil fuel use.* The anticipated percent reduction in the use of fossil fuels will be measured using the same evidence provided by the applicant for measuring cost-effectiveness. However, this set of criteria will measure actual fossil fuel use for the 24-month period prior to submission of the application or for at least 12 months of data supported by engineering and design calculations, and site plans, prepared by the construction engineering firm.

Note: The intent of this program is to assist eligible biorefineries to use renewable biomass and move away from fossil fuels including but not limited to: propane, coal, oil, and natural gas. Most sources of electric generation are derived from fossil fuel, and the program takes that into account in evaluating the content of electric power consumed by an applicant. All fossil fuel use, for thermal loads as well as for electric use, will be evaluated by using information provided by the Energy Information Agency (EIA). The Agency will determine the percentage reduction of fossil fuel use based on and in cooperation with the applicant's submission of electric power provider contracts, power agreements, and utility billings in relation to available information from the EIA. A maximum of 35 points will be awarded as follows:

(i) Applicant demonstrates an anticipated reduction in fossil fuel use of 100 percent, award 35 points.

(ii) Applicant demonstrates an anticipated reduction in fossil fuel use of at least 80 percent but less than 100 percent, award 25 points.

(iii) Applicant demonstrates an anticipated reduction in fossil fuel use of at least 60 percent but less than 80 percent, award 15 points.

(iv) Applicant demonstrates an anticipated reduction in fossil fuel use of at least 40 percent but less than 60 percent, award 5 points.

(v) Applicant demonstrates an anticipated reduction in fossil fuel use of less than 40 percent, award 0 points.

(3) *Renewable biomass factors.* If an applicant demonstrates that it has 100 percent control, via on-site or contractual commitments, over its feedstock at the time of application for the repowering project for at least 3 years, 10 points will be awarded. If an applicant cannot demonstrate this, no points will be awarded.

(4) *Technical review factors.* Technical reviews will be conducted by a team of experts, including rural energy coordinators and State engineers. The Agency may engage the services of other government agencies or other recognized industry experts in the applicable technology field, at its discretion, to evaluate and rate the application. Each section of the technical review will be scored within a range of possible points available within that section. A maximum of 25 points will be awarded as follows:

(i) *Qualifications of the applicant's project team.* The applicant must describe the qualifications of those individuals who will be essential to successful performance of the proposed project. This will include information regarding professional credentials, relevant experience, and education, and must be supported with documentation of service capabilities, professional credentials, licenses, certifications, and resumes, as applicable. Award 0–5 points.

(ii) *Agreements and permits.* The applicant must describe the agreements and permits necessary for project implementation. An Agency-acceptable schedule for securing the required documents and permits must be provided. Award 0–3 points.

(iii) *Design and engineering.* The applicant must describe the design, engineering, and testing needed for the proposed project. The Design and Engineering documents shall demonstrate that they meet the intended purpose, ensure public safety, and comply with all applicable laws, regulations, agreements, permits, codes, and standards. Award 0–5 points.

(iv) *Project development schedule.* The applicant must provide a detailed plan for project development including a proposed schedule of activities, a description of each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through to successful completion. This description must address the applicant's project development cash flow requirements. Award 0–3 points.

(v) *Equipment procurement.* The applicant must describe the equipment needed, and the availability of the equipment needed, to complete installation and activation of the new system. The description supports that the required equipment is available, and can be procured and delivered within the proposed project development schedule. Award 0–3 points.

(vi) *Equipment installation.* The applicant must provide a satisfactory description of the plan for site development and system installation that reflects the soundness of the project plan. Award 0–3 points.

(vii) *Operations and maintenance.* The applicant must describe the operations and maintenance requirements of the system necessary for the system to operate as designed and provide the savings and efficiencies as described. The description and requirements noted must be supportable by the technical review. Award 0–3 points.

(5) *Liquid transportation fuels.* If the biorefinery primarily produces liquid transportation fuels, award 10 points.

§ 4288.22 Ranking of applications.

All scored applications will be ranked by the Agency as soon after the application deadline as possible. The Agency will consider the score an application has received compared to the scores of other applications in the priority list, with higher scoring applications receiving first consideration for payments.

(a) *Selection of applications for payments.* Using the application scoring criteria point values specified in § 4288.21 of this subpart, the Agency will select applications for payments. The Agency will notify, in writing, all applicants whose applications have been selected for payments. Applicants whose applications have not been selected for payments will be notified in writing, with a brief explanation as to why.

(b) *Availability of funds.* If, after the majority of applications have been considered, insufficient funds remain to pay the next highest scoring application, the Agency may elect to pay a lower scoring application. Before this occurs, the Agency will provide the applicant of the higher scoring application the opportunity to reduce the amount of its payment request to the amount of funds available. If the applicant agrees to lower its payment request, it must certify that the purposes of the project can be met, and the Agency must determine the project is feasible at the lower amount.

§ 4288.23 Program payment provisions.

The procedure the Agency will use to make payments to eligible biorefineries is specified in paragraphs (a) through (f) of this section.

(a) *Payment applications.* To request payments under this program during a FY, an eligible biorefinery must:

(1) Submit Form RD 4288–6, "Repowering Assistance Program-Payment Request."

(i) Upon completion of the project or project improvements, the first payment will not exceed 20 percent of the project award. Subsequent semiannual payments will be paid based on actual measured renewable biomass energy production at a rate of 50 cents per million British thermal units (MMBTUs), up to the limit of the award.

(ii) After processing an initial payment, additional payments may be processed semiannually with the submission of Form RD 4288–6. This form must be accompanied by measurement and verification records including metered data demonstrating displacement of fossil fuel use from the conversion to renewable biomass. Payment will be at the rate of 50 cents per MMBTU up to and until the project payment limit has been reached.

(2) Certify that the request is accurate.

(3) Furnish the Agency such certifications as required in RD Form 4288–4 Part C, and access to records that verify compliance with program provisions.

(4) Provide documentation, as requested by the Agency, regarding the production of usable energy at the biorefinery during the relevant payment period. Approved documentation for payment and verification of energy production from renewable biomass must include the following:

(i) Metered data documenting the production of heat, gas and power must be obtained utilizing an Agency approved measurement device.

(ii) Metered data must be verifiable and subject to independent calibration testing.

(iii) Receipts for drop shipments of and use of renewable biomass on RD Form 4288–6 Part C(3) for the corresponding period in which payments are requested. Payment requests must also present the current utility billing data from the same utilities used in the base energy use period for the corresponding payment request period.

(b) *Clarifying information.* After semiannual payment applications are submitted, eligible biorefineries may be required to submit additional supporting clarification if their original submittal is not sufficient to verify eligibility for payment.

(c) *Notification.* The Agency will notify the biorefinery, in writing, whenever the Agency determines that a payment request is ineligible and why the request was determined ineligible.

(d) *Payment adjustments.* The Agency may make adjustments to payments otherwise payable to the biorefinery if it finds there is a difference between the quantity of fossil fuel actually replaced by renewable biomass and the quantity certified to in a payment request.

(e) *Refunds and interest payments.* An eligible biorefinery that has received a payment under this program may be required to refund such payment as specified in paragraphs (e)(1) through (5) of this section.

(1) An eligible biorefinery receiving payment under this program will become ineligible for payments if the Agency determines the producer has:

(i) Made any material fraudulent representation; or

(ii) Misrepresented any material fact affecting a program determination.

(2) All payments made to a biorefinery determined by the Agency to be ineligible must be refunded to the Agency with interest and other such sums as may become due, including, but not limited to, any interest, penalties, and administrative costs, as determined appropriate under 31 CFR 901.9.

(3) When a refund is due, it must be paid promptly. If a refund is not made promptly, the Agency may use all remedies available to it, including Treasury offset under the Debt Collection Improvement Act of 1996, financial judgment against the biorefinery, and sharing information with the Department of Justice.

(4) Late payment interest will be assessed on each refund in accordance with provisions and rates as determined by the Agency.

(i) Interest charged by the Agency under this program will be at the rate established annually by the Secretary of the U.S. Treasury pursuant to 31 U.S.C. 3717. Interest will accrue from the date payments were received by the biorefinery to the date of repayment, and the rate will adjust in accordance with applicable regulations.

(ii) The Agency may waive the accrual of interest and/or damages if the Agency determines that the cause of the erroneous determination was not due to any fraudulent action of the biorefinery.

(5) Any biorefinery or person receiving payment under this program will be jointly and severally liable for any refund or related charges due under this program.

(f) *Remedies.* The remedies provided in this subpart will be in addition to other civil, criminal, or administrative remedies that may apply.

§ 4288.24 Succession and control of facilities and production.

Any party obtaining a biorefinery that is participating in this program must request permission to participate in this program as a successor. The Agency may grant such request if it is determined that, the party is eligible, and permitting such succession would serve the purposes of the program. If appropriate, the Agency will require the consent of the previous party to such succession. Also, the Agency may terminate payments and demand full refund of payments made if a party loses control of a biorefinery whose production of heat or power from renewable biomass is the basis of a program payment, or otherwise fails to retain the ability to assure that all program obligations and requirements will be met.

§§ 4288.25–4288.100 [Reserved]

Dated: April 5, 2010.

Judith A. Canales,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 2010–8283 Filed 4–15–10; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

7 CFR Part 4288

RIN 0570–AA75

Subpart B—Advanced Biofuel Payment Program

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Business-Cooperative Service (Agency) is proposing to establish a payment program for producers of advanced biofuels to support existing advanced biofuel production and to encourage new production of advanced biofuels. The Agency would enter into contracts with advanced biofuel producers to pay such producers for the production of eligible advanced biofuels. To be eligible for payments, advanced biofuels must be produced from renewable biomass, excluding corn kernel starch, in a biorefinery located in the United States.

DATES: Written comments on the proposed rule must be received on or before May 17, 2010. The comment period for the information collection under the Paperwork Reduction Act of 1995 continues through June 15, 2010.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.
- *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

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

FOR FURTHER INFORMATION CONTACT: Diane Berger, USDA Rural Development, 1400 Independence Ave., SW., Room 6865, STOP 3225, Washington, DC 20250. Telephone: (202) 260–1508. Fax: (202) 720–2213. E-mail: *diane.berger@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This proposed rule has been reviewed under Executive Order (EO) 12866 and has been determined to be economically significant by the Office of Management and Budget. The EO defines a "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this EO.

The Agency conducted a benefit-cost analysis to fulfill the requirements of Executive Order 12866. The Agency has identified potential benefits to the advanced biofuel producer and to the Agency. While unable to quantify any costs or benefits associated with this rulemaking, the Agency believes that the overall effect of the rule may be beneficial.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act 1995 (UMRA) of Public Law 104–4 establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, Rural Development generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or Tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires Rural Development to identify and consider a reasonable number of

regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and Tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

National Environmental Policy Act/ Environmental Impact Statement

This renewable energy program under Title IX of the 2008 Farm Bill has been operated on an interim basis through the issuance of a Notice of Contract Proposal (NOCP). During this initial round of applications, the Agency conducted National Environmental Policy Act (NEPA) reviews on each individual application for funding. No significant environmental impacts were reported. As expected, these applications were not from any concentrated grouping of applicant facilities, but represented a wide variety of applicants for a diverse range of renewable energy proposals. Taken collectively, the applications show no potential for significant adverse cumulative effects.

The Agency is preparing a programmatic environmental assessment (PEA), pursuant to 7 CFR subpart 1940–G, to analyze the environmental effects to air, water, and biotic resources; land use; historic and cultural resources, and greenhouse gas emissions affected by the Section 9005 proposed rule. The purpose of the PEA is to assess the overall environmental impacts of the programs related to the Congressional goals of advancing biofuels production for the purposes of energy independence and green house gas emission reductions. The impact analyses will be national in scope but will draw upon site-specific data from advanced biofuel facilities funded under Sections 9003, 9004, and 9005 NOFA's (or NOCP's) for FY 2008 and/or FY 2009 as reasonable assumptions for the types of facilities, feedstocks, and impacts likely to be funded under the proposed rulemaking for FY 2010–FY 2012. Site-specific NEPA documents prepared for those facilities funded under Sections 9003 and 9004 in FY 2008 and/or 2009 will be utilized, as well, to forecast likely impacts under the proposed rules. Qualitative analyses of likely programmatic impacts beyond the FY 2012 program expiration date will be provided, as appropriate. The draft PEA will be made available to the public for comment on the USDA Rural Business Service's Web site by May 3, 2010, and all comments will be addressed as part of any revision of the PEA, or prior to the publication of any Finding of No Significant Impact (FONSI).

Executive Order 12988, Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. In accordance with this rule: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given this rule; and (3) administrative proceedings in accordance with the regulations of the Department of Agriculture's National Appeals Division (7 CFR part 11) must be exhausted before bringing suit in court challenging action taken under this rule unless those regulations specifically allow bringing suit at an earlier time.

Executive Order 13132, Federalism

It has been determined, under Executive Order 13132, Federalism, that this proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in the proposed rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–602) (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have an economically significant impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

In compliance with the RFA, Rural Development has determined that this action will not have an economically significant impact on a substantial number of small entities. Rural Development made this determination based on the fact that this regulation only impacts those who choose to participate in the Program. Small entity applicants will not be affected to a greater extent than large entity applicants.

The entities affected by the Program are biorefineries. The Agency received approximately 180 applications in fiscal year 2009, and approved 160 entities for participation. In assessing whether these entities are small businesses, the Agency notes that there is no unique Small Business Administration (SBA) definition for biorefineries, because biorefineries are found in a number of North American Industry Classification System (NAICS) codes. The majority of existing biorefineries produce biodiesel, and for these biorefineries, the small business definition is 1,000 employees. Based on Agency experience and in-house knowledge of the fiscal year 2009 applicants and using 1,000 employees as the definition of small business, the majority of biorefineries applying in fiscal year 2009 would be classified as small businesses. The Agency expects this to continue to be true as the Program continues.

The average cost to a biorefinery to participate in the Program is estimated to be approximately $500. This cost is not expected to impose an economically significant impact on these small entities. Because of this minimal cost, the Agency does not believe that the cost of applying and participating will dissuade a small business from seeking to participate in this program. Further, biorefineries are expected to realize more in payments than in costs for participating in the program. Thus, participating biorefineries will be able to recoup this expense, although small biorefineries are likely to take longer to recoup the expense because they will be producing less advanced biofuel. Also, this regulation only affects biorefineries that choose to participate in the program. Lastly, the program is open to all eligible producers.

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

The regulatory impact analysis conducted for this proposed rule meets the requirements for Actions Concerning Regulations That Significantly Affect Energy Supply Distribution and Use, Executive Order No. 13211, which states that an agency undertaking regulatory actions related to energy supply, distribution, or use is to prepare a Statement of Energy Effects. This analysis does not find that this proposed rule will have any adverse impacts on energy supply, distribution or use.

Section 9005 payments will be made to existing biorefineries. These payments will likely increase quantities of renewable energy produced from domestic feedstock. While an increase in advanced biofuels will likely displace the use of petroleum-based liquid and gaseous fuels, the volumes supported by

this program will not disrupt U.S. energy supply. On the contrary, increased biofuels from domestic feedstock will diversify transportation fuels in the U.S. and replace petroleum imports. Replacing imported petroleum with biofuels from domestic feedstock will reduce the risk of potential disruption in supply or spike in prices from relying on foreign oil imports. The reduction in risks will improve our energy security and stabilize our energy supply.

In sum, because the regulatory impacts analysis does not find that this proposed rule will have any adverse impacts on energy supply, distribution or use, a Statement of Energy Effects was not prepared.

Executive Order 12372, Intergovernmental Review of Federal Programs

This Program is not subject to Executive Order 12372, Intergovernmental Review of Federal Programs, because the Program involves no construction and therefore no mitigation or planning activities are involved.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This executive order imposes requirements on Rural Development in the development of regulatory policies that have Tribal implications or preempt Tribal laws. Rural Development has determined that the proposed rule does not have a substantial direct effect on one or more Indian Tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and the Indian Tribes. Thus, the proposed rule is not subject to the requirements of Executive Order 13175.

Programs Affected

This Program is listed in the Catalog of Federal Domestic Assistance under Number 10.867.

Paperwork Reduction Act

The information collection requirements contained in the Notice of Funding Availability for the Section 9005 Advanced Biofuels Payments Program published on June 12, 2009, were approved by the Office of Management and Budget under emergency clearance procedures and assigned OMB Control Number 0570–0057. As noted in the June 12, 2009 notice, the Agency sought emergency clearance to comply with the time frames mandated by a Presidential Memorandum in order to implement the Program as quickly as possible, and that providing for public comment under the normal procedure would unduly delay the provision of benefits associated with this Program and be contrary to the public interest. Now, however, in accordance with the Paperwork Reduction Act of 1995, the Agency is seeking OMB approval for three years of the reporting and recordkeeping requirements contained in this proposed rule and hereby opens a 60-day public comment period.

Title: Advanced Biofuels Producer Payment Program.

Type of Request: New collection.

Abstract: Rural Development is providing payments to eligible producers of advanced biofuels to support and ensure an expanding production of advanced biofuels.

The collection of information is vital to Rural Development to make wise decisions regarding the eligibility of advanced biofuels producers and their products in order to ensure compliance with the provisions of this Program and to ensure that the payments are made to eligible producers and advanced biofuels and is necessary in order to implement this Program.

Advanced biofuel producers seeking to participate in the Program must enroll in the Program by submitting an Agency-approved application. This application requires the advanced biofuel producer to provide information on the applicant; the applicant's biorefineries at which the advanced biofuels are produced, including location and quantities produced and a description of the business; the types and quantities of renewable biomass feedstock being used to produce the advanced biofuels; and the amount of eligible advanced biofuels produced at each biorefinery in the 12 months prior to the first day of the sign-up period for the fiscal year for which the annual application is being submitted. Applicants are also required to submit documentation to support the amount of eligible advanced biofuels reported in the form and to certify the information provided, including that the advanced biofuels are eligible advanced biofuels and that the renewable biomass feedstock used to produce the advanced biofuels are eligible biomass feedstock. Applicants must submit authoritative evidence documenting production of advanced biofuels, and the eligibility of the advanced biofuels.

The information contained in the application will be used by the Agency to determine whether the advanced biofuel producer is eligible to participate in the Program and whether the advanced biofuel being produced is eligible for payments under the Program. The same Agency-approved application form will also be used by the Agency to sign-up advance biofuel producers in subsequent fiscal years (FY) and to obtain information to help determine payment rates.

Before being accepted into the Program, the advanced biofuel producer must also furnish the Agency all required certifications, as applicable, and furnish access to the advanced biofuel producer's records required by the Agency to verify compliance with program provisions. The required certifications, which must be completed and provided by an accredited independent third party, depend on the type of biofuel produced.

Once an advanced biofuel producer has been approved to participate in the Program, the producer and the Agency enter into an Agency-approved contract. All contracts will be reviewed at least annually to ensure compliance with the contract and ensure the integrity of the program.

Once the contract is signed, the advanced biofuel producer will submit, preferably on a quarterly basis, an Agency-approved form to request payment. This form requires the advanced biofuel producer to provide information on the types and quantities of advanced biofuels produced in each quarter and on the types and quantities of renewable feedstock used to produce those advanced biofuels. In addition, the advanced biofuel producer will report cumulative production of advanced biofuels and the use of renewable biomass feedstock for all advanced biofuel biorefineries. The information for each advanced biofuel biorefinery is to be provided cumulatively and on an individual advanced biofuel biorefinery basis. This information is required in order for the Agency to determine the payments to be made to the eligible producers each quarter and to track the quantities of advanced feedstock for which payments have been made.

The following estimates are based on the average over the first three years the Program is in place.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.8 hour per response.

Respondents: Advanced biofuels producers.

Estimated Number of Respondents: 302.

Estimated Number of Responses per Respondent: 9.4.

Estimated Number of Responses: 2,842.

Estimated Total Annual Burden (hours) on Respondents: 2,273.

Copies of this information collection may be obtained from Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250–0742 or by calling (202) 692–0043.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of Rural Development, including whether the information will have practical utility; (b) the accuracy of the new Rural Development estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Cheryl Thompson, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250. All responses to this proposed rule will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

E-Government Act Compliance

Rural Development is committed to complying with the E-Government Act, to 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.

I. Background

Rural Development administers a multitude of Federal programs benefitting rural America, ranging from housing and community facilities to infrastructure and business development. Its mission is to increase economic opportunity and improve the quality of life in rural communities by providing leadership, infrastructure, venture capital, and technical support that can support rural communities, helping them prosper.

To achieve its mission, Rural Development provides financial support (including direct loans, grants, and loan guarantees) and technical assistance to help enhance the quality of life and provide a support for economic development in rural areas. The Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) contains several sections under which Rural Development will provide financial assistance for the production and use of biofuels. This proposed rule addresses Section 9005 of the 2008 Farm Bill, which authorizes the Secretary of Agriculture to "make payments to eligible producers to support and ensure an expanding production of advanced biofuels" by entering into contracts for the production of advanced biofuels to both support existing advanced biofuel production and encourage new production.

Section 9005 of the Farm Security and Rural Investment Act of 2002 as added by the Food Conservation and Energy Act of 2008, authorizes the Secretary of Agriculture to "make payments to eligible producers to support and ensure an expanding production of advanced biofuels" by entering into contracts for the production of advanced biofuels to both support existing advanced biofuel production and encourage new production. To be eligible for payments, advanced biofuels produced must be derived from renewable biomass, excluding corn kernel starch, in a biorefinery located in the United States.

Under the proposed rule, the sign-up period for new and current producers of advanced biofuels is October 1 to October 31 of the fiscal year for which payment is sought, unless otherwise announced by the Agency in a **Federal Register** notice. An executed contract remains valid until the end of the program (September 30, 2012), or terminated by either the Agency or participating party. All contracts will be reviewed at least annually to ensure compliance with the contract and ensure the integrity of the program. Applicants will update production amounts annually during the solicitation process.

Payment rates under the proposed rule are determined based on the size of the facility and whether production is "base" or "incremental." Base production is defined as a facility's existing level of production; any subsequent production that is in excess of the base amount is considered to be incremental. Under the proposed rule, to encourage more production of advanced biofuels, the payment rate for the incremental production will be five times greater than the payment rate for base production. The proposed rule provides that the base and incremental rates will be calculated on a British Thermal Unit basis.

The Agency is also considering an approach to offer different payment rates based on their lifecycle greenhouse gas (GHG) emissions. This approach would offer a significantly higher payment rate for biofuels that are demonstrated to significantly reduce GHGs emissions relative to the conventional fuels that they replace; biofuels that do not demonstrate significant GHG reductions would receive the lower payment rate. For example, in the case of liquid biofuels, fuels that have been certified as advanced biofuels, cellulosic biofuels, or bio-based diesel under EPA's Renewable Fuels Standard achieve lifecycle GHG reductions of at least 50 percent relative to conventional liquid fuels and so would qualify for the higher payment rate. We request comments on this approach as an alternative to the proposed rule text, including comments on how such an alternative should be drafted to best address the goal of lifecycle GHG reductions. Please provide analytical support for comments provided in response to this request.

Because there is no limit on the number of advanced biofuels producers that enter this program, the actual payment rates will be determined based on the number of eligible applications received each year.

Consistent with the authorizing legislation, the goal of this program is to encourage the expansion of the country's production capacity of advanced biofuels. To help meet this goal, the program would be open to all producers of advanced biofuels given the difficulty of determining the types or technologies that will ultimately create the foundation of this industry at this early stage of development of the industry. In addition, given that the biofuels industry is very capital intensive, the Agency is proposing multi-year contracts to enable advanced biofuels producers the assurance of a multi-year revenue stream. This approach is consistent with the goal of creating a stable industry. Finally, the Agency is proposing a two-tiered payment approach under which incremental production is paid at a significantly higher rate than base production in order to balance the interests of encouraging new production while providing stability to existing production. With respect to all of these points, the Agency welcomes feedback from the public during the comment period.

The Agency views this program in conjunction with its other renewable

energy programs in the context of an overall Federal renewable energy strategy. The goal of this strategy is to foster the development of a strong, expanding, and economically sustainable group of renewable energy industries in the United States to supply an increasing share of the country's energy needs. The success of these industries will depend on their ability to produce energy sources that meet the demands of the country's energy markets. These markets are driven by a number of factors including the price of oil and other fossil fuels, developments in technologies, the acceptance of the public, the capacity of distribution systems, and the impact of government regulation such as the renewable fuels standard.

The Advanced Biofuels Payment Program is one part of Rural Development's contribution to the Department of Agriculture's renewable energy efforts that support the overall Federal renewable energy strategy. This program provides stability and incentives to maintain and grow the advanced biofuels industry.

The development of the advanced biofuels industry will take a strong partnership between the Federal government and the private sector to generate the capital needed to construct and operate these facilities to meet the future energy needs of the country. This program provides funding stability that will assist these advanced biofuels producers to attract the private capital they need to continue expansion of this industry.

II. Discussion of Proposed Rule for Advanced Biofuel Payment Program

On June 12, 2009, the Agency published a Notice, Contract Proposal for Payments to Eligible Advanced Biofuel Producers [74 FR 27998]. (This Notice is referred to in this preamble as the Section 9005 NOCP.) While the Section 9005 NOCP provided requirements for participation in Fiscal Year 2009, most of its provisions are applicable to Fiscal Year 2010 and beyond and, thus, have been carried forward into this proposed rule.

This section describes the Advanced Biofuel Payment Program, first by presenting a brief overview of how the Program will work, then by the overall organization of the Program, and lastly by presenting a section-by-section description. In developing this Program, the Agency relied heavily on the predecessor Bioenergy Program (7 CFR Part 1424), although there are some differences between the two programs. For example, under the Bioenergy Program, payments were made for the production of ethanol and biodiesel from eligible commodities including, but not limited to, barley; corn; grain sorghum; oats; rice; wheat; soybeans; switchgrass; fats, oils, and greases (including recycled fats, oils and greases) derived from an agricultural product; and any animal byproduct. In contrast, under the Section 9005 Program, payments will be made to producers of advanced biofuel and biogas, which is fuel derived from renewable biomass, other than corn kernel starch (cellulose, hemicellulose, or lignin, sugar and starch; waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste; vegetable oil and animal fat, *etc.*). Another example is that the Section 9005 Program requires the biorefinery to have at least 51 percent U.S. ownership; the Bioenergy Program did not have this requirement.

By relying on this predecessor program, the Agency believes that the proposed Advanced Biofuel Payment Program is within the guidance of its authorizing statute and will facilitate participation from those producers already familiar with the Bioenergy Program.

A. Program Overview

As noted earlier in this preamble, the Section 9005 Program will make payments to eligible producers for the production of eligible advanced biofuels. Participation in the Program requires advanced biofuel producers to follow the following three steps:

1. Producers submit form RD 4288–1, "Advanced Biofuel Payment Program Annual Application" along with applicable permits, registrations *etc.* Currently, the application form requires the producer to complete the base amount and project the incremental amount for the fiscal year.

2. If the producer meets the eligibility requirements, a contract (form RD 4288–2) will be issued. An executed contract remains valid until the end of the program (September 30, 2012), or until terminated by either the Agency or participating party. The Agency will review all contracts at least annually to ensure compliance with the contract and ensure the integrity of the program.

3. The producer must submit form RD 4288–3, "Advanced Biofuel Payment Program—Payment Request" with documentation verifying the actual amount produced.

Therefore, each fiscal year, current, participating producers complete steps 1 and 3 above. If a producer is new to the Program, the producer must complete steps 1 through 3. The sign-up period for both new and current participating producers is October 1 to October 31 of the fiscal year for which payment is sought, unless otherwise announced by the Agency in a **Federal Register** notice.

Each fiscal year, the Agency will notify each eligible applicant of the program payment the applicant may expect to receive for that fiscal year. A producer will only be paid for the advanced biofuels identified in the application submitted during the sign-up period and which are actually produced during the fiscal year. If the producer starts producing a new advanced biofuel or changes the type of advanced biofuel during the fiscal year, the producer will not receive any payments for those new advanced biofuels. However, during each sign-up period, a producer can identify new advanced biofuels and production levels compared to the previous year.

To ensure compliance with the Section 9005, the Agency will conduct a number of oversight and monitoring activities, including site visits and records review. By conducting such activities, the Agency will be verifying production and feedstock eligibility, the portion of the advanced biofuel eligible for payment, and certificate of analyses records. If the Agency discovers any misrepresentation or fraud by a producer, it may suspend payment, terminate the contract, or debar the producer from participation in any Federal program.

B. Overall Organization of the Advanced Biofuel Payments Program Rule

The proposed Advanced Biofuel Payment Program is divided into four sets of sections, which are described in the following paragraphs.

General Provisions. This set of sections in Subpart B of Part 4288 of title 7 of the CFR (hereafter referred to as Subpart B) contains provisions general to the administration of the Advanced Biofuel Payment Program. It covers the purpose and scope of the Program (§ 4288.101), definitions (§ 4288.102), reviews and appeals (§ 4288.103), compliance with other Federal, State, and local laws (§ 4288.104), oversight and monitoring (§ 4288.105), forms, regulations, and instructions (§ 4288.106), and exception authority (§ 4288.107).

Eligibility Provisions. This set of sections of Subpart B contains provisions addressing the eligibility of applicants (§ 4288.110) and biofuels (§ 4288.111), and the notification process that the Agency will use to inform the public of its eligibility

decisions (§ 4288.112). This section concludes with requirements for records required to document payment requests (§ 4288.113).

Enrollment Provisions. This set of sections contains the provisions associated with enrolling in the Program (§ 4288.120) and on contracts and their termination (§ 4288.121). Figure 1 illustrates the basic steps for initially enrolling in the Program.

Payment Provisions. This set of sections contains the provisions associated with applying for and receiving payments under the Program. Figure 2 illustrates the basic steps for payment applications. Section 4288.130 covers payment application provisions, while §§ 4288.131 through 4288.136 cover procedures associated with determining payment amounts and adjustments, payment liability, refunds and interest payments, unauthorized assistance and offsets, and remedies. This section concludes with provisions addressing the succession and transfer of ownership of biorefineries participating in the Program (§ 4288.137).

There is no competition for available funding. Assistance is based on total requests received and funding available. Each eligible applicant will receive a pro rata share of available funding based on the applicant's production compared to the total production for all eligible applicants.

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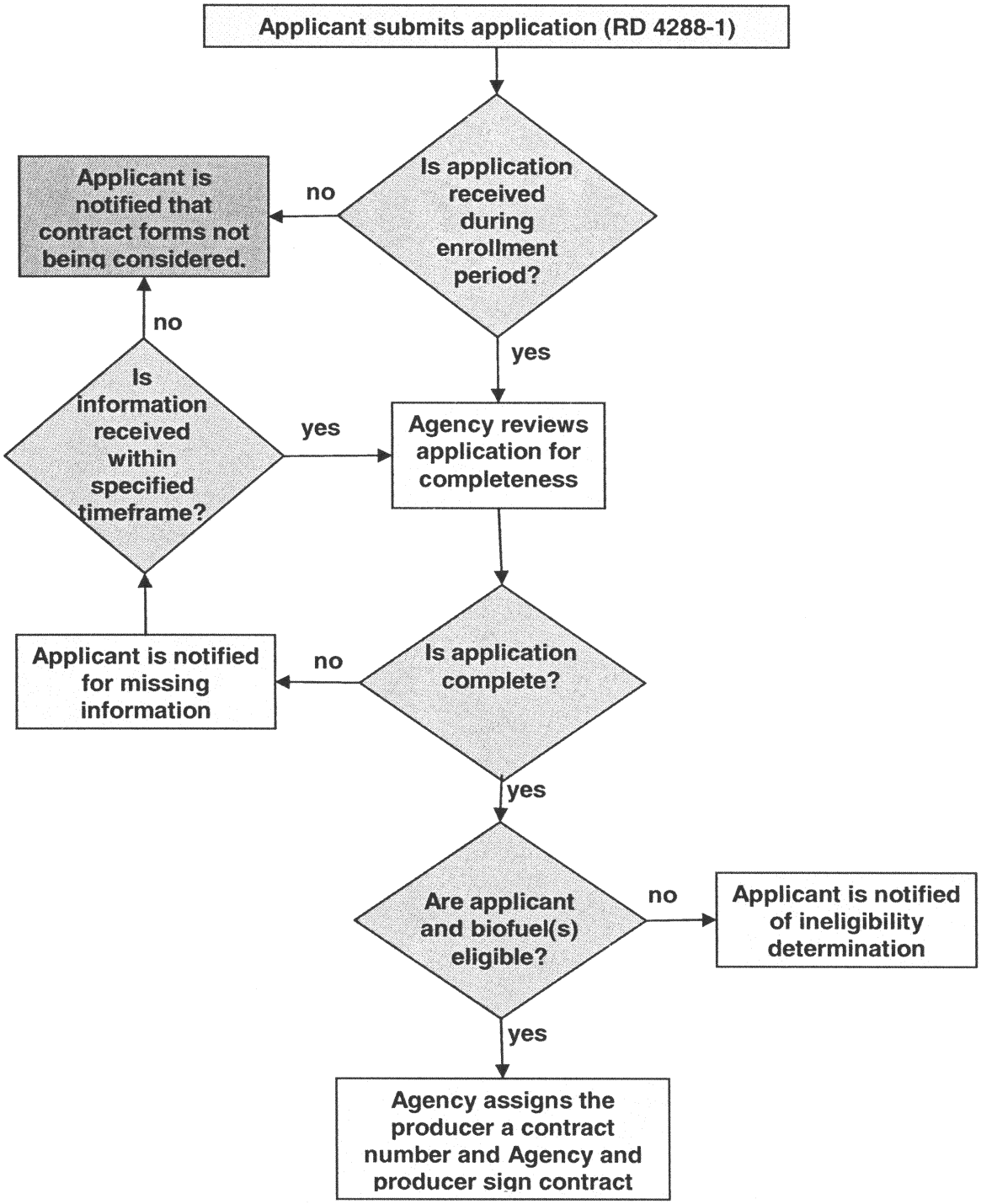

Figure 1. Simplified Initial Enrollment Process

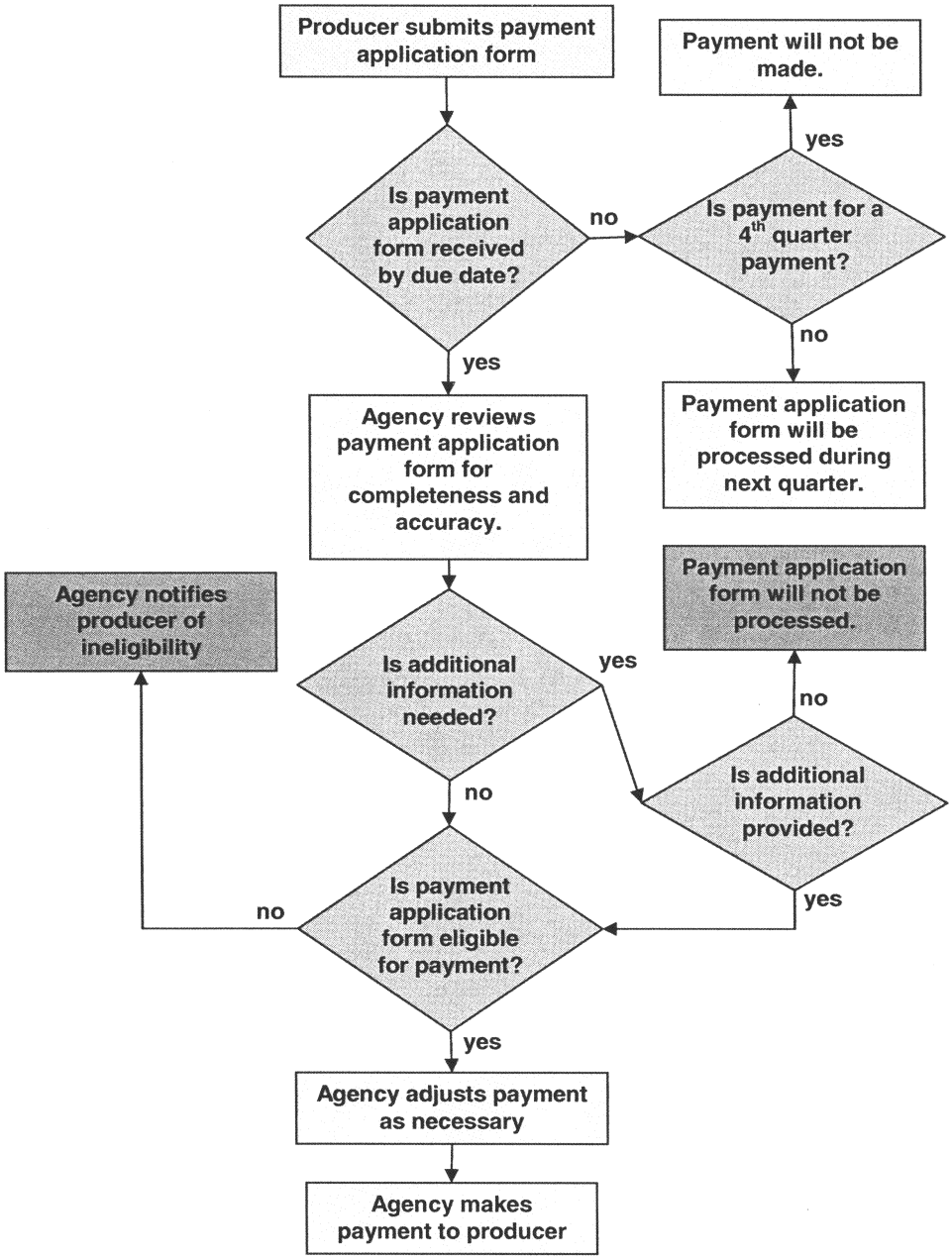

Figure 2. Simplified Payment Application Process

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C. Discussion of Sections

Section A—General Provisions

Purpose and Scope (§ 4288.101)

Paragraph (a) defines the purpose, which is to support and ensure an expanding production of advanced biofuels by providing payments to eligible advanced biofuel producers. Paragraph (b) identifies the scope, which lays out the terms and conditions an advanced biofuel producer must meet in order to obtain payments from the Agency for eligible advanced biofuel production under the Advanced Biofuel Payment Program. This section also states that additional terms and conditions may be provided in the Program contract and the payment agreement prescribed by the Agency.

Definitions (§ 4288.102)

This section presents the definitions used in this subpart B, including terms that are specified in the 2008 Farm Bill. The definitions contained in this section are found in the Section 9005 NOCP, with revisions to the definitions of base production and incremental production necessary to implement the proposed rule and to the definitions for larger producers and smaller producers. As discussed below, there are four key definitions associated with this rule.

Two of the key definitions are advanced biofuel and renewable biomass. Both terms are defined in the Food, Conservation, and Energy Act of 2008.

With regard to the definition of advanced biofuel, the Agency notes that the statute requires payments to be made for "advanced biofuels," which are fuels derived from renewable biomass

(other than corn kernel starch). The Agency understands the definition to apply to solid, liquid, or gaseous fuels that are final products and not to intermediary components or products that are used in the production of the final advanced biofuel product. Therefore, the Agency is proposing that this rulemaking only applies to producers of solid, liquid, or gaseous advanced biofuels that are final products and not to producers of intermediary components and products used in the production of a final advanced biofuel product (*see* § 4288.111(a)(2) and (3)).

In addition, in order to be eligible for payment under this Program, the Agency is proposing that if the advanced biofuel is used on-site, the producer must be able to verify the quantity of advanced biofuel being consumed on-site using an Agency-approved system (*see* § 4288.111(a)(4)).

While many advanced biofuels are used in the transportation market, there are other end use markets for advanced biofuels. For example, biogas can be used for the production of electricity and replacing petroleum-based gases, such as natural gas, for both mobile and stationary uses. It is the Agency's intent to make the Section 9005 program available to all eligible advanced biofuels, regardless of the end use market. The Agency, however, does expect that the majority of advanced biofuels participating in this program would be used as transportation fuels, thus furthering the goals of the Renewable Fuels Standard mandate. Lastly, the Agency notes that the Section 9005 program is different from the REAP because the REAP program is used to construct facilities, which may include biorefineries, and to make energy efficiency improvements, while the Section 9005 program will make payments to producers for the advanced biofuels produced.

With regard to the definition of renewable biomass, the Agency notes that the definition of renewable biomass provides for a wide range of feedstock to be used in the production of advanced biofuel. For example, sunflower seeds can be used to produce long-chain hydrocarbons; algae and jatropha can be used to produce biodiesel; forest mass can be used to produce alcohols and methanol; and switchgrass can be used to produce ethanol. The only feedstock specifically excluded from the statutory definition of advanced biofuels is corn kernel starch. Further, the Agency points out that both second generation (biochemical) advanced biofuels and third generation (thermochemical) advanced biofuels are eligible for participation in the Program.

The third and fourth key definitions are base production and incremental production. As discussed later in this preamble, the Agency is proposing that payments be made based on both a biorefinery's existing level of production and for increases above the biorefinery's existing level of production. This requires the Agency to define a biorefinery's "existing level of production." This is referred to in the rule as the biorefinery's base production.

Base production. For the Section 9005 rule, the Agency is proposing to determine an advanced biofuel biorefinery's base production using one of two methods, as applicable, which are the same as two of the methods found in the Section 9005 (NOCP). These two methods are:

- If the biorefinery has been in existence for 12 months or more prior to the first day of the sign-up period for the fiscal year (*i.e.,* October 1) for which payment under this Program is sought, the biorefinery's base production for the sign-up fiscal year will be equal to the quantity of eligible advanced biofuel produced at the advanced biofuel biorefinery in the 12 months immediately preceding the first day of the sign-up period. For example, for Fiscal Year 2011, the base production for a biorefinery would be the quantity of eligible advanced biofuel produced from October 1, 2009, through September 30, 2010.
- If the biorefinery has been in existence less than 12 months prior to the first day of the sign-up period for the fiscal year for which payment under this Program is sought or if the biorefinery will begin producing on or after October 1 of the sign-up fiscal year, the biorefinery's base production for the sign-up fiscal year will be equal to the quantity projected to be produced by the biorefinery's producer as reported in Form RD 4288–1, "Advanced Biofuel Payment Program Annual Application."

Incremental production. The fourth key definition is incremental production. As proposed, a biorefinery's incremental production is the quantity of eligible advanced biofuel produced at the biorefinery that is in excess of that biorefinery's base production. However, for a biorefinery that has been in existence less than 12 months before October 1 of the sign-up fiscal year or that begins producing eligible advanced biofuels on or after October 1 of the sign-up fiscal year, there is no incremental production; all production for that sign-up fiscal year will be considered base production and the biorefinery's producer would receive payment at the base production payment rate for that fiscal year. In subsequent fiscal years, the advance biofuel producer for such a biorefinery would be eligible for both base and incremental production payments.

Lastly, the Agency is revising the definitions for "larger producers" and "smaller producers" to clarify the calculation of the amount of advanced biofuel a producer is producing. In the NOCP, the determination of whether a producer was a larger producer or smaller producer did not address the situation where a producer owned more than one advanced biofuel biorefinery. In making this calculation, the Agency will determine the refining capacity of an advanced biofuel producer based on the production of advanced biofuel at all of the advanced biofuel biorefineries in which the producer has 50 percent or more ownership.

Review or Appeal Rights (§ 4288.103)

This section provides the legal basis for a person to seek a review of an adverse Agency decision under this subpart. When the Agency makes an adverse decision, a person may seek a review of an Agency decision or appeal to the National Appeals Division in accordance with 7 CFR part 11. This provision is the same as found in the Section 9005 NOCP.

Compliance With Other Laws and Regulations (§ 4288.104)

This section states that advanced biofuel producers must comply with other applicable Federal, State, and local laws including, but not limited to, Equal Employment Opportunity Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, The Age Discrimination Act of 1975, the American with Disabilities Act of 1990, and 7 CFR part 1901, subpart E. This includes collection and maintenance of race, sex, and national origin data of the recipient's employee.

Furthermore, producers must comply with equal opportunity and nondiscriminatory requirements in accordance with 7 CFR 15d. The Agency will not discriminate against an applicant on the basis of race, color, religion, national origin, sex, sexual orientation, marital status, familial status, disability, or age (provided that the applicant has the capacity to contract); on the basis of whether all or part of the applicant's income derives from public assistance program; or whether the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

Oversight and Monitoring (§ 4288.105)

The provisions in this section, which are substantively the same as found in the Section 9005 NOCP, cover how the Agency will enforce the terms of this Program, including site visits (which the Agency will conduct as frequently as necessary to ensure compliance with the provisions of this Program) and examination of records. In order to ensure the integrity of the Program, the Agency reserves the right to verify, as frequently as necessary, all payment applications and subsequent payments made under paragraph (a) of this section. Enforcement of this Program includes, but will not necessarily be limited to, three key Program aspects as described below. The Agency is focusing on these three areas because they are key to ensuring the integrity of the Program.

- *Production and feedstock verification.* The Agency will review producer records to verify the type and amount of biofuel produced and the type and amount of feedstocks used.
- *Blending verification.* The Agency will review the producer's certificates of analysis and feedstock records to verify the portion of the advanced biofuel eligible for payment.
- *Certificate of Analysis.* The Agency will review the producer records to ensure that each certificate of analysis has been issued by a qualified, independent third party.

This section also states that all eligible advanced biofuel producers participating in the Program must make available to the Agency for inspection, at one place and at a reasonable time, all books, papers, records, contracts, scale tickets, settlement sheets, invoices, written price quotations, and other documents related to the Program that is within the control of the producer (§ 4288.105(b)). In addition, these records must be maintained by the producer for not less than three years from each Program payment date. These records are required in order for the Agency to ensure compliance with the Program and that all payments are made appropriately.

Forms, Regulations, and Instructions (§ 4288.106)

This section states that all forms, regulations, instructions, and other materials related to the Program may be obtained from any USDA Rural Development State Office, Rural Energy Coordinator, and the USDA Rural Development Web site at: *http://www.rurdev.usda.gov/rbs/busp/9005Biofuels.htm.* The Agency notes that this link may change in the future.

Exception Authority (§ 4288.107)

This section identifies that condition under which the Administrator may make, on a case-by-case basis, exceptions to any requirement or provision of this subpart. The proposed provisions are the same as found in 7 CFR 4280, subpart B, for the renewable energy systems and energy efficiency improvements program.

Section B—Eligibility

This section addresses the eligibility requirements for advanced biofuel producers and their biofuels, notifications of the Agency's eligibility determinations, and payment record requirements.

Applicant Eligibility (§ 4288.110)

This section identifies the requirements for applicant eligibility and conditions under which an otherwise eligible advanced biofuel producer may be found to be ineligible for participation in the Program. The requirements for applicant eligibility in this section are the same as those in the Section 9005 NOCP, except that the Agency has added provisions to clarify the eligibility of applicants that are subsidiaries and has clarified that public bodies and educational institutions are not eligible for this Program.

To be eligible for this Program, an applicant must be an eligible producer, which is defined as a producer of advanced biofuels (§ 4288.102). This is a statutory requirement. Any applicant that generates biogas from an anaerobic digester, including those located on a farm, would be eligible if all other program requirements are met.

Lastly, applicants will be required to meet the following citizenship requirements, as applicable:

- If the applicant is an individual, the applicant must be a citizen or national of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or must reside in the U.S. after legal admittance for permanent residence.
- If the applicant is an entity other than an individual, the applicant must be at least 51 percent owned by persons who are either citizens or nationals of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S. However, this requirement is not applicable if the entity is composed solely of members of an immediate family. In such instances, if at least one of the immediate family members is a citizen or national as described above, then the entity is eligible to participate in this program. Immediate family is being defined as: Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, domestic partner, parent, child, brother, sister, aunt, uncle, grandparent, grandchild, niece, or nephew.
- If the applicant is a subsidiary, the parent entity or the entities that have an ownership in that applicant must also be at least 51 percent owned by persons who are either citizens or nationals of the United States (U.S), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S.

If an applicant does not meet the citizenship requirement, the applicant is not eligible for this program. While this citizenship requirement is not required by statute, it is consistent with the Agency's other programs. As found in Section III of this preamble, the Agency is seeking comment on this requirement.

To make its determination as to whether or not the applicant is eligible for participation, the Agency will review the application to determine if the information submitted is sufficient to determine if the applicant is eligible. If the Agency determines that the submitted information is insufficient to make this determination, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application, as to what additional information is needed and a timeframe in which to provide the information (§ 4288.110(b)). The Agency is requesting that applicants supply information in a timely fashion in order to setup the payment amounts each fiscal year and to estimate expected payments to each participating producer.

If the additional information is received within the specified timeframe, the Agency will determine the applicant's eligibility for the upcoming fiscal year. However, if the additional information is not received by the Agency within the specified timeframe, the Agency will not consider the applicant any further for the year in which the applicant has submitted its application form. Such an applicant may reapply to participate in the Program during the next sign-up period.

As noted above, this section also contains three conditions under which the Agency may determine that an advanced biofuel producer is no longer eligible to participate in the Advanced

Biofuel Payment Program (§ 4288.110(c)). These conditions, which are the same as in the Section 9005 NOCP, are necessary for ensuring the integrity of the Program. The three conditions are where the producer:

- Refuses to allow the Agency to verify any information provided by the producer under this subpart, including information for determining applicant eligibility, advanced biofuel eligibility, and application payments;
- Fails to meet any of the conditions set out in this subpart, in the contract, or in other Program documents; or
- Fails to comply with all applicable Federal, State, or local laws.

Biofuel Eligibility (§ 4288.111)

This section identifies four criteria that a biofuel must meet in order to be eligible for payment under this Program (§ 4288.111(a)). These four criteria notwithstanding, flared gases would not be eligible for payments under this Program.

First. The biofuel must meet the definition of advanced biofuel. As noted earlier in this preamble, this requirement is based on the authorizing statute that payments are to be made for advanced biofuel.

Second. As discussed earlier in this preamble under the discussion on the definition of advanced biofuel, the biofuel must be a solid, liquid, or gaseous advanced biofuel.

Third. The biofuel must be a final product and not an intermediary component or product to the biofuel. As stated earlier in this preamble, the Agency understands the definition of advanced biofuel applies to solid, liquid, and gaseous fuels that are final products and not to intermediary components or products used in the production of the final advanced biofuel product. We do not believe it is consistent with the Program to pay for both the intermediary components or products and the end product; this would be essentially paying twice for the same advanced biofuel. Therefore, the Agency is proposing that only advanced biofuels that are final products are eligible for payment under this Program, and that production of intermediary components and products are not eligible for payment under this Program. This provision was not specifically articulated in the Section 9005 NOCP.

Fourth. As discussed earlier in this preamble under the discussion on the definition of advanced biofuel, if the advanced biofuel is used on-site, the producer must be able to verify the quantity of advanced biofuel being used on-site using an Agency-approved system.

The Agency notes that, as proposed, the biofuel may be produced in a biorefinery located in either a rural or non-rural area. This is different from the Section 9005 NOCP, which required that the biofuel be produced in a biorefinery located in a rural area in order to be eligible for payment. Lastly, as found in Section III of this preamble, the Agency is seeking public comment on whether this program should limit payments to only those eligible advanced biofuels produced at a biorefinery located in a rural area.

As for when determining applicant eligibility, if the Agency determines that there is insufficient information provided to determine if a biofuel is an eligible advanced biofuel, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application, as to what additional information is needed and a timeframe in which to provide the information (§ 4288.111(b)). If the applicant provides the requested information to the Agency within the specified timeframe, the Agency will determine the biofuel's eligibility for the upcoming fiscal year.

If the applicant does not provide the requested information to the Agency within the specified timeframe, the biofuel will not be eligible for payment in the upcoming fiscal year. The applicant may elect to include such biofuels during the next sign-up period. The Agency notes that determination by the Agency that a biofuel is ineligible or that information is insufficient to make an eligibility determination does not affect the status of other biofuels included in the application form.

Eligibility Notifications (§ 4288.112)

This section presents the process that the Agency will use to notify applicants of its decisions concerning applicant and biofuel eligibility. It also addresses notifications concerning subsequent Agency determinations regarding producer and biofuel eligibility.

With regard to applicant eligibility (§ 4288.112(a)), if the Agency determines that an applicant is eligible for participation in the Program, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application and will assign the applicant a contract number.

If the Agency determines that an applicant or a biofuel is ineligible (§ 4288.112(b)), the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application, and will include the reason(s) for the Agency's determination that the applicant or biofuel was determined to be ineligible.

Lastly, § 4288.112(c) states that the Agency will notify a producer, in writing, whenever the Agency determines that the producer or the producer's biofuel(s) are subsequently determined by the Agency to be ineligible.

Because any finding of ineligibility is an adverse decision, the applicant/producer, as applicable, would have the right to appeal such a decision, as provided in § 4288.103.

The Agency notes that the Section 9005 NOCP addressed notifying the applicant concerning applicant eligibility. The Agency is specifically including in the proposed rule the notification process concerning biofuel eligibility and subsequent ineligibility determinations to more clearly identify its intent to communicate such findings to the producer.

Payment Record Requirements (§ 4288.113)

This section identifies records that an advanced biofuel producer approved for participation in the Advanced Biofuel Payment Program must maintain in order to be eligible to receive payments under this subpart. The records required in the proposed rule are identified in more detail than those identified in the Section 9005 NOCP, but the intent in either case is to ensure that sufficient records are maintained by participating advanced biofuel producers to ensure the integrity of the Program and to allow the Agency to conduct its oversight and monitoring responsibilities. These records are:

- The type and amount of eligible renewable biomass used in the production of advanced biofuel;
- The quantity of advanced biofuel produced from eligible renewable biomass at each advanced biofuel biorefinery;
- The quantity of eligible renewable biomass used at each advanced biofuel biorefinery to produce the advanced biofuel; and
- All other records required to establish Program eligibility and compliance.

The advanced biofuel producer is required to maintain these records for each fiscal year and each fiscal year quarter for each advanced biofuel biorefinery for which the producer has requested payment under this Program. As noted earlier, these records must be maintained by the producer for not less than three years from each Program payment date. The Agency is proposing these records to be kept because they are needed by the Agency in order to verify

that payments made to each producer are in compliance with the provisions of this subpart.

Section C—Enrollment Provisions

In order to participate in the Advanced Biofuel Payment Program, a producer of advanced biofuels must be approved by the Agency and enter into a contract with the Agency. The process for enrolling and continued participation in the Advanced Biofuel Payment Program is presented in this subpart. The provisions for enrolling in the Program (§ 4288.120) are consistent with those found in the Section 9005 NOCP. The contract provisions (§ 4288.121), while consistent with the contract identified in the Section 9005 NOCP, are described more specifically in the proposed rule than in the Section 9005 NOCP.

Enrollment (§ 4288.120)

To enroll in the Advanced Biofuel Payment Program, a producer must submit a completed enrollment application (Form RD 4288–1) to the Agency. This form requests information on the advanced biofuel producer; the advanced biofuel biorefineries in which the producer has 50 percent or more ownership and at which the advanced biofuels are produced, including location and quantities produced; the types and quantities of renewable biomass feedstock being used to produce the advanced biofuels; and the amount of eligible advanced biofuels produced at each biorefinery in the 12 months prior to the first day of the sign-up period for the fiscal year for which the enrollment application is being submitted. Applicants are required to submit with this form documentation to support the amount of eligible advanced biofuels reported in the form. The form also requires the advanced biofuel producer to certify the information provided, including that the advanced biofuels are eligible advanced biofuels and that the renewable biomass feedstock used to produce the advanced biofuels are eligible biomass feedstock. The Agency will identify in an annual **Federal Register** notice where this form is to be submitted.

All applicants, except those that are individuals, are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. A DUNS number can be obtained at no cost via a toll-free request line at 1–866–705–5711 or online at *http://fedgov.dnb.com/webform.*

The first time a producer submits Form RD 4288–1, the Agency will make its determination as to whether or not the producer is eligible to participate. If an advanced biofuel producer is determined to be ineligible, the Agency will notify the producer, in writing, as soon as practicable after receipt of the application, of its determination.

After the first year a producer is enrolled in the Program, the producer must submit to the Agency Form RD 4288–1 in each subsequent sign-up period in order to receive payments for the corresponding fiscal year (§ 4288.120(a)(1)). For example, Producer A's first year of participation is FY 2010. In order to receive payments in FY 2011, Producer A must submit Form RD 4288–1 during the sign-up period for FY 2011 in order to be eligible to receive payments during FY 2011.

Eligible advanced biofuel producers may submit Form RD 4288–1 during a fiscal year's sign-up period even if the advanced biofuel biorefinery is scheduled to start producing advanced biofuel in the upcoming fiscal year.

If a participating producer fails to submit Form RD 4288–1 during a fiscal year's applicable sign-up period, the producer's contract will be terminated and the producer will be ineligible to receive payments for that fiscal year (§ 4288.120(a)(1)). Such a producer must reapply, and sign a new contract, to participate in the Program for the next fiscal year.

In addition to the application form, applicants must also submit the appropriate certifications for the type(s) of advanced biofuels for which they are seeking payment. These certifications, which must be completed and provided by an accredited independent third-party, are those the Agency believes are necessary to ensure that the biofuels being produced are of sufficient quality for sale and use in the marketplace. The certifications producers are required to submit, which are the same as identified in the Section 9005 NOCP (unless otherwise noted), depend on the type of biofuel produced, as summarized below.

- For alcohol, a copy of either the Alcohol Fuel Producers Permit (TTB F 5110.74) or the registration of Distilled Spirits Plant (TTB F 5110.41) and Operating Permit (TTB F 5110.25).
- For hydrous ethanol, if the advanced biofuel producer is the hydrous ethanol producer, an affidavit, acceptable to the Agency, from the distiller stating that the applicable hydrous ethanol produced is distilled and denatured for fuel use according to ATF requirements, and that the distiller will not include the applicable ethanol in any payment requests that the distiller may make under this Program.
- For hydrous ethanol, if the advanced biofuel producer is the distiller that upgrades hydrous ethanol to anhydrous ethyl alcohol, an affidavit, acceptable to the Agency, from the hydrous ethanol producer stating that the hydrous ethanol producer will not include the applicable ethanol in any payment requests that may be made under this Program.
- For biodiesel, biomass-based diesel, and liquid hydrocarbons derived from biomass, a self-certification by the producer that the producer, the advanced biofuel biorefinery, and the biofuel meet the definition of each term as defined in § 4288.102, the applicable registration requirements under the Energy Independence and Security Act and the Clean Air Act, the applicable regulations of the U.S. Environmental Protection Agency and Internal Revenue Service, and quality requirements per applicable ASTM International standards (*e.g.,* ASTM D6751) and commercially acceptable quality standards of the local market. The advanced biofuel producer shall also provide the Renewable Identification Number (RIN) for each advanced biofuel and BQ–9000 certification.
- For gaseous advanced biofuel, certification that the biofuel meets commercially acceptable pipeline quality standards of the local market; that the flow meters used to determine the quantity of advanced biofuel produced are industry standard and properly calibrated by a third party professional; and that the readings have been taken by a qualified individual. The certification provisions for gaseous advanced biofuel have been modified from those in the Section 9005 NOCP to include certification associated with the flow meters and the readings.

In addition, for woody biomass feedstocks, the applicant must submit documentation that the woody biomass feedstock cannot be used as a higher value wood-based product.

Participating producers who enroll and project increased advanced biobased production and all producers enrolling in the program for the first time must submit with their application documentation to support their production projections in the enrollment application. Such documentation may include historical production data, production capacity of the biorefinery, and evidence of ability to distribute final product, including distribution networks and contracts for purchase of final product.

Lastly, applicants will also be required to submit three additional

forms, which are standard Agency requirements for such financial assistance. These three forms, which are the same as found in the Section 9005 NOCP, are submitted once when the applicant first applies for the Program. These three forms will be submitted, as needed, each time an applicant re-enrolls in the program. The three forms are:

- RD Instruction 1940–Q, Exhibit A–1, "Certification for Contracts, Grants and Loans";
- SF–LLL, "Disclosure of Lobbying Activities"; and
- RD 400–4, "Assurance Agreement".

Applicants would be required to submit the application form during the sign-up period, which is October 1 through October 31 of the fiscal year for which payment under the Advanced Biofuel Payment Program is sought, unless the Agency otherwise announces in a **Federal Register** notice (§ 4288.120(b)). For example, for Fiscal Year 2011, the sign-up period is October 1 through October 31, 2010. As another illustration, a producer with a new biorefinery that is expected to become operational in June 2011 must enroll that biorefinery in the Program during Fiscal Year 2011's sign-up period (*i.e.,* October 1 through October 31, 2010) to be eligible to receive Program payments on that new production during Fiscal Year 2011. If the producer does not enroll this biorefinery between October 1 and October 31, 2010, the producer would have to wait until October 2011 to enroll the biorefinery to receive payments for Fiscal Year 2012.

Contract (§ 4288.121)

If an advanced biofuel producer is determined eligible to receive payments, the eligible advanced biofuel producer must then enter into a contract with the Agency using Form RD 4288–2, "Advanced Biofuel Payment Program Contract," (or successor form(s)) in order to participate in this Program. The Agency will forward Form RD 4288–2 to the advanced biofuel producer. The advanced biofuel producer must agree to the terms and conditions of the contract, sign, date, and return it to the Agency within the time provided by the Agency.

Once a contract has been signed, it will remain in force through the end of the contract period unless it is terminated in writing by the Agency. All contracts will be reviewed at least annually to ensure compliance with the contract and ensure the integrity of the program. Contracts may be terminated under any one of the following conditions:

- At the mutual agreement of the parties;
- In accordance with applicable Program notices and regulations;
- The advanced biofuel producer withdraws from the Program and so notifies the Agency, in writing;
- The advanced biofuel producer fails to submit Form RD 4288–1 during a sign-up period;
- The Program is discontinued or not funded;
- All of a participating advanced biofuel producer's advanced biofuel biorefineries no longer exist or no longer produce any eligible advanced biofuel; or
- The Agency determines that the advanced biofuel producer is ineligible for participation.

Section D—Payment Provisions

This section presents the procedures the Agency will use in making payments to eligible advanced biofuel producers under the Advanced Biofuel Payment Program, how the Agency will calculate those payments, how those payments may be adjusted, including refunds to the Agency. This subpart also addresses payment liability, unauthorized assistance and offsets, and succession and loss of control associated with making payments under the Advanced Biofuel Payment Program.

Payment Applications (§ 4288.130)

An advanced biofuel producer participating in the Advanced Biofuel Payment Program must submit a payment application form (Form RD 4288–3, "Advanced Biofuel Payment Program Application" or successor form(s)) to the Agency in order to receive payments under this Program (§ 4288.130(a)). The provisions in the section are essentially the same as found in the Section 9005 NOCP.

Each participating producer is requested to submit payment applications on a quarterly basis. Along with each payment application, the producer is required to:

- Certify with respect to the accuracy of the information provided;
- Furnish the Agency such certification, and access to such records, as the Agency considers necessary to verify compliance with Program provisions; and
- Provide documentation, as requested by the Agency, of the net production of advanced biofuel at all advanced biofuel biorefineries during the relevant quarters.

As noted above, producers are being requested, but are not being required, to submit payment applications on a quarterly basis. This allows a participating producer to submit a payment application that covers multiple consecutive quarters. For example, after each quarter has ended, Producer A may submit a payment application for the first quarter, a second payment application for the second and third quarters, and a third payment application for the fourth quarter. Producer B may submit a payment application for the first and second quarters after the end of the second quarter and a second payment application for the third and fourth quarters after the end of the fourth quarter.

The Agency strongly encourages participating producers to submit payment applications quarterly for several reasons. First, the Agency does not believe that it is reasonable to have eligible advanced biofuel producers wait up to a full year to receive their payments when production occurs throughout the year. Providing payments on a more frequent basis provides these producers with a more useful income stream. Second, these producers are likely to be submitting quarterly tax payments. Providing payments on a quarterly basis would be more consistent with current accounting activities. Third, receiving payment applications on a quarterly basis allows the Agency to better manage its workload and to process applications more efficiently than waiting until the end of the year.

Upon receipt of a payment application, the Agency will review the application to determine whether or not it is eligible for payment (§ 4288.130(b)). In making this determination, the Agency will consider whether the advanced biofuel producer has a valid contract with the Agency for this Program, whether the biofuel for which payment is sought is an eligible advanced biofuel under this Program, and the completeness and accuracy of the calculations provided in the payment application.

If, in reviewing a payment application, the Agency determines that additional documentation is required in order for the Agency to complete its review of the application, the eligible advanced biofuel producer would be required to submit such additional supporting documentation as requested by the Agency. For example, a producer provides with the payment application an internal spreadsheet that they utilized to track production. In this situation, the Agency may request the producer to submit sales receipts to verify the numbers reported in the spreadsheet. If the producer does not provide the requested information to the

Agency within the required time period, the Agency will not process the payment application and, as a result, the producer will not receive payment for that quarter.

Whenever the Agency determines that a payment application, or any portion thereof, is ineligible for payment, the Agency will notify the advanced biofuel producer, in writing, as soon as practicable after receipt of the payment application and provide the basis for the Agency's determination of ineligibility (§ 4288.130(c)).

Lastly, the Agency will specify where to submit payment applications in an annual notice published in the **Federal Register**. The payment applications must be submitted no later than 4:30 p.m. local time on the last day of the calendar month following the quarter for which payment is being requested. Neither complete nor incomplete applications received after this date and time will be considered, regardless of the postmark on the application.

Any payment application form received by the Agency after October 31 of the calendar year for the preceding fiscal year will be ineligible and the Agency will not make payment to the producer. For example, if Producer A submits a payment application covering the third and fourth quarters of Fiscal Year 2011 after October 31, 2011, the producer will not receive any payment for the advanced biofuel produced in the third and fourth quarters of Fiscal Year 2011. The Agency is including this provision because it needs to obligate funds for accounting purposes and for determining the funds that will be carried over to the next fiscal year for the Program.

In all instances, if the actual deadline for payment applications falls on a weekend or a Federally-observed holiday, the deadline is the next Federal business day.

Payment Provisions (§ 4288.131)

This section covers basic provisions associated with the calculation of payment under the Advanced Biofuel Payment Program. Paragraph (a) addresses how the Agency will determine payment rates, paragraph (b) addresses how the Agency will establish the value of each contract; paragraph (c) addresses payment amounts; and paragraph (d) addresses other payment provisions. The provisions in these paragraphs are essentially the same as found in the Section 9005 NOCP.

The basics steps in determining payment to producers as addressed paragraphs (a) through (c) of this section and are outlined below. These six steps will be performed each fiscal year.

Step 1. Determine the quantity of eligible advanced biofuel subject to payment each fiscal year, including both base production quantity and incremental production quantity. This determination will be made for both smaller producers and larger producers.

Step 2. Determine the British Thermal Unit (BTU) content of each of the four advanced biofuel quantities determined under Step 1.

Step 3. Determine the amount of funds available for payment for smaller producers and for larger producers.

Step 4. Determine the payment rates for base production and for incremental production for both smaller producers and larger producers based on the results of Steps 2 and 3.

Step 5. Assign expected payments to each producer based on the results of Step 4 and the base and incremental production in the application.

Step 6. Make payments to each participating advanced biofuel producer each quarter.

The following paragraphs address each of these steps in more detail.

Paragraph (a)(1) of this section addresses the quantity of production that will be eligible for payment. Using information submitted in Form RD 4288–1, from each participating advanced biofuel producer and the information from the previous fiscal year's Form RD 4288–3 from each participating producer, the Agency will determine each producer's base production and incremental production. The Agency will make this calculation for both smaller producers and for larger producers. (The distinction between smaller and larger producers is based on the requirement in the 2008 Farm Bill that the Agency limit the amount of funds available to large producers (*i.e.,* those that produce 150,000,000 or more gallons) to 5 percent of program funds. Small producers (*i.e.,* those that produce less than 150,000,000 gallons) would receive the remaining funds.) This will result in the following four quantities being determined:

- Base production quantity for smaller producers;
- Incremental production quantity for smaller producers;
- Base production quantity for larger producers; and
- Incremental production quantity for larger producers.

When determining these quantities, the Agency will use the documentation submitted with the enrollment application to determine whether the documentation supports the estimated production reported by the producer. If the Agency determines that the documentation does not support the estimated production, the Agency may reduce the production estimates for the purposes of calculating the payment rate. Because a producer will be paid for its actual production, such an adjustment does not affect the quantity of production for which the producer will be paid, but will affect the payment rate. The Agency may adjust a producer's estimated production in order to avoid the potential overestimation of production which has led to a program funds remaining at the end of the fiscal year.

Paragraph (a)(2) of this section addresses advanced biofuels that are blended with ineligible feedstocks (*e.g.,* fossil gasoline or methanol, corn kernel starch). In determining the four quantities under paragraph (a)(1) of this section, if an advanced biofuel is blended with ineligible feedstocks, only the quantity of advanced biofuel being produced from eligible feedstocks will be used, as described below, in determining the payment rates and for which payments will be made. In other words, it is important to note that only advanced biofuels eligible for payment under this Program will be included in these calculations.

Paragraph (a)(3) of this section addresses the conversion of the base production and the incremental production into BTUs determined under § 4288.131(a)(1) and (a)(2). The Agency will make these conversions using factors published by the Energy Information Administration (or successor organization). If the Energy Information Administration does not publish such conversion factor for a specific type of advanced biofuel, the Agency will use a conversion factor developed by another appropriate entity. If no such conversion factor exists, the Agency will establish and use a conversion formula as appropriate until such time as the Energy Information Administration or other appropriate entity publishes a conversion factor for said advanced biofuel. The Agency will then calculate the total eligible BTUs across all eligible applications.

The Agency is converting the production amounts to BTUs in order to develop a common measure for all types of advanced biofuels that are eligible for this Program. Previously, almost all biofuels were liquids, where a measure such as gallons provided a useful and simple measure. Currently, however, there are many more types of advanced biofuels that are not liquids (*e.g.,* biogases) where a typical measure is cubic feet, not gallons. Thus, it is difficult to compare quantities of the different biofuels being produced based

on common measures such as gallons and cubic feet. Therefore, the Agency is proposing to convert all production into the common measure of BTUs. The Agency believes that this is a reasonable methodology for comparing biofuels and treats all eligible advanced biofuels and their producers fairly and equally.

Paragraph (a)(4) addresses the funds that will be available for the Program. As specified in the statute, "[o]f the funds provided for each fiscal year, not more than 5 percent of the funds shall be made available to eligible producers for production at facilities with a total refining capacity exceeding 150,000,000 gallons per year." Thus, at least 95 percent of the funds provided each year will be made available to eligible producers whose total refining capacity is 150 million gallons or less. Keeping these percentages in mind, the Agency will determine how much money will be available for the Program each fiscal year for smaller producers (*i.e.,* those whose total refining capacity is 150 million gallons or less) and how much will be available for larger producers (*i.e.,* those whose total refining capacity is greater than 150 million gallons). The authorizing statute provides both mandatory and discretionary funding for this Program, and allows for funds to be carried over from one fiscal year to the next. Therefore, each fiscal year, the Agency will determine how much of funding is available to make payments, and how much will be available to smaller producers and to larger producers. The Agency will announce these amounts each fiscal year in a **Federal Register** notice.

Paragraph (a)(5) addresses the calculation of payment rates. As proposed, the Agency would calculate payment rates based on the quantity of BTUs calculated under paragraph (a)(3) and the amount of funds available as determined under paragraph (a)(4). The Agency will calculate a payment rate for base production and a payment rate for incremental production. Separate rates will be calculated for smaller producers and larger producers.

In setting these payment rates, the Agency will set the incremental production rates at a value that is 5 times higher than their respective base production rates. The Agency is doing this in order to encourage growth in the advanced biofuel industry. These rates will be calculated such that all funds allocated for a fiscal year will be distributed for that fiscal year if base production and incremental production quantities projected at the beginning of the fiscal year are met.

Once the Agency has determined the payment rates, it will calculate a fiscal year value for each eligible producer based on the payment rates and the base production and incremental production across a producer's advanced biofuel biorefineries that are identified in Form RD 4288–1 for that fiscal year (*see* § 4288.131(b)). This calculation will take place each fiscal year because the base and incremental production and available funds will change every year. After calculating the fiscal year value, the Agency will notify the producer, in writing, of the estimated payment to the producer for that fiscal year.

Paragraph (c) addresses payments to eligible advanced biofuel producers. The Agency will make payments to an eligible advanced biofuel producer, assuming the availability of funds, based on that producer's quantity of BTUs produced from eligible advanced biofuels and the applicable base and incremental production payment rates. Provided the payment application forms are submitted on a quarterly basis, these payments will also be made on a quarterly basis. The Agency will not pay a producer more than the expected payment established under § 4288.131(b).

Lastly, paragraph (d) of this section addresses six additional payment provisions, the first three of which are the same as found in the Section 9005 NOCP.

First. Paragraph (d)(1) states that advanced biofuel producers will be paid on the basis of the amount of eligible renewable energy content of the advanced biofuels only if the producer provides sufficient documentation, including a Certificate of Analysis for the Agency to determine the eligible renewable energy content for which payment is being requested, and quantity produced through such documentation as, but not limited to, records of sale and calibrated flow meter records. This provision puts producers on notice concerning the need for sufficient documentation for the Agency to make payments under this Program.

Second. Paragraph (d)(2) states that the Agency will make payment to only one eligible advanced biofuel producer per advanced biofuel biorefinery. This provision is intended to ensure that payment is made only once for the same biofuel produced at a biorefinery. Where multiple applications are received for the same biorefinery, the Agency will make payment to only one of the applicants. For example, if Producer A and Producer B both submit applications for advanced biofuel produced at Biorefinery C, the Agency will make only one payment to either Producer A or Producer B. It is the responsibility of such advanced biofuel producers to identify to the Agency to whom the payment will be made. As another example, if Biorefinery D's legal business structure is a partnership, the Agency will make payment to only one individual for Biorefinery D. In all cases where there are multiple owners, it is the owners' responsibility to determine how the received payment will be split.

Third. Paragraph (d)(3) states that, subject to other provisions of this section, advanced biofuel producers will be paid any sum due subject to the requirements and refund provisions of this subpart.

Fourth. Paragraph (d)(4) states that biorefineries signed up for payments in a fiscal year that either have been in existence less than 12 months prior to that fiscal year or begin production in that fiscal year (*e.g.,* signed up in October 2010 for Fiscal Year 2011 and begin production in Fiscal Year 2011) are eligible only for payment at the base production rate. Such biorefineries become eligible for base and incremental production payments in subsequent fiscal years. This provision, not specifically stated in the Section 9005 NOCP, clarifies how the Agency will make payments to such biorefineries and their producers.

Fifth. Paragraph (d)(5) states that if an advanced biofuel producer transfers any production capacity for one biorefinery to another, such transferred production capacity shall be considered base production for the biorefinery to which the production was transferred. This provision is intended to prevent producers from shifting production from one biorefinery to another and receiving the higher incremental production payment rate at the biorefinery to which the production was transferred. In such situations, there is no actual increase in the quantity of advanced biofuels being produced and thus it would be inconsistent with the Program's goal to apply the incremental production payment rate to such transferred production.

Sixth. A producer will only be paid for the advanced biofuels identified in the application submitted during the sign-up period and which are actually produced during the fiscal year. If the producer starts producing a new advanced biofuel or changes the type of advanced biofuel during the fiscal year, the producer will not receive any payments for those new advanced biofuels. However, during each sign-up period, a producer can identify new advanced biofuels and production levels compared to the previous year.

The Agency notes that paragraph (d)(5) better states its intent that the corresponding provision in the Section

9005 NOCP, which stated "An advanced biofuel biorefinery's base production cannot be transferred to another advanced biofuel biorefinery." It is not the Agency's intent to prohibit the industry from moving its production capacity between biorefineries, but to address how payments will be made for base production and for incremental production.

Payment Adjustments (§ 4288.132)

Under this section, which is the same as found in the Section 9005 NOCP, the Agency will adjust the payments otherwise payable to the advanced biofuel producer if there is a difference between the amount actually produced and the amount determined by the Agency to be eligible for payment. For example, if the Agency finds that it has underpaid a producer, the Agency will correct the underpayment. The Agency may have underpaid a producer, for example, by making an incorrect conversion that underestimates the BTUs for the quantity of advanced biofuel produced. If, on the other hand, the Agency finds that it has overpaid a producer, the Agency may collect such overpayments from the producer. Such overpayments may have occurred, for example, because the Agency overestimated the BTUs for the quantity of advanced biofuel produced or because the Agency determines, for example, that an advanced biofuel originally identified as being eligible is discovered to have not been eligible for payment. If the Agency determines that overpayments were made as the result of fraud or other intentional misrepresentation by a producer, the Agency may seek penalties against the producer as provided under § 4288.134.

Payment Liability (§ 4288.133)

This section, which is the same as found in the Section 9005 NOCP, states that any payment, or portion thereof, made under this subpart must be made without regard to questions of title under State law and without regard to any claim or lien against the advanced biofuel, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government.

Refunds and Interest Payments (§ 4288.134)

Under this section, otherwise eligible producers who are found by the Agency to be ineligible may be required to refund payments made to that producer under this Program. If the Agency suspects fraudulent representation through its oversight and monitoring activities under § 4288.105(a), it will be referred to the Office of Inspector General for appropriate action. This section also addresses how interest on such refunds would be handled. With the exception of the addition of a provision concerning payments to producers who win an appeal of an adverse decision, the provisions in this section are the same as found in the Section 9005 NOCP.

Paragraph (a) of this section identifies the situations that would result in an otherwise eligible producer becoming an ineligible producer. These situations are where a producer has:

- Made any fraudulent representation; or
- Misrepresented any material fact affecting a Program determination.

The Agency may determine that an advanced biofuel producer is ineligible for participation in the Program. Such producers may appeal this determination. If the producer wins this appeal (*i.e.,* the producer is eligible for participation in the Program), the Agency will make such appropriate and applicable payments to the producer from any Program funds that remain from the fiscal year in which the original Agency adverse decision was made (§ 4288.134(b)). The Agency points out, however, that there may be no funds or insufficient funds from which to make payment.

Where payments have been made to an entity determined by the Agency to be ineligible, such payments must be refunded to the Agency (§ 4288.134(c)). Such refunds must include interest and any other sums as may become due including, but not necessarily limited to, any interest, penalties, and administrative costs as determined appropriate under 31 CFR 901.9.

When a refund is due, the entity must pay it promptly. If the refund is not paid promptly, the Agency may use all remedies available to it to collect the refund, including Treasury offset under the Debt Collection Improvement Act of 1996, financial judgment against the producer, and referral to the Department of Justice (§ 4288.134(d)).

Refund payments that are received late will be assessed a late payment interest in accordance with provisions and rates as established by the United States Treasury (§ 4288.134(e)). The interest charged will be established by the United States Treasury and will accrue from the date such payments were made to the date of repayment. The Agency, however, may waive the accrual of interest or damages if the Agency determines that the cause of the erroneous payment was not due to any action of the advanced biofuel producer.

Lastly, paragraph (f) of this section states that any producer or person engaged in an act prohibited by this section and any producer or person receiving payment under this subpart would be jointly and severally liable for any refund due under this subpart and for related charges.

Unauthorized Assistance and Offsets (§ 4288.135)

This section, which is not found in the Section 9005 NOCP, addresses the procedures the Agency will use to collect unauthorized assistance made to advanced biofuel producers (§ 4288.135(a)). To illustrate "unauthorized assistance," consider a producer who manufactures an advanced biofuel made from the blending of 100 percent eligible feedstock. This producer applies for the Program and is determined by the Agency to be eligible to participate. The producer submits an application request and payment is made by the Agency. After payment is made, the Agency conducts a site visit at the producer's biorefinery. During that visit, the Agency finds that the advanced biofuel for which payment was made was being produced from feedstock of which only 5 percent is eligible feedstock. Thus, the payment made is incorrect; it is higher than it should have been and the excess amount paid constitutes "unauthorized assistance."

If the recipient fails to pay the Agency the unauthorized assistance plus other sums due under this section, the Agency reserves the right to offset that amount against Program payments (§ 4288.135(b)).

As stated in paragraph (a) of this section, the Agency will seek to collect from recipients all unauthorized assistance made under this Program. The basic process the Agency will use is summarized below.

First. When the Agency determines that unauthorized assistance has been made to an advanced biofuel producer under this Program, the Agency will send a demand letter to the producer. The demand letter will:

- Specify the amount of unauthorized assistance, including any accrued interest to be repaid, and the standards for imposing accrued interest;
- State the amount of penalties and administrative costs to be paid, the standards for imposing them and the date on which they will begin to accrue;
- Provide detailed reason(s) why the assistance was determined to be unauthorized;
- State the amount is immediately due and payable to the Agency;
- Describe the rights the producer has for seeking review or appeal of the

Agency's determination pursuant to 7 CFR part 11;

• Describe the Agency's available remedies regarding enforced collection, including referral of debt delinquent after due process for Federal salary, benefit and tax offset under the Department of Treasury Offset Program; and

• Provide an opportunity for the producer to meet with the Agency and to provide to the Agency facts, figures, written records, or other information that might refute the Agency's determination.

A producer who receives a demand letter can meet with the Agency to discuss the letter and will have the opportunity to provide information to refute the Agency's findings. Because the producer may need additional time to assemble the necessary documentation, the producer may request additional time before this meeting occurs. Interest and other charges will continue to accrue pursuant to the initial demand letter during any extension period unless the terms of the demand letter are modified in writing by the Agency.

If the producer agrees with the Agency's determination or will pay the amount in question, the Agency may allow a reasonable period of time (usually not to exceed 90 days) for the producer to arrange for repayment. The amount due will be the unauthorized payments made plus interest accrued beginning on the date of the demand letter at the interest rate stipulated until the date paid unless otherwise agreed, in writing, by the Agency.

In those instances where such producers cannot repay the unauthorized assistance within a reasonable period of time, the Agency will convert the unauthorized assistance amount to a loan provided the following three conditions are met:

• The producer did not provide false information;

• It would be highly inequitable to require prompt repayment of the unauthorized assistance; and

• Failure to collect the unauthorized assistance immediately will not adversely affect the Agency's interests.

Such loans will be at the Treasury interest rate in effect on the date the financial assistance was provided and consistent with the term length of the promissory note. In all cases, the receivable will be amortized per a repayment schedule satisfactory to the Agency that has the producer pay the unauthorized assistance as quickly as possible, but in no event will the amortization period exceed fifteen (15) years. The producer will be required to execute a debt instrument to evidence this receivable, and the best security position practicable in a manner which will adequately protect the Agency's interest during the repayment period will be taken as security.

Producers who receive a demand letter may file an appeal according to the procedures specified in § 4288.103. All appeal provisions will be concluded before proceeding with further actions.

The Agency will treat any failure by a producer to make payment for unauthorized assistance as a debt that can be collected by an Administrative offset, unless written agreements to repay such debt as an alternative to administrative offset is agreed to between the Agency and the producer. A producer who wishes to reach a written agreement to repay the debt as an alternative to administrative offset must submit a written proposal for repayment of the debt, which must be received by the Agency within 20 calendar days of the date the notice was delivered to the debtor. In response, the Agency will notify the debtor in writing whether the proposed agreement is acceptable. In exercising its discretion, the Agency will balance the Government's interest in collecting the debt against fairness to the debtor.

When the Agency receives a debtor's proposal for a repayment agreement, the offset is stayed until the debtor is notified as to whether the proposed agreement is acceptable. If a Government payment will be made before the end of the fiscal year and the review is not yet completed, the offset will be taken after 30 days, even when a review is requested. The amount of the debt and interest will be withheld from payment to the debtor, but not applied against the debt until the stay expires. If withheld funds are later determined not to be subject to offset, they will promptly be paid to the debtor without interest. Administrative offsets will be taken against delinquent debtors requesting reviews that are pending final determination by the Review Officer. However, a review and appeal will also include the adequacy of any proposed written repayment agreement.

Remedies (§ 4288.136)

This section, which is different from the provisions found in the Section 9005 NOCP, identifies the steps the Agency will take in instances of misrepresentation or fraud by a producer. Such steps are suspension of payment, contract termination, and debarment from participation in any Federal program.

Succession and Loss of Control of Biorefineries and Production (§ 4288.137)

This section addresses conditions under which transfer of a biorefinery under an Advanced Biofuel Payment Program contract may be transferred from one person to another without a loss of payment (§ 4288.137(a)). Such a transfer of control provision is common to other Rural Business-Cooperative Service programs. This section also addresses the loss of control of a biorefinery (§ 4288.137(b)). Both provisions are the same as found in the Section 9005 NOCP.

An entity who becomes the eligible advanced biofuel producer for a biorefinery under contract under this subpart must first request permission from the Agency to succeed to the Program contract. The Agency may grant this request if the Agency determines that the new entity is an eligible producer and permitting such succession would serve the purposes of the Program. In other words, the new entity must meet the same requirements as the old entity. If appropriate, the Agency may require the consent of the previous eligible advanced biofuel producer to such succession.

The Agency will make payments only for eligible advanced biofuels produced at a biorefinery that is owned or controlled by an eligible advanced biofuel producer with a valid contract. If payments are made to an advanced biofuel producer for production at a biorefinery no longer owned or controlled by said producer or to an otherwise ineligible advanced biofuel producer, the Agency will demand full refund of all such payments.

III. Request for Comments

The Agency is requesting comments on the overall program being proposed. The Agency is especially interested in comments on the following areas:

1. If entities do not sell the advanced biofuel, but use the biofuel for internal purposes, should these entities be entitled to Program payments? If so, how should the on-site usage be verified?

2. Whether the proposed rule is following the intent of the Program.

3. The appropriateness of the proposed payment rates.

4. Should the program allow entities that do not meet the proposed citizenship requirements (§ 4288.110(a)) of at least 51 percent domestic ownership to participate, including those entities owned entirely by immediate family members where only one of the family members meets the

citizenship requirements? Please be sure to provide rationale for your position.

5. Should advanced biofuels produced at biorefineries that are located in non-rural areas be eligible for payments under the Program? Please be sure to provide rationale for your position.

6. As proposed, the applicant eligibility requirement for entities would require the entity to be at least 51 percent owned by persons who are either U.S. citizens or nationals unless the entity is owned solely by members of an immediate family. In such instance, if at least one of the immediate family members is a citizen or national, then the entity is eligible. The Agency is requesting comment on whether this exception should require more than one member of the immediate family be a U.S. citizen or national and, if so, how many or what percentage. Please be sure to provide rationale for your position.

7. The Agency is considering an approach to offer different payment rates based on the advanced biofuels' lifecycle greenhouse gas (GHG) emissions. This approach would offer a significantly higher payment rate for biofuels that are demonstrated to significantly reduce GHGs emissions relative to the conventional fuels that they replace; biofuels that do not demonstrate significant GHG reductions would receive the lower payment rate. For example, in the case of liquid biofuels, fuels that have been certified as advanced biofuels, cellulosic biofuels, or bio-based diesel under EPA's Renewable Fuels Standard achieve lifecycle GHG reductions of at least 50 percent relative to conventional liquid fuels and so would qualify for the higher payment rate. The Agency requests comments on this approach as an alternative to the proposed rule text, including comments on how such an alternative should be drafted to best address the goal of lifecycle GHG reductions. Please provide analytical support for comments provided in response to this request.

The Agency is particularly interested in the views of program applicants and interested stakeholders.

Submit comments as indicated in the **DATES** and **ADDRESSES** sections.

List of Subjects in 7 CFR Part 4288

Administrative practice and procedure, Energy—advanced biofuel, Renewable biomass, Reporting and recordkeeping.

For the reasons set forth in the preamble, title 7, Chapter XLII of the code of Federal Regulations, is proposed to be amended by adding part 4288 as follows:

CHAPTER XLII—RURAL BUSINESS–COOPERATIVE SERVICE AND UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE

PART 4288–PAYMENT PROGRAMS

Subpart A [Reserved]

Subpart B–Advanced Biofuel Payments

Section A—General Provisions

Sec.

4288.101 Purpose and scope.
4288.102 Definitions.
4288.103 Review or appeal rights.
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4288.105 Oversight and monitoring.
4288.106 Forms, regulations, and instructions.
4288.107 Exception authority.
4288.108–4288.109 [Reserved]

Section B—Eligibility Provisions

4288.110 Applicant eligibility.
4288.111 Biofuel eligibility.
4288.112 Eligibility notifications.
4288.113 Payment record requirements.
4288.114—4288.119 [Reserved]

Section C–Enrollment Provisions

4288.120 Enrollment.
4288.121 Contract.
4288.122—4288.129 [Reserved]

Section D—Payment Provisions

4288.130 Payment applications.
4288.131 Payment provisions.
4288.132 Payment adjustments.
4288.133 Payment liability.
4288.134 Refunds and interest payments.
4288.135 Unauthorized payments and offsets.
4288.136 Remedies.
4288.137 Succession and loss of control of facilities and production.
4288.138–4288.200 [Reserved]

Authority: 5 U.S.C. 301.

Section A–General Provisions

§ 4288.101 Purpose and scope.

(a) *Purpose.* The purpose of this subpart is to support and ensure an expanding production of advanced biofuels by providing payments to eligible advanced biofuel producers.

(b) *Scope.* This subpart sets forth, subject to the availability of funds as provided herein, or as may be limited by law, the terms and conditions an advanced biofuel producer must meet to obtain payments under this Program from the United States Department of Agriculture for eligible advanced biofuel production. Additional terms and conditions may be set forth in the Program contract and payment agreement prescribed by the Agency.

§ 4288.102 Definitions.

The definitions set forth in this section are applicable for all purposes of program administration under this subpart.

Advanced biofuel. A fuel that is derived from renewable biomass, other than corn kernel starch, to include:

(1) Biofuel derived from cellulose, hemicellulose, or lignin;

(2) Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);

(3) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;

(4) Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat;

(5) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass;

(6) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass; or

(7) Other fuel derived from cellulosic biomass.

Advanced biofuel producer. An individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or non-profit entity that produces and sells an advanced biofuel. An entity that blends or otherwise combines advanced biofuels into a blended biofuel is not considered an advanced biofuel producer under this Program.

Agency. The Rural Business and Cooperative Service on behalf of the U.S. Department of Agriculture.

Alcohol. Anhydrous ethyl alcohol manufactured in the United States and its territories and sold either:

(1) For fuel use, rendered unfit for beverage use, produced at a biorefinery and in a manner approved by ATF for the production of alcohol for fuel; or

(2) As denatured alcohol used by blenders and refiners and rendered unfit for beverage use.

Alcohol producer. An advanced biofuel producer authorized by ATF to produce alcohol.

ATF. The Bureau of Alcohol, Tobacco, Firearms, and Explosives of the United States Department of Justice.

Base production. The quantity of eligible advanced biofuels produced at an advanced biofuel biorefinery as determined by the Agency under one of the following paragraphs as applicable.

(1) If the biorefinery has been in existence for 12 months or more prior to the first day of the sign-up period for the

fiscal year for which payment under this Program is sought, the biorefinery's base production for each sign-up fiscal year will be equal to the quantity of eligible advanced biofuel produced at the advanced biofuel biorefinery in the 12 months immediately preceding the first day of the sign-up period.

(2) If the biorefinery has been in existence less than 12 months prior to the first day of the sign-up period for the fiscal year for which payment under this Program is sought or if the biorefinery will begin producing on or after October 1 of the sign-up fiscal year, the biorefinery's base production for the sign-up fiscal year will be equal to the quantity projected to be produced by the biorefinery's producer as reported in the enrollment application.

Biodiesel. A mono alkyl ester, manufactured in the United States and its territories, that meets the requirements of the appropriate ASTM International standard.

Biofuel. Fuel derived from renewable biomass.

Biorefinery. A facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products and may produce electricity.

Certificate of analysis. A document approved by the Agency that certifies the quality and purity of the advanced biofuel being produced. The document must be from a qualified, independent third party.

Contract. An Agency-approved form, signed by the eligible advanced biofuel producer and the Agency, that defines the terms and conditions for participating in and receiving payment under this Program.

Eligible advanced biofuel producer. A producer of advanced biofuels that meets all requirements of § 4288.110 of this subpart.

Eligible renewable biomass. Renewable biomass, as defined in this section, excluding corn kernel starch.

Eligible renewable energy content. That portion of an advanced biofuel's energy content derived from eligible renewable biomass feedstock. The energy content from any portion of the biofuel, whether from, for example, blending with another fuel or a denaturant, that is derived from a non-eligible renewable biomass feedstock (*e.g.,* corn kernel starch) is not eligible for payment under this Program.

Enrollment application. An Agency-approved form submitted by advanced biofuel producers for participation in this Program.

Ethanol. Anhydrous ethyl alcohol manufactured in the United States and its territories and sold either

(1) For fuel use, and which has been rendered unfit for beverage use and produced at a biorefinery approved by the ATF for the production of ethanol for fuel, or

(2) As denatured ethanol used by blenders and energy refiners, which has been rendered unfit for beverage use.

Ethanol producer. An advanced biofuel producer authorized by ATF to produce ethanol.

Flared gas. The burning of unwanted gas through a pipe (also called a flare). Flaring is a means of disposal used when the operator cannot transport the gas to market or convert to electricity and cannot use the gas for any other purpose.

Fiscal Year (FY). A 12-month period beginning each October 1 and ending September 30 of the following calendar year.

Immediate family. Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, domestic partner, parent, child, brother, sister, aunt, uncle, grandparent, grandchild, niece, or nephew.

Incremental production. The quantity of eligible advanced biofuel produced at an advanced biofuel biorefinery that is in excess of that biorefinery's base production, except for advanced biofuel biorefineries that either have been in existence less than 12 months prior to October 1 of the sign-up fiscal year or begin producing eligible advanced biofuels on or after October 1 of the sign-up fiscal year. For such biorefineries, all production in the sign-up fiscal year will be considered base production.

Larger producer means an eligible advanced biofuel producer with a refining capacity exceeding 150,000,000 gallons of advanced biofuel per year from all of the advanced biofuel facilities in which the producer has 50% or more ownership.

Payment application. An Agency-approved form submitted by an eligible advance producer to the Agency in order to receive payment under this Program.

Quarter. The Federal fiscal time period for any fiscal year as follows:

(1) 1st Quarter: October 1 through December 31;

(2) 2nd Quarter: January 1 through March 31;

(3) 3rd Quarter: April 1 through June 30; and

(4) 4th Quarter: July 1 through September 30.

Renewable biomass.

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) that:

(i) Are byproducts of preventive treatments that are removed to reduce hazardous fuels; to reduce or contain disease or insect infestation; or to restore ecosystem health;

(ii) Would not otherwise be used for higher-value products; and

(iii) Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of paragraphs (e)(2), (e)(3), and (e)(4) and large-tree retention of paragraph (f) of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512); or

(2) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

(i) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

(ii) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and byproducts (including fats, oils, greases, and manure); and food waste and yard waste.

Sign-up period. The time period during which the Agency will accept enrollment applications.

Smaller producer. An eligible advanced biofuel producer with a refining capacity of 150,000,000 gallons or less of advanced biofuel per year from all of the advanced biofuel facilities in which the producer has 50% or more ownership.

State. Any of the 50 States of the United States, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

USDA. The United States Department of Agriculture.

§ 4288.103 Review or appeal rights.

A person may seek a review of an Agency decision or appeal to the National Appeals Division in accordance with 7 CFR part 11 of this title.

§ 4288.104 Compliance with other laws and regulations.

(a) Advanced biofuel producers must comply with other applicable Federal,

State, and local laws, including, but not limited to, the Equal Employment Opportunity Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, The Age Discrimination Act of 1975, the American with Disabilities Act of 1990, and 7 CFR part 1901, subpart E. This includes collection and maintenance of race, sex, and national origin data of the recipient's employee.

(b) Producers must comply with equal opportunity and nondiscriminatory requirements in accordance with 7 CFR 15d. Rural Development will not discriminate against an applicant on the bases of race, color, religion, national origin, sex, sexual orientation, marital status, familial status, disability, or age (provided that the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

§ 4288.105 Oversight and monitoring.

(a) *Verification.* The Agency reserves the right to verify all payment applications and subsequent payments made under this subpart, as frequently as necessary, to ensure the integrity of the Program. The Agency will conduct site visits as necessary.

(1) *Production and feedstock verification.* The Agency will review producer records to verify the type and amount of biofuel produced and the type and amount of feedstocks used.

(2) *Blending verification.* The Agency will review the producer's certificates of analysis and feedstock records to verify the portion of the advanced biofuel eligible for payment.

(3) *Certificate of Analysis.* The Agency will review the producer records to ensure that each certificate of analysis has been issued by a qualified, independent third party.

(b) *Records.* For the purpose of verifying compliance with the requirements of this subpart, each eligible advanced biofuel producer shall make available at one place at a reasonable time for examination by representatives of USDA, all books, papers, records, contracts, scale tickets, settlement sheets, invoices, written price quotations, and other documents related to the Program that is within the control of such advanced biofuel producer for not less than three years from each Program payment date.

§ 4288.106 Forms, regulations, and instructions.

Copies of all forms, regulations, instructions, and other materials related to this Program may be obtained from the USDA Rural Development State Office, Rural Energy Coordinator and the USDA Rural Development Web site at *http://www.rurdev.usda.gov.*

§ 4288.107 Exception authority.

The Administrator may, on a case-by-case basis, make an exception to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the Administrator determines that application of the requirement or provision would adversely affect the USDA's interest.

§ 4288.108–4288.109 [Reserved]

Section B—Eligibility Provisions

§ 4288.110 Applicant eligibility.

Section B represents the requirements associated with advanced biofuel producer eligibility, biofuel eligibility, eligibility notifications, and payment record requirements. To be eligible for this Program, the applicant must meet the requirements specified in paragraph (a) of this section and must provide additional information as may be requested by the Agency under paragraph (b) of this section. Public bodies and educational institutions are not eligible for this Program.

(a) *Eligible producer.* The applicant must be an advanced biofuel producer, as defined in § 4288.102, and must meet one of the following citizenship requirements:

(1) If the applicant is an individual, the applicant must be a citizen or national of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or must reside in the U.S. after legal admittance for permanent residence.

(2) If the applicant is an entity other than an individual, the applicant must be at least 51 percent owned by persons who are either citizens or nationals of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S. This paragraph is not applicable if the entity is owned solely by members of an immediate family. In such instance, if at least one of the immediate family members is a citizen or national, as defined in paragraph (b)(2)(i) of this section, then the entity is eligible.

(3) If the applicant is a subsidiary, the parent entity or the entities that have an ownership in that applicant must also be at least 51 percent owned by persons who are either citizens or nationals of the United States (U.S), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S.

(b) *Eligibility determination.* The Agency will determine an applicant's eligibility for participation in this Program. If an applicant's original submittal is not sufficient to verify an applicant's eligibility, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application. This notification will identify, at a minimum, the additional information being requested to enable the Agency to determine the applicant's eligibility and a timeframe in which to supply the information.

(1) If the applicant provides the requested information to the Agency within the specified timeframe, the Agency will determine the applicant's eligibility for the upcoming fiscal year.

(2) If the applicant does not provide the requested information to the Agency within the specified timeframe, the Agency will not consider the applicant any further for participation in the upcoming fiscal year. Such applicants may elect to enroll during the next sign-up period.

(c) *Ineligibility determination.* An otherwise eligible producer will be determined to be ineligible if the producer:

(1) Refuses to allow the Agency to verify any information provided by the advanced biofuel producer under this subpart, including information for determining applicant eligibility, advanced biofuel eligibility, and application payments;

(2) Fails to meet any of the conditions set out in this subpart, in the contract, or in other Program documents; or

(3) Fails to comply with all applicable Federal, State, or local laws.

§ 4288.111 Biofuel eligibility.

To be eligible for this Program, a biofuel must meet the requirements specified in paragraph (a) of this section and the biofuel's producer must provide additional information as may be requested by the Agency under paragraph (b) of this section. Notwithstanding the provisions of paragraph (a) of this section, for the purposes of this subpart, flared gases are not eligible.

(a) *Eligible advanced biofuel.* The biofuel must:

(1) Meet the definition of advanced biofuel;

(2) Be a solid, liquid, or gaseous advanced biofuel;

(3) Be a final product; and

(4) If the biofuel is used on-site, there must be an Agency-approved system to verify the quantity of biofuel used on-site.

(b) *Eligibility determination.* The Agency will determine a biofuel's eligibility for payment under this Program. If an applicant's original submittal is not sufficient to verify a biofuel's eligibility, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application. This notification will identify, at a minimum, the additional information being requested to enable the Agency to determine the biofuel's eligibility and a timeframe in which to supply the information.

(1) If the applicant provides the requested information to the Agency within the specified timeframe, the Agency will determine the biofuel's eligibility for the upcoming fiscal year.

(2) If the applicant does not provide the requested information to the Agency within the specified timeframe, the biofuel will not be eligible for payment under this Program in the upcoming fiscal year. Applicants may elect to include such biofuels in the application form submitted during the next sign-up period.

§ 4288.112 Eligibility notifications.

(a) *Applicant eligibility.* If an applicant is determined by the Agency to be eligible for participation, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application and will assign the applicant a contract number.

(b) *Ineligibility notifications.* If an applicant or a biofuel is determined by the Agency to be ineligible, the Agency will notify the applicant, in writing, as soon as practicable after receipt of the application, as to the reason(s) the applicant or biofuel was determined to be ineligible. Such applicant will have appeal rights as specified in this subpart.

(c) *Subsequent ineligibility determinations.* If at any time a producer or an advanced biofuel is determined to be ineligible, the Agency will notify the producer in writing of its determination.

§ 4288.113 Payment record requirements.

To be eligible for Program payments, an advanced biofuel producer must maintain records for all relevant FY's and FY quarters for each advanced biofuel biorefinery indicating:

(a) The type and quantity of eligible renewable biomass used in the production of advanced biofuel;

(b) The quantity of advanced biofuel produced from eligible renewable biomass at each advanced biofuel biorefinery;

(c) The quantity of eligible renewable biomass used at each advanced biofuel biorefinery to produce the advanced biofuel; and

(d) All other records required to establish Program eligibility and compliance.

§§ 4288.114–4288.119 [Reserved]

Section C—Enrollment Provisions

§ 4288.120 Enrollment.

In order to participate in the Program, a producer of advanced biofuels must be approved by the Agency and enter into a contract with the Agency. The process for enrolling in the Program is presented in this section. Advanced biofuel producers who expect to produce eligible advanced biofuels at any time during a fiscal year must enroll in the Program as described in this section.

(a) *Enrollment.* To enroll in the Program, an advanced biofuel producer must submit to the Agency a completed enrollment application during the applicable sign-up period, as specified in paragraph (b) of this section. An original, signed hard copy of the enrollment application must be submitted as specified in the annual **Federal Register** notice for this program. All applicants, except those that are individuals, are required to have a Dun and Bradstreet Universal Numbering System (DUNS) number.

(1) Eligible advanced biofuel producers must submit enrollment applications during each sign-up period in order to continue participating in this Program. If a participating producer fails to submit the enrollment application during a fiscal year's applicable sign-up period, the producer's contract will be terminated and the producer will be ineligible to receive payments for that fiscal year. Such a producer must reapply, and sign a new contract, to participate in the Program for future fiscal years.

(2) Eligible advanced biofuel producers may submit an enrollment application during a fiscal year's sign-up period even if the advanced biofuel biorefinery is scheduled to start producing advanced biofuel in that fiscal year.

(3) The producer must furnish the Agency all required certifications before acceptance into the Program, and furnish access to the advanced biofuel producer's records required by the Agency to verify compliance with Program provisions. The required certifications depend on the type of biofuel produced. Certifications specified in paragraphs (a)(1)(i) through (iv) of this section are to be completed and provided by an accredited independent, third-party.

(i) *Alcohol.* For alcohol producers with authority from ATF to produce alcohol, copies of either

(A) The Alcohol Fuel Producers Permit (TTBF F 5110.74) or

(B) The registration of Distilled Spirits Plant (TTB F 5110.41) and Operating Permit (TTB F 5110.25).

(ii) *Hydrous ethanol.* For hydrous ethanol that is upgraded by another distiller to anhydrous ethyl alcohol, the increased ethanol production is eligible for payment one time only. If the advanced biofuel producer entering into this agreement is:

(A) The hydrous ethanol producer, then the advanced biofuel producer shall include with the contract an affidavit, acceptable to the Agency, from the distiller stating that the:

(*i*) Applicable hydrous ethanol produced is distilled and denatured for fuel use according to ATF requirements, and

(*ii*) Distiller will not include the applicable ethanol in any payment requests that the distiller may make under this Program.

(B) The distiller that upgrades hydrous ethanol to anhydrous ethyl alcohol, then the advanced biofuel producer shall include with the contract an affidavit, acceptable to the Agency, from the hydrous ethanol producer stating that the hydrous ethanol producer will not include the applicable ethanol in any payment requests that may be made under this Program.

(iii) *Biodiesel, biomass-based diesel, and liquid hydrocarbons derived from biomass.* For these fuels, the advanced biofuel producer shall self-certify that the producer, the advanced biofuel biorefinery, and the biofuel meet the definitions of these terms as defined in § 4288.102, the applicable registration requirements under the Energy Independence and Security Act and the Clean Air Act and under the applicable regulations of the U.S. Environmental Protection Agency and Internal Revenue Service, and the quality requirements per applicable ASTM International standards (*e.g.,* ASTM D6751) and commercially acceptable quality standards of the local market. The advanced biofuel producer shall also provide the Renewable Identification Number (RIN) for each advanced biofuel and BQ–9000 certification.

(iv) *Gaseous advanced biofuel.* For gaseous advanced biofuel producers, certification that the biofuel meets commercially acceptable pipeline quality standards of the local market; that the flow meters used to determine

the quantity of advanced biofuel produced are industry standard and properly calibrated by a third party professional; and that the readings have been taken by a qualified individual.

(v) *Woody biomass feedstock.* Document that any and all woody biomass feedstock cannot be used as a higher value wood-based product.

(4) *Supporting documentation.* Each participating advanced biofuel producer that is projecting an increase in production from the previous fiscal year and each new applicant must submit documentation to support the production estimates reported in the enrollment application. Such documentation includes, but is not limited to:

(i) Historical production data;

(ii) Production capacity of the biorefinery; and

(iii) Evidence of ability to distribute final product, including distribution networks and contracts for purchase of final product.

(5) *Additional forms.* Applicants must submit the forms specified in this paragraph with the enrollment application when applying for participation under this subpart and as needed when re-enrolling in the program.

(i) RD Instruction 1940–Q, Exhibit A–1, "Certification for Contracts, Grants and Loans".

(ii) SF–LLL, "Disclosure of Lobbying Activities".

(iii) RD 400–4, "Assurance Agreement".

(b) *Sign-up period.* The sign-up period is October 1 to October 31 of the fiscal year for which payment is sought, unless otherwise announced by the Agency in a **Federal Register** notice.

§ 4288.121 Contract.

Advanced biofuel producers determined to be eligible to receive payments must then enter into a contract with the Agency in order to participate in this Program.

(a) *Contract.* The Agency will forward the contract to the advanced biofuel producer. The advanced biofuel producer must agree to the terms and conditions of the contract, sign, date, and return it to the Agency within the time provided by the Agency.

(b) *Length of contract.* Once signed, a contract will remain in effect through the end of the contract period unless terminated as specified in paragraph (c) of this section.

(c) *Contract review.* All contracts will be reviewed at least annually to ensure compliance with the contract and ensure the integrity of the program.

(d) *Contract termination.* Contracts under this Program will be terminated in writing by the Agency. Contracts may be terminated under any one of the following conditions:

(1) At the mutual agreement of the parties;

(2) In accordance with applicable Program notices and regulations;

(3) The advanced biofuel producer withdraws from the Program and so notifies the Agency, in writing;

(4) The advanced biofuel producer fails to submit the enrollment application during a sign-up period;

(5) The Program is discontinued or not funded;

(6) All of a participating advanced biofuel producer's advanced biofuel biorefineries no longer exist or no longer produce any eligible advanced biofuel; or

(7) The Agency determines that the advanced biofuel producer is ineligible for participation.

§§ 4288.122–4288.129 [Reserved]

Section D—Payment Provisions

§ 4288.130 Payment applications.

Section D identifies the process and procedures the Agency will use to make payments to eligible advanced biofuel producers. In order to receive payments under this Program, eligible advanced biofuel producers with valid contracts must submit a payment application, as required under paragraph (a) of this section. The Agency will review the payment application and, if necessary, may request additional information, as specified under paragraph (b) of this section.

(a) *Applying for payment.* To apply for payments under this subpart during a fiscal year, an eligible advanced biofuel producer must:

(1) After a quarter has been completed, submit a payment application covering one or more quarters;

(2) Certify that the request is accurate;

(3) Furnish the Agency such certification, and access to such records, as the Agency considers necessary to verify compliance with Program provisions; and

(4) Provide documentation as requested by the Agency of the net production of advanced biofuel at all advanced biofuel biorefineries during the relevant quarters.

(b) *Review of payment applications.* The Agency will review each payment application it receives to determine if it is eligible for payment.

(1) *Review factors.* Factors that the Agency will consider in reviewing payments applications include, but are not necessarily limited to:

(i) *Contract validity.* Whether the entity submitting the payment application has a valid contract with the Agency under this Program;

(ii) *Biofuel eligibility.* Whether the biofuel for which payment is sought is an eligible advance biofuel; and

(iii) *Calculations.* Whether the calculations for determining the requested payment are complete and accurate.

(2) *Additional documentation.* If the Agency determines additional information is required for the Agency to complete its review of a payment application, eligible advanced biofuel producers shall submit such additional supporting documentation as requested by the Agency. If the producer does not provide the requested information within the required time period, the Agency will not make payment.

(c) *Payment application eligibility.* The Agency will notify the advanced biofuel producer, in writing, as soon as practicable after the payment application, whenever the Agency determines that a payment application, or any portion thereof, is ineligible for payment and the basis for the Agency's determination of ineligibility.

(d) *Submittal information.* Eligible advanced biofuel producers must submit payment applications as specified in the annual **Federal Register** notice for this program no later than 4:30 p.m. on the last day of the calendar month following the quarter for which payment is being requested. Neither complete or incomplete applications received after this date and time will be considered, regardless of the postmark on the application.

(1) Any payment application form that is received by the Agency after October 31 of the calendar year for the preceding fiscal year is ineligible for payment.

(2) If the actual deadline falls on a weekend or a Federally-observed holiday, the deadline is the next Federal business day.

§ 4288.131 Payment provisions.

Payments to advanced biofuel producers for eligible advanced biofuel production will be determined in accordance with the provisions of this section.

(a) *Determination of payment rate.* Each fiscal year, the Agency will establish payment rates for both base and incremental production of eligible advanced biofuels for both smaller producers and larger producers using the procedures specified in paragraphs (a)(1) through (5) of this section. These rates will be applied to the actual quantity of eligible advanced biofuel produced when making payments to

eligible advanced biofuel producers, as described below.

(1) Based on the information provided in each eligible enrollment application, the Agency will determine base and incremental eligible advanced biofuel production for both smaller producers and larger producers. If the Agency determines that the amount of advanced biofuel production reported in an enrollment application is not supported by the documentation submitted with the enrollment application, the Agency may reduce the production estimates reported in the enrollment application.

(2) If an applicant is blending its advanced biofuel using ineligible feedstocks (*e.g.,* fossil gasoline or methanol, corn kernel starch), only the quantity of advanced biofuel being produced from eligible feedstocks will be used in determining the payment rates and for which payments will be made.

(3) For each combination of production type (base, incremental) and producer size (smaller, larger—over 150 million equivalent gallons of production), the Agency will convert the base and incremental production determined to be eligible under paragraph (a)(1) into British Thermal Unit (BTU) equivalent using factors published by the Energy Information Administration (or successor organization). If the Energy Information Administration does not publish such conversion factor for a specific type of advanced biofuel, the Agency will use a conversion factor developed by another appropriate entity. If no such conversion factor exists, the Agency will establish and use a conversion formula as appropriate, that it publishes in the **Federal Register**, until such time as the Energy Information Administration or other appropriate entity publishes a conversion factor for said advanced biofuel. The Agency will then calculate the total eligible BTUs across all eligible applications.

(4) For each fiscal year, the Agency will determine the amount of Program funds available to smaller Producers and to larger producers in the fiscal year.

(5) For each fiscal year, the Agency will determine the base production and incremental production payment rates ($/BTU) for smaller producers and for larger producers. For both smaller producers and larger producers, the incremental production payment rate will be 5 times higher than their respective base production rate, unless otherwise specified in a notice published in the **Federal Register**. These rates will be calculated such that all of the funds allocated will be distributed in the fiscal year.

(b) *Fiscal year payment.* Using the payment rates and the base and incremental production determined under paragraph (a) of this section for each advanced biofuel biorefinery, the Agency will calculate each fiscal year an expected payment for each eligible advanced biofuel producer for that fiscal year using Equation 2 (*see* below). Each fiscal year, the Agency will notify each advanced biofuel producer, in writing, of the expected payment to be made to the producer for that fiscal year.

$$EP_{FY} = (BPPR \times BP) + (IPPR \times IP) \qquad \text{(Eq. 2)}$$

Where:

EP_{FY} = expected payment for the fiscal year
BPPR = base production payment rate, $/BTU
BP = projected eligible base production, BTUs
IPPR = incremental production payment rate, $/BTU
IP = projected eligible incremental production, BTUs

(c) *Payment amount.* Each eligible advanced biofuel producer will be paid for the actual amount of BTUs produced in a quarter from advanced biofuels identified in the enrollment applications for that fiscal year and that have been determined by the Agency as being eligible for payment. The Agency will not pay a producer more than the expected payment established under paragraph (b) for that fiscal year.

(d) *Other payment provisions.* The following provisions apply.

(1) Advanced biofuel producers will be paid on the basis of the amount of eligible renewable energy content of the advanced biofuels only if the producer provides documentation sufficient, including a Certificate of Analysis, for the Agency to determine the eligible renewable energy content for which payment is being requested, and quantity produced through such documentation as, but not limited to, records of sale and calibrated flow meter records.

(2) Payment will be made to only one eligible advanced biofuel producer per advanced biofuel biorefinery.

(3) Subject to other provisions of this section, advanced biofuel producers shall be paid any sum due subject to the requirements and refund provisions of this subpart.

(4) Biorefineries that are signed up for payments in a fiscal year and that either have been in existence less than 12 months prior to that fiscal year or begin production in that fiscal year (*e.g.,* signed up in October 2010 for Fiscal Year 2011 and begin production in Fiscal Year 2011) are eligible only for payment at the base production rate. Such biorefineries become eligible for base and incremental production payments in subsequent fiscal years.

(5) If an advanced biofuel producer transfers any production capacity for one biorefinery to another, such transferred production capacity shall be considered base production for the biorefinery to which the production was transferred.

(6) A producer will only be paid for the advanced biofuels identified in the application submitted during the sign-up period and which are actually produced during the fiscal year. If the producer starts producing a new advanced biofuel or changes the type of advanced biofuel during the fiscal year, the producer will not receive any payments for those new advanced biofuels. However, during each sign-up period, a producer can identify new advanced biofuels and production levels compared to the previous year.

§ 4288.132 Payment adjustments.

The Agency will adjust the payments otherwise payable to the advanced biofuel producer if there is a difference between the amount actually produced and the amount determined by the Agency to be eligible for payment.

§ 4288.133 Payment liability.

Any payment, or portion thereof, made under this subpart shall be made without regard to questions of title under State law and without regard to any claim or lien against the advanced biofuel, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government.

§ 4288.134 Refunds and interest payments.

An eligible advanced biofuel producer who receives payments under this subpart may be required to refund such payments as specified in this section. If the Agency suspects fraudulent representation through its site visits and records inspections under § 4288.105(b), it will be referred to the Office of Inspector General for appropriate action.

(a) An eligible advanced biofuel producer receiving payments under this subpart shall become ineligible if the Agency determines the advanced biofuel producer has:

(1) Made any fraudulent representation; or

(2) Misrepresented any material fact affecting a Program determination.

(b) If an Agency determination that a producer is not eligible for participation under this subpart is appealed and overturned, the Agency will make appropriate and applicable payments to the producer from Program funds, to the extent such funds are available, that remain from the fiscal year in which the original adverse Agency decision was made.

(c) All payments made to an entity determined by the Agency to be ineligible shall be refunded to the Agency with interest and other such sums as may become due, including, but not limited to, any interest, penalties, and administrative costs as determined appropriate under 31 CFR 901.9.

(d) When a refund is due, it shall be paid promptly. If a refund is not made promptly, the Agency may use all remedies available to it, including Treasury offset under the Debt Collection Improvement Act of 1996, financial judgment against the producer, and referral to the Department of Justice.

(e) Late payment interest shall be assessed on each refund in accordance with the provisions and rates as established by the United States Treasury.

(1) Interest charged by the Agency under this subpart shall be established by the United States Treasury. Such interest shall accrue from the date such payments were made to the date of repayment.

(2) The Agency may waive the accrual of interest or damages if the Agency determines that the cause of the erroneous payment was not due to any action of the advanced biofuel producer.

(f) Any advanced biofuel producer or person engaged in an act prohibited by this section and any advanced biofuel producer or person receiving payment under this subpart shall be jointly and severally liable for any refund due under this subpart and for related charges.

§ 4288.135 Unauthorized assistance and offsets.

When unauthorized assistance has been made to an advanced biofuel producer under this Program, the Agency reserves the right to collect from the recipient the sum that is determined to be unauthorized. If the recipient fails to pay the Agency the unauthorized assistance plus other sums due under this section, the Agency reserves the right to offset that amount against Program payments.

(a) *Unauthorized assistance.* The Agency will seek to collect from recipients all unauthorized assistance made under this Program using the procedures specified in paragraphs (a)(1) through (4) of this section.

(1) *Notification to the producer.* Upon determination that unauthorized assistance has been made to an advanced biofuel producer under this Program, the Agency will send a demand letter to the producer. Unless the Agency modifies the original demand, it will remain in full force and effect. The demand letter will:

(i) Specify the amount of unauthorized assistance, including any accrued interest to be repaid, and the standards for imposing accrued interest;

(ii) State the amount of penalties and administrative costs to be paid, the standards for imposing them and the date on which they will begin to accrue;

(iii) Provide detailed reason(s) why the assistance was determined to be unauthorized;

(iv) State the amount is immediately due and payable to the Agency;

(v) Describe the rights the producer has for seeking review or appeal of the Agency's determination pursuant to 7 CFR part 11;

(vi) Describe the Agency's available remedies regarding enforced collection, including referral of debt delinquent after due process for Federal salary, benefit and tax offset under the Department of Treasury Offset Program; and

(vii) Provide an opportunity for the producer to meet with the Agency and to provide to the Agency facts, figures, written records, or other information that might refute the Agency's determination.

(A) If the producer meets with the Agency, the producer will be given an opportunity to provide information to refute the Agency's findings.

(B) When requested by the producer, the Agency may grant additional time for the producer to assemble documentation. Such extension of time for payment will be valid only if the Agency documents the extension in writing and specifies the period in days during which period the payment obligation created by the demand letter (but not the ongoing accrual of interest) will be suspended. Interest and other charges will continue to accrue pursuant to the initial demand letter during any extension period unless the terms of the demand letter are modified in writing by the Agency.

(2) *Payment in full.* If the producer agrees with the Agency's determination or will pay the amount in question, the Agency may allow a reasonable period of time (usually not to exceed 90 days) for the producer to arrange for repayment. The amount due will be the unauthorized payments made plus interest accrued beginning on the date of the demand letter at the interest rate stipulated until the date paid unless otherwise agreed, in writing, by the Agency.

(3) *Promissory note.* If the producer agrees with the Agency's determination or is willing to pay the amount in question, but cannot repay the unauthorized assistance within a reasonable period of time, the Agency will convert the unauthorized assistance amount to a loan provided all of the conditions specified in paragraphs (a)(3)(i) through (iii) of this section are met. Loans established under this paragraph will be at the Treasury interest rate in effect on the date the financial assistance was provided and that is consistent with the term length of the promissory note. In all cases, the receivable will be amortized per a repayment schedule satisfactory to the Agency that has the producer pay the unauthorized assistance as quickly as possible, but in no event will the amortization period exceed fifteen (15) years. The producer will be required to execute a debt instrument to evidence this receivable, and the best security position practicable in a manner that will adequately protect the Agency's interest during the repayment period will be taken as security.

(i) The producer did not provide false information;

(ii) It would be highly inequitable to require prompt repayment of the unauthorized assistance; and

(iii) Failure to collect the unauthorized assistance immediately will not adversely affect the Agency's interests.

(4) *Appeals.* Appeals resulting from the demand letter prescribed in paragraph (a)(1) of this section will be handled according to the provisions § 4288.103. All appeal provisions will be concluded before proceeding with further actions.

(b) *Offsets.* Failure to make payment as determined under paragraph (a) of this section will be treated by the Agency as a debt that can be collected by an Administrative offset, unless written agreements to repay such debt as an alternative to administrative offset is agreed to between the Agency and the producer.

(1) Any debtor who wishes to reach a written agreement to repay the debt as

an alternative to administrative offset must submit a written proposal for repayment of the debt, which must be received by the Agency within 20 calendar days of the date the notice was delivered to the debtor. In response, the Agency will notify the debtor in writing whether the proposed agreement is acceptable. In exercising its discretion, the Agency will balance the Government's interest in collecting the debt against fairness to the debtor.

(2) When the Agency receives a debtor's proposal for a repayment agreement, the offset is stayed until the debtor is notified as to whether the proposed agreement is acceptable. If a Government payment will be made before the end of the fiscal year and the review is not yet completed, the offset will be taken after 30 days, even when a review is requested. The amount of the debt and interest will be withheld from payment to the debtor, but not applied against the debt until the stay expires. If withheld funds are later determined not to be subject to offset, they will promptly be paid to the debtor without interest. Administrative offsets will be taken against delinquent debtors requesting reviews that are pending final determination by the Review Officer. However, a review and appeal will also include the adequacy of any proposed written repayment agreement.

§ 4288.136 Remedies.

If the Agency has determined that a producer has misrepresented the information or defrauded the Government, the Agency will take one of the following steps in accordance to 7 CFR part 3017, Government-wide Debarment and Suspension:

(a) Suspend payments on the Contract until the violation has been reconciled;

(b) Terminate the Contract; or

(c) Debarment to participate in any Federal Government program.

§ 4288.137 Succession and loss of control of biorefineries and production.

(a) *Contract succession.* An entity who becomes the eligible advanced biofuel producer for a biorefinery that is under contract under this subpart must request permission from the Agency to succeed to the Program contract and the Agency may grant such request if it is determined that the entity is an eligible producer and permitting such succession would serve the purposes of the Program. If appropriate, the Agency may require the consent of the previous eligible advanced biofuel producer to such succession.

(b) *Loss of control.* Payments will be made only for eligible advanced biofuels produced at a biorefinery owned or controlled by an eligible advanced biofuel producer with a valid contract. If payments are made to an advanced biofuel producer for production at a biorefinery no longer owned or controlled by said producer or to an otherwise ineligible advanced biofuel producer, the Agency will demand full refund of all such payments.

§§ 4288.138–4288.200 [Reserved]

Dated: April 5, 2010.

Judith A. Canales,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 2010–8278 Filed 4–15–10; 8:45 am]

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Federal Register

Friday,
April 16, 2010

Part III

Department of Energy

10 CFR Part 430

Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters; Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket Number EE–2006–BT–STD–0129]

RIN 1904–AA90

Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (DOE) is amending the existing energy conservation standards for residential water heaters (other than tabletop and electric instantaneous models), gas-fired direct heating equipment, and gas-fired pool heaters. It has determined that the amended energy conservation standards for these products would result in significant conservation of energy, and are technologically feasible and economically justified.

DATES: The effective date of this rule is June 15, 2010. Compliance with the amended standards established for residential water heaters in today's final rule is required starting on April 16, 2015, and compliance with the standards established for DHE and pool heaters is required starting on April 16, 2013.

ADDRESSES: For access to the docket to read background documents, the technical support document, transcripts of the public meetings in this proceeding, or comments received, visit the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., 6th Floor, Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room. You may also obtain copies of certain previous rulemaking documents in this proceeding (*i.e.,* framework document, notice of public meeting and announcement of a preliminary technical support document (TSD), notice of proposed rulemaking), draft analyses, public meeting materials, and related test procedure documents from the Office of Energy Efficiency and Renewable Energy's Web site at: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/waterheaters.html.*

FOR FURTHER INFORMATION CONTACT: Mr. Mohammed Khan, U.S. Department of Energy, Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–7892. *E-mail: Mohammed.Khan@ee.doe.gov.*

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I. Summary of the Final Rule and Its Benefits

A. The Energy Conservation Standard Levels

The Energy Policy and Conservation Act, as amended (42 U.S.C. 6291 *et seq.;* EPCA or the Act), provides that any new or amended energy conservation standard the Department of Energy (DOE) prescribes for covered consumer products, including residential water heaters, direct heating equipment (DHE), and pool heaters (collectively referred to in this document as the "three heating products") must be designed to "achieve the maximum improvement in energy efficiency * * * which the Secretary [of Energy] determines is technologically feasible and economically justified." (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must "result in significant conservation of energy." (42 U.S.C. 6295(o)(3)(B)) The standards in today's final rule, which apply to certain types of the three heating products, satisfy these requirements.

Table I.1 shows the standard levels DOE is adopting today. These standards will apply to the types of the three heating products listed in the table and manufactured for sale in the United States, or imported into the United States, on or after April 16, 2015 in the case of water heaters, or on or after April 15, 2013 in the case of direct heating equipment and pool heaters.

TABLE I.1—AMENDED ENERGY CONSERVATION STANDARDS FOR RESIDENTIAL WATER HEATERS, DIRECT HEATING EQUIPMENT, AND POOL HEATERS

Product class	Standard level	
Residential water heaters*		
Gas-fired Storage	For tanks with a Rated Storage Volume at or below 55 gallons: EF = 0.675 − (0.0015 × Rated Storage Volume in gallons).	For tanks with a Rated Storage Volume above 55 gallons: EF = 0.8012 − (0.00078 × Rated Storage Volume in gallons).
Electric Storage	For tanks with a Rated Storage Volume at or below 55 gallons: EF = 0.960 − (0.0003 × Rated Storage Volume in gallons).	For tanks with a Rated Storage Volume above 55 gallons: EF = 2.057 − (0.00113 × Rated Storage Volume in gallons) .
Oil-fired Storage	EF = 0.68 − (0.0019 × Rated Storage Volume in gallons).	
Gas-fired Instantaneous	EF = 0.82 − (0.0019 × Rated Storage Volume in gallons).	

Product class	Standard level
Direct heating equipment**	
Gas wall fan type up to 42,000 Btu/h	AFUE = 75%
Gas wall fan type over 42,000 Btu/h	AFUE = 76%
Gas wall gravity type up to 27,000 Btu/h	AFUE = 65%
Gas wall gravity type over 27,000 Btu/h up to 46,000 Btu/h	AFUE = 66%
Gas wall gravity type over 46,000 Btu/h	AFUE = 67%
Gas floor up to 37,000 Btu/h	AFUE = 57%
Gas floor over 37,000 Btu/h	AFUE = 58%
Gas room up to 20,000 Btu/h	AFUE = 61%
Gas room over 20,000 Btu/h up to 27,000 Btu/h	AFUE = 66%
Gas room over 27,000 Btu/h up to 46,000 Btu/h	AFUE = 67%
Gas room over 46,000 Btu/h	AFUE = 68%
Gas hearth up to 20,000 Btu/h	AFUE = 61%
Gas hearth over 20,000 Btu/h and up to 27,000 Btu/h	AFUE = 66%

Product class	Standard level
Gas hearth over 27,000 Btu/h and up to 46,000 Btu/h	AFUE = 67%
Gas hearth over 46,000 Btu/h	AFUE = 68%
Pool heaters	
Gas-fired	Thermal Efficiency = 82%

* EF is the "energy factor," and the "Rated Storage Volume" equals the water storage capacity of a water heater (in gallons), as specified by the manufacturer.
** Btu/h is "British thermal units per hour," and AFUE is "Annual Fuel Utilization Efficiency."

B. Benefits and Costs to Purchasers of the Three Heating Products

1. Water Heaters

Table I.2 presents the implications of today's standards for consumers of residential water heaters. The economic impacts of the standards on consumers, as measured by the average life-cycle cost (LCC) savings, are positive, even though the standards may increase some initial costs. For example, a typical gas storage water heater has an average installed price of $1,079 and average lifetime operating costs (discounted) of $2,473. To meet the amended standards, DOE estimates that the average installed price of such equipment will increase by $120, which will be offset by savings of $143 in average lifetime operating costs (discounted).

TABLE I.2—IMPLICATIONS OF STANDARDS FOR PURCHASERS OF RESIDENTIAL WATER HEATERS

Product class	Energy conservation standard *EF**	Average baseline installed price** *$*	Average installed price increase *$*	Average life-cycle cost savings*** *$*	Median payback period *years*
Gas-Fired Storage Water Heater	0.62 (40 gallons)	$1,072	$92	$6	2.0
	0.76 (56 gallons)	1,261	805	77	9.8
	Weighted	1,079	120	18	2.3
Electric Storage Water Heater	0.95 (50 gallons)	554	140	10	6.9
	2.0 (56 gallons)	729	974	626	6.0
	Weighted	569	213	64	6.8
Oil-Fired Storage Water Heater	0.62 (32 gallons)	1,974	67	295	0.5
Gas-Fired Instantaneous Water Heater.	0.82 (0 gallons)	1,779	601	6	14.8

* The values are for the representative storage volumes (40 gallons for gas-fired storage water heaters, 50 gallons for electric storage water heaters, 32 gallons for oil-fired storage water heaters, and 0 gallons for gas-fired instantaneous water heaters). The standard level is represented by an energy-efficiency equation, which specifies an EF level over the entire storage volume range.
** For a baseline model.
*** The average life-cycle cost savings refers to the average savings in the discounted life-cycle costs of owning and operating the product due to the standard. This value represents the net benefit (or cost) of a more-efficient product after considering both the increased installed price and the lifetime operating cost savings.

2. Direct Heating Equipment

Table I.3 presents the implications of today's standards for consumers of direct heating equipment. The economic impacts of the standards on consumers, as measured by the average LCC savings, are positive, even though the standards may increase some initial costs. For example, a typical gas wall fan DHE has an average installed price of $1,832 and average lifetime operating costs (discounted) of $5,544. To meet the amended standards, DOE estimates that the average installed price of such equipment will increase by $81, which will be more than offset by savings of $249 in average lifetime operating costs (discounted).

TABLE I.3—IMPLICATIONS OF STANDARDS FOR PURCHASERS OF DIRECT HEATING EQUIPMENT AT THE REPRESENTATIVE RATED INPUT CAPACITY RANGE

Product class	Energy conservation standard* *AFUE (%)*	Average baseline installed price** *$*	Average installed price increase *$*	Average life-cycle cost savings*** *$*	Median payback period *Years*
Gas Wall Fan	76	$1,832	$81	$102	3.2
Gas Wall Gravity	66	1,433	61	21	7.5
Gas Floor	58	2,209	54	13	10.7
Gas Room	67	1,208	83	60	4.5
Gas Hearth	67	1,603	82	112	0.0

* The values are for the representative input capacity ranges (>42,000 Btu/h for wall fan, >27,000 Btu/h and ≤46,000 Btu/h for wall gravity, >37,000 Btu/h for floor, >27,000 Btu/h and ≤46,000 Btu/h for room, and >27,000 Btu/h and ≤46,000 Btu/h for hearth). The standard levels vary by input capacity range.
** For a baseline model.
*** The average life-cycle cost savings refers to the average savings in the discounted life-cycle costs of owning and operating the product due to the standard. This value represents the net benefit (or cost) of a more-efficient product after considering both the increased installed price and the lifetime operating cost savings.

3. Pool Heaters

Table I.4 presents the implications of today's standards for consumers of pool heaters. The economic impacts of the standards on consumers, as measured by the average LCC savings, are positive, even though the standards may increase some initial costs. For example, a typical pool heater has an average installed price of $3,240 and average lifetime operating costs (discounted) of $5,099. To meet the amended standards, DOE estimates that the average installed price of such equipment will increase by $103, which will be offset by savings of $226 in average lifetime operating costs (discounted).

TABLE I.4—IMPLICATIONS OF STANDARDS FOR PURCHASERS OF POOL HEATERS AT 250,000 Btu/h

Product class	Energy conservation standard* *Thermal Efficiency (%)*	Average baseline installed price** *$*	Average installed price increase *$*	Average life-cycle cost savings*** *$*	Median payback period *Years*
Gas-fired	82	$3,240	$103	$22	8.6

* The values are for the representative input capacity of 250,000 Btu/h.
** For a baseline model.
*** The average life-cycle cost savings refers to the average savings in the discounted life-cycle costs of owning and operating the product due to the standard. This value represents the net benefit (or cost) of a more-efficient product after considering both the increased installed price and the lifetime operating cost savings.

C. Impact on Manufacturers

1. Water Heaters

Using a real corporate discount rate of 8.9 percent for gas-fired and electric storage water heaters, 7.6 percent for oil-fired storage water heaters, and 9.5 percent for gas-fired instantaneous water heaters, which DOE calculated by examining the financial statements of residential water heater manufacturers, DOE estimates the industry net present value (INPV) of the manufacturing industry to be $880 million for gas-fired and electric storage water heaters, $9 million for oil-fired storage water heaters, and $648 million for gas-fired instantaneous water heaters (all figures in 2009$). DOE expects the impact of the standards on the INPV of manufacturers of gas-fired and electric storage water heaters to range from a loss of 2.9 percent to a loss of 13.9 percent (a loss of $25.9 million to a loss of $122.6 million). DOE expects the impact of the standards on the INPV of manufacturers of oil-fired storage water heaters to range from a loss of 2.0 percent to a loss of 4.2 percent (a loss of $0.2 million to a loss of $0.4 million). DOE expects the impact of the standards on the INPV of manufacturers of gas-fired instantaneous water heaters to range from an increase of 0.4 percent to a loss of 0.2 percent (an increase of $2.3 million to a loss of $1.2 million). Based on DOE's interviews with the major manufacturers of residential water heaters, DOE expects minimal plant closings or loss of employment as a result of the standards. At the amended standard level, DOE does not expect significant impacts on competition in the overall water heater market. For gas-fired and electric storage water heaters, DOE believes there are primarily three major manufacturers who have established market positions. In addition, DOE believes there is another major appliance manufacturer with significant resources that has recently announced intentions to scale its efforts in the water heating market. For oil-fired storage water heaters and gas-fired instantaneous water heaters, DOE believes the standards-case market can at least sustain the base-case level of competition.

2. Direct Heating Equipment

Using a real corporate discount rate of 8.5 percent, which DOE calculated by examining the financial statements of direct heating equipment manufacturers, DOE estimates the INPV of the manufacturing industry to be $17 million for traditional direct heating equipment and $77 million for hearth direct heating equipment (both figures in 2009$). DOE expects the impact of the standards on the INPV of manufacturers of traditional direct heating equipment to range from a loss of 7.2 percent to a loss of 23.6 percent (a loss of $1.2 million to a loss of $3.9 million). DOE expects the impact of the standards on the INPV of manufacturers of hearth direct heating equipment to range from a loss of 0.3 percent to a loss of 1.2 percent (a loss of $0.2 million to a loss of $0.9 million). Based on DOE's interviews with the major manufacturers of both traditional and hearth direct heating equipment, DOE expects minimal plant closings or loss of employment as a result of the standards. DOE believes the impact of the amended standards on competition in the traditional and hearth DHE market will not be significant because small manufacturers will be able to upgrade enough product lines to meet the standard, which in combination with product lines that currently meet the standard, will enable them to remain viable competitors.

3. Pool Heaters

Using a real corporate discount rate of 7.4 percent, which DOE calculated by examining the financial statements of pool heater manufacturers, DOE estimates the INPV of the manufacturing industry to be $49 million for gas-fired pool heaters (figures in 2009$). DOE expects the impact of the standards on the INPV of manufacturers of gas-fired pool heaters to range from an increase of 0.5 percent to a loss of 1.7 percent (an increase of $0.3 million to a loss of $0.8 million). Based on DOE's interviews with the major manufacturers of pool heaters, DOE expects minimal plant closings or loss of employment as a result of the standards. DOE does not believe there will be any lessening of competition in the pool heater market as a result of the standards established by today's final rule, because all of the manufacturers already offer at least one product line that meets or exceeds the standard level promulgated by today's final rule.

D. National Benefits

DOE estimates the standards will save approximately 2.81 quads (quadrillion or 10^{15}) British thermal units (Btu) of energy over a 30-year period: 2.58 quads for residential water heaters during 2015–2045, and 0.21 and 0.02 quads for DHE and pool heaters, respectively, during 2013–2043. The total of 2.81 quads is equivalent to all the energy consumed by nearly 15 million American households in a single year. By 2045, DOE expects the energy savings from today's standards to eliminate the need for approximately three new 250 MW power plants.

These energy savings will result in cumulative greenhouse gas emission

reductions of approximately 164 million tons (Mt) of carbon dioxide (CO_2), or an amount equal to that produced by approximately 46 million cars every year. Additionally, the standards will help alleviate air pollution by resulting in cumulative emissions reductions of approximately 125 kilotons (kt) for nitrogen oxides (NO_X) and 0.54 tons for power plant mercury (Hg).

The estimated monetary value of the cumulative CO_2 emissions reductions, based on a range of values from a recent interagency process, is $560 to $8,725 million. The estimated monetary value of the cumulative CO_2 emissions reductions, based on the central value from the interagency process, is $2,861 million. The estimated net present monetary value of the other emissions reductions (discounted to 2010 using a 7-percent discount rate and expressed in 2009$) is $12.2 to 125 million for NO_X. At a 3-percent discount rate, the estimated net present value of these emissions reductions is $27.2 to 284 million for NO_X.

The national NPV of consumer benefit of today's standards is $1.98 billion using a 7-percent discount rate and $10.11 billion using a 3-percent discount rate, cumulative from 2013 to 2043 for DHE and pool heaters, and from 2015 to 2045 for water heaters, in 2009$. This is the estimated present value of future operating cost savings minus the estimated increased costs of purchasing and installing the three types of heating products, discounted to 2010.

The benefits and costs of today's rule can also be expressed in terms of annualized values from 2013 to 2043 for DHE and pool heaters, and from 2015 to 2045 for water heaters. Estimates of annualized values for the three types of heating products are shown in Table I.5, Table I.6, and Table I.7. The annualized monetary benefits are the sum of the annualized national economic value of operating cost savings (energy, maintenance, and repair), expressed in 2009$, plus the monetary value of the benefits of CO_2 and NO_X emission reductions. For the value of CO_2 emission reductions, DOE uses the global Social Cost of Carbon (SCC) calculated using the average value derived using a 3-percent discount rate (equivalent to $21.40 per metric ton of CO_2 emitted in 2010, in 2007$). This value is a central value from a recent interagency process. The derivation of this value is discussed in section IV.M. The monetary benefits of cumulative emissions reductions are reported in 2009$ so that they can be compared with the other costs and benefits in the same dollar units.

Although the above consideration of benefits provides a valuable perspective, please note the following: (1) The national operating cost savings are domestic U.S. consumer monetary savings found in market transactions, while the value of CO_2 reductions is based on a global value. Also, note that the central value is only one of four SCC developed by the interagency workgroup. Other marginal SCC values for 2010 are $4.70, $35.10, and $64.90 per metric ton (2007$ for emissions in 2010), which reflect different discount rates and, for the highest value, the possibility of higher-than-expected impacts further out in the tails of the SCC distribution. (2) The assessments of operating cost savings and CO_2 savings are performed with different computer models, leading to different time frames for analysis. The national operating cost savings is measured for the lifetime of heating products shipped in the period 2013–2043 (for DHE and pool heaters) or 2015–2045 (for water heaters). The value of CO_2, on the other hand, reflects the present value of all future climate-related impacts (out to 2300) due to emitting a ton of carbon dioxide in each year of the forecast period.

Using a 7-percent discount rate and the central SCC value, the combined cost of the standards adopted in today's final rule for heating products is $1,285 million per year in increased equipment and installation costs, while the annualized benefits are $1,500 million per year in reduced equipment operating costs, $169 million in CO_2 reductions, and $7.7 million in reduced NO_X emissions. At a 7-percent discount rate, the net benefit amounts to $391 million per year. Using a 3-percent discount rate and the central SCC value, the cost of the standards adopted in today's rule is $1,249 million per year in increased equipment and installation costs, while the benefits of today's standards are $1,843 million per year in reduced operating costs, $169 million in CO_2 reductions, and $9.2 million in reduced NO_X emissions. At a 3-percent discount rate, the net benefit amounts to $771 million per year.

TABLE I.5—ANNUALIZED BENEFITS AND COSTS FOR WATER HEATERS (TSL 5)

Category	Primary estimate (AEO reference case)	Low estimate (low energy price case)	High estimate (high energy price case)	Units		
				Year dollars	Disc. rate	Period covered (2015–2045)
Benefits						
Energy Annualized Monetized (millions$/year).	1407.0	1275.5	1537.5	2009	7%	30
	1729.6	1556.1	1902.9	2009	3%	30
CO_2 Monetized Value (at $4.7/Metric Ton, millions$/year)*.	43.5	43.5	43.5	2009	5%	30
CO_2 Monetized Value (at $21.4/Metric Ton, millions$/year)*.	158.6	158.6	158.6	2009	3%	30
CO_2 Monetized Value (at $35.1/Metric Ton, millions$/year)*.	245.7	245.7	245.7	2009	2.5%	30
CO_2 Monetized Value (at $64.9/Metric Ton, millions$/year)*.	483.8	483.8	483.8	2009	3%	30
NO_x Monetized Value (at $2,437/Metric Ton, millions$/year).	7.0	7.0	7.0	2009	7%	30
	8.5	8.5	8.5	2009	3%	30
Total Monetary Benefits (millions$/year)**.	1457.5–1897.8	1326–1766.3	1588–2028.3	2009	7% range	30
	1572.7	1441.1	1703.2	2009	7%	.....
	1896.7	1723.2	2070.0	2009	3%	.....

TABLE I.5—ANNUALIZED BENEFITS AND COSTS FOR WATER HEATERS (TSL 5)—Continued

Category	Primary estimate (AEO reference case)	Low estimate (low energy price case)	High estimate (high energy price case)	Units		
				Year dollars	Disc. rate	Period covered (2015–2045)
	1781.5–2221.8	1608–2048.3	1954.9–2395.2	2009	3% range	30
Costs						
Annualized Monetized (millions$/year).	1250.3	1184.5	1321.6	2009	7%	30
	1216.6	1145.7	1295.6	2009	3%	30
Net Benefits/Costs						
Annualized Monetized, including CO_2 Benefits (million$/year)**.	207.2–647.5	141.5–581.8	266.4–706.7	2009	7% range	30
	322.4	256.6	381.5	2009	7%	30
	680.1	577.5	774.4	2009	3%	30
	565–1005.3	462.3–902.6	659.3–1099.6	2009	3% range	30

*These values represent global values (in 2009$) of the social cost of CO_2 emissions in 2010 under several scenarios. The values of $4.7, $21.4, and $35.1 per ton are the averages of SCC distributions calculated using 5%, 3%, and 2.5% discount rates, respectively. The value of $64.9 per ton represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. *See* section IV.M for details.

**Total Monetary Benefits for both the 3% and 7% cases utilize the central estimate of social cost of CO_2 emissions calculated at a 3% discount rate (averaged across three Integrated Assessment Models (IAMs)), which is equal to $21.4/ton in 2010 (in 2009$). The rows labeled as "7% Range" and "3% Range" calculate consumer and NO_X cases with the labeled discount rate but add these values to the full range of CO_2 values with the $4.7/ton value at the low end, and the $64.9/ton value at the high end.

TABLE I.6—ANNUALIZED BENEFITS AND COSTS FOR DIRECT HEATING EQUIPMENT

[TSL 2]

Category	Primary estimate (AEO reference case)	Low estimate (low energy price case)	High estimate (high energy price case)	Units		
				Year dollars	Disc. rate	Period covered (2013–2043)
Benefits						
Energy Annualized Monetized (millions$/year).	82.2	78.8	84.6	2009	7%	30
	100.6	96.3	103.6	2009	3%	30
CO_2 Monetized Value (at $4.7/Metric Ton, millions$/year)*.	2.5	2.5	2.5	2009	5%	30
CO_2 Monetized Value (at $21.4/Metric Ton, millions$/year)*.	9.2	9.2	9.2	2009	3%	30
CO_2 Monetized Value (at $35.1/Metric Ton, millions$/year)*.	14.3	14.3	14.3	2009	2.5%	30
CO_2 Monetized Value (at $64.9/Metric Ton, millions$/year)*.	28.1	28.1	28.1	2009	3%	30
NO_X Monetized Value (at $2,437/Metric Ton, millions$/year).	0.6	0.6	0.6	2009	7%	30
	0.6	0.6	0.6	2009	3%	30
Total Monetary Benefits (millions$/year)**.	85.2–110.8	81.8–107.4	87.7–113.2	2009	7% range	30
	91.9	88.5	94.4	2009	7%	.....
	110.4	106.2	113.4	2009	3%	.....
	103.7–129.3	99.5–125	106.7–132.3	2009	3% range	30
Costs						
Annualized Monetized (millions$/year).	27.7	27.7	27.7	2009	7%	30
	26.0	26.0	26.0	2009	3%	30
Net Benefits/Costs						
Annualized Monetized, including CO_2 Benefits (millions$/year)**.	57.6–83.1	54.1–79.7	60–85.6	2009	7% range	30
	64.3	60.8	66.7	2009	7%	30
	84.4	80.1	87.4	2009	3%	30

TABLE I.6—ANNUALIZED BENEFITS AND COSTS FOR DIRECT HEATING EQUIPMENT—Continued

[TSL 2]

Category	Primary estimate (AEO reference case)	Low estimate (low energy price case)	High estimate (high energy price case)	Units		
				Year dollars	Disc. rate	Period covered (2013–2043)
	77.7–103.2	73.4–99	80.7–106.3	2009	3% range	30

* These values represent global values (in 2009$) of the social cost of CO_2 emissions in 2010 under several scenarios. The values of $4.7, $21.4, and $35.1 per ton are the averages of SCC distributions calculated using 5%, 3%, and 2.5% discount rates, respectively. The value of $64.9 per ton represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. *See* section IV.M for details.

** Total Monetary Benefits for both the 3% and 7% cases utilize the central estimate of social cost of CO_2 emissions calculated at a 3% discount rate (averaged across three IAMs), which is equal to $21.4/ton in 2010 (in 2009$). The rows labeled as "7% Range" and "3% Range" calculate consumer and NO_X cases with the labeled discount rate but add these values to the full range of CO_2 values with the $4.7/ton value at the low end, and the $64.9/ton value at the high end.

TABLE I.7—ANNUALIZED BENEFITS AND COSTS FOR POOL HEATERS

[TSL 2]

Category	Primary estimate (AEO reference case)	Low estimate (low energy price case)	High estimate (high energy price case)	Units		
				Year dollars	Disc. rate	Period covered (2013–2043)
Benefits						
Energy Annualized Monetized (millions$/year).	10.6	10.1	10.9	2009	7%	30
	12.5	12.0	12.9	2009	3%	30
CO_2 Monetized Value (at $4.7/Metric Ton, millions$/year)*.	0.2	0.2	0.2	2009	5%	30
CO_2 Monetized Value (at $21.4/Metric Ton, millions$/year)*.	0.8	0.8	0.8	2009	3%	30
CO_2 Monetized Value (at $35.1/Metric Ton, millions$/year)*.	1.3	1.3	1.3	2009	2.5%	30
CO_2 Monetized Value (at $64.9/Metric Ton, millions$/year)*.	2.4	2.4	2.4	2009	3%	30
NO_X Monetized Value (at $2,437/Metric Ton, millions$/year).	0.1	0.1	0.1	2009	7%	30
	0.1	0.1	0.1	2009	3%	30
Total Monetary Benefits (millions$/year)**.	10.8–13	10.4–12.6	11.1–13.3	2009	7% range	30
	11.4	11.0	11.7	2009	7%	.....
	13.4	12.8	13.7	2009	3%	.....
	12.8–15	12.3–14.4	13.2–15.3	2009	3% range	30
Costs						
Annualized Monetized (millions$/year).	6.9	6.9	6.9	2009	7%	30
	6.7	6.7	6.7	2009	3%	30
Net Benefits/Costs						
Annualized Monetized, including CO_2 Benefits (millions$/year)**.	3.9–6.1	3.4–5.6	4.2–6.4	2009	7% range	30
	4.5	4.0	4.8	2009	7%	30
	6.7	6.2	7.1	2009	3%	30
	6.1–8.3	5.6–7.8	6.5–8.7	2009	3% range	30

* These values represent global values (in 2009$) of the social cost of CO_2 emissions in 2010 under several scenarios. The values of $4.7, $21.4, and $35.1 per ton are the averages of SCC distributions calculated using 5%, 3%, and 2.5% discount rates, respectively. The value of $64.9 per ton represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. *See* section IV.M for details.

** Total Monetary Benefits for both the 3% and 7% cases utilize the central estimate of social cost of CO_2 emissions calculated at a 3% discount rate (averaged across three IAMs), which is equal to $21.4/ton in 2010 (in 2009$). The rows labeled as "7% Range" and "3% Range" calculate consumer and NO_X cases with the labeled discount rate but add these values to the full range of CO_2 values with the $4.7/ton value at the low end, and the $64.9/ton value at the high end.

TABLE I.8—SUM OF ANNUALIZED BENEFITS AND COSTS FOR HEATING PRODUCTS STANDARDS

Category	Primary estimate (AEO reference case)	Low estimate (low energy price case)	High estimate (high energy price case)	Units		
				Year dollars	Disc. rate	Period covered
Benefits						
Energy Annualized Monetized (millions$/year).	1499.8	1364.4	1633.0	2009	7%	30
	1842.7	1664.4	2019.4	2009	3%	30
CO_2 Monetized Value (at $4.7/Metric Ton, millions$/year)*.	46.2	46.2	46.2	2009	5%	30
CO_2 Monetized Value (at $21.4/Metric Ton, millions$/year)*.	168.6	168.6	168.6	2009	3%	30
CO_2 Monetized Value (at $35.1/Metric Ton, millions$/year)*.	261.3	261.3	261.3	2009	2.5%	30
CO_2 Monetized Value (at $64.9/Metric Ton, millions$/year)*.	514.2	514.2	514.2	2009	3%	30
NO_X Monetized Value (at $2,437/Metric Ton, millions$/year).	7.6	7.6	7.6	2009	7%	30
	9.2	9.2	9.2	2009	3%	30
Total Monetary Benefits (millions$/year)**.	1553.5–2021.6	1418.2–1886.3	1686.8–2154.8	2009	7% range	30
	1676.0	1540.6	1809.2	2009	7%	.....
	2020.5	1842.2	2197.2	2009	3%	.....
	1898–2366.1	1719.8–2187.7	2074.8–2542.8	2009	3% range	30
Costs						
Annualized Monetized (millions$/year)	1284.9	1219.1	1356.3	2009	7%	30
	1249.3	1178.4	1328.3	2009	3%	30
Annualized Monetized, including CO_2 Benefits (millions$/year)**.	268.7–736.7	199–667.1	330.6–798.7	2009	7% range	30
	391.1	321.5	453.0	2009	7%	30
	771.2	663.8	868.9	2009	3%	30
	648.8–1116.8	541.3–1009.4	746.5–1214.6	2009	3% range	30

*These values represent global values (in 2009$) of the social cost of CO_2 emissions in 2010 under several scenarios. The values of $4.7, $21.4, and $35.1 per ton are the averages of SCC distributions calculated using 5%, 3%, and 2.5% discount rates, respectively. The value of $64.9 per ton represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. *See* section IV.M for details.

**Total Monetary Benefits for both the 3% and 7% cases utilize the central estimate of social cost of CO_2 emissions calculated at a 3% discount rate (averaged across three IAMs), which is equal to $21.4/ton in 2010 (in 2009$). The rows labeled as "7% Range" and "3% Range" calculate consumer and NO_X cases with the labeled discount rate but add these values to the full range of CO_2 values with the $4.7/ton value at the low end, and the $64.9/ton value at the high end.

E. Conclusion

Based upon the analysis culminating in this final rule, DOE has concluded that the benefits (energy savings, consumer LCC savings, positive national NPV, and emissions reductions) to the Nation of today's amended standards outweigh their costs (a potential loss of manufacturer INPV and consumer LCC increases for some users of the three heating products). Table 1.9 below summarizes total annualized monetized benefits and costs for these energy conservation standards. Today's standards also represent the maximum improvement in energy efficiency that is technologically feasible and economically justified, and will result in significant energy savings for all three types of the heating products. At present, residential water heaters, DHE, and pool heaters that meet the new standard levels are either commercially available or available as prototypes.

TABLE I.9—SUMMARY ANNUALIZED MONETIZED BENEFITS AND COSTS

Category	($million/year)	Discount rate
Benefits*		
	1676.0	7%
	2020.5	3%
Costs		
	1284.9	7%
	1249.3	3%
Net Benefits/Costs*		
	391.1	7%
	771.2	3%

*Annualized Monetized, including monetized CO_2 and NO_X benefits.

II. Introduction

A. Authority

Title III of EPCA sets forth a variety of provisions designed to improve energy efficiency. Part A[1] of Title III (42 U.S.C. 6291–6309) provides for the Energy Conservation Program for Consumer Products Other Than Automobiles. The program covers consumer products and certain commercial products (all of which are referred to hereafter as "covered products"), including the three heating products that are the subject of this rulemaking. (42 U.S.C. 6292(a)(4), (9), (11)) DOE publishes today's final rule pursuant to Part A of Title III, which also provides for test procedures, labeling, and energy conservation standards for the three heating products and certain other types of products, and authorizes DOE to require information and reports from manufacturers. The test procedures for water heaters, vented DHE, and pool heaters appear at Title 10 of the Code of Federal Regulations (CFR) part 430, subpart B, appendices E, O, and P, respectively.

EPCA prescribes specific energy conservation standards for the three heating products. (42 U.S.C. 6295(e)(1)–(3)) The statute further directs DOE to conduct two cycles of rulemakings to determine whether to amend these standards. (42 U.S.C. 6295(e)(4)) This rulemaking represents the second round of amendments to the water heater standards, and the first round of amendments to the DHE and pool heater standards. The notice of proposed rulemaking (NOPR) in this proceeding (the December 2009 NOPR; 74 FR 65852, 65858–59, 65866 (Dec. 11, 2009), and section II.B.2 below, provide additional detail on the nature and statutory history of the requirements for the three types of heating products.

EPCA also provides criteria for prescribing amended standards for covered products generally, including the three heating products. As indicated above, any such amended standard must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Additionally, EPCA provides specific prohibitions on prescribing such standards. DOE may not prescribe an amended standard for any of the three heating products for which it has not established a test procedure. (42 U.S.C. 6295(o)(3)(A)) Further, DOE may not prescribe a standard if DOE determines by rule that such standard would not result in "significant conservation of energy," or "is not technologically feasible or economically justified." (42 U.S.C. 6295(o)(3)(B))

EPCA also provides that in deciding whether a standard is economically justified for covered products, DOE must, after receiving comments on the proposed standard, determine whether the benefits of the standard exceed its burdens by considering, to the greatest extent practicable, the following seven factors:

1. The economic impact of the standard on manufacturers and consumers of the products subject to the standard;
2. The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the imposition of the standard;
3. The total projected amount of energy (or, as applicable, water) savings likely to result directly from the imposition of the standard;
4. Any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;
5. The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;
6. The need for national energy and water conservation; and
7. Other factors the Secretary of Energy (Secretary) considers relevant. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

In addition, EPCA, as amended, establishes a rebuttable presumption that any standard for covered products is economically justified if the Secretary finds that "the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy (and as applicable, water) savings during the first year that the consumer will receive as a result of the standard," as calculated under the test procedure in place for that standard. (42 U.S.C. 6295(o)(2)(B)(iii))

EPCA also contains what is commonly known as an "anti-backsliding" provision. (42 U.S.C. 6295(o)(1)) This provision mandates that the Secretary not prescribe any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. EPCA further provides that the Secretary may not prescribe an amended standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States of any product type (or class) with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding. (42 U.S.C. 6295(o)(4))

Under 42 U.S.C. 6295(q)(1), EPCA specifies requirements applicable to promulgating standards for any type or class of covered product that has two or more subcategories. Under this provision, DOE must specify a different standard level than that which applies generally to such type or class of product for any group of products "which have the same function or intended use, if * * * products within such group—(A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard" than applies or will apply to the other products. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies such a different standard for a group of products, DOE must consider "such factors as the utility to the consumer of such a feature" and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which DOE established such higher or lower level. (42 U.S.C. 6295(q)(2))

Section 310(3) of the Energy Independence and Security Act of 2007 (EISA 2007; Pub. L. 110–140) amended EPCA to prospectively require that energy conservation standards address standby mode and off mode energy use. Specifically, when DOE adopts new or amended standards for a covered product after July 1, 2010, the final rule must, if justified by the criteria for adoption of standards in section 325(o) of EPCA, incorporate standby mode and off mode energy use into a single standard if feasible, or otherwise adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)) Because DOE is adopting today's final rule before July 2010, this requirement does not apply in this rulemaking, and DOE has not specifically addressed standby mode or off mode energy use here. DOE is currently working on a test procedure rulemaking to address the measurement of standby mode and off

[1] This part was originally titled Part B. It was redesignated Part A in the United States Code for editorial reasons.

mode energy consumption for the three types of heating products that are the subject of this rulemaking.

Finally, Federal energy conservation requirements for covered products generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE can, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions of section 327(d) of the Act. (42 U.S.C. 6297(d))

B. Background

1. Current Standards

On January 17, 2001, DOE published a final rule prescribing the current Federal energy conservation standards for residential water heaters manufactured on or after January 20, 2004, which set minimum energy factors (EFs) that vary based on the storage volume of the water heater, the type of energy it uses (*i.e.,* gas, oil, or electricity), and whether it is a storage, instantaneous, or tabletop model. 66 FR 4474; 10 CFR 430.32(d). EPCA prescribes the Federal energy conservation standards for DHE and pool heaters. For DHE, these consist of minimum annual fuel utilization efficiency (AFUE) levels, each of which applies to a type of unit (*i.e.,* wall fan, wall gravity, floor, or room) and heating capacity range. (42 U.S.C. 6295(e)(3)); 10 CFR 430.32(i). For pool heaters, the Federal energy conservation standard prescribed by EPCA includes a single minimum thermal efficiency level. (42 U.S.C. 6295(e)(2)); 10 CFR 430.32(k).

Table II.1, Table II.2, and Table II.3 present the current Federal energy conservation standards for residential water heaters, DHE, and pool heaters, respectively. The water heater standards, set forth in 10 CFR 430.32(d), consist of minimum energy factors (EF) that vary based on the rated storage volume of the water heater, the type of energy it uses (*i.e.,* gas, oil, or electricity), and whether it is a storage, instantaneous, or tabletop model. The DHE standards, set forth in 42 U.S.C. 6295(e)(3) and 10 CFR 430.32(i), consist of minimum annual fuel utilization efficiency (AFUE) levels, each of which applies to a particular type of gas-fired product (*i.e.,* wall fan, wall gravity, floor, room) and input heating capacity range. (Although electric DHE are available, no Federal energy conservation standards exist for these products, and today's final rule contains no such standards. For a more detailed discussion of DHE coverage under EPCA, *see* 74 FR 65852, 65866 (Dec. 11, 2009) (the December 2009 NOPR)). The pool heater standards, set forth at 42 U.S.C. 6295(e)(2) and 10 CFR 430.32(k), consist of a thermal efficiency level. (Similar to the situation with DHE, this standard applies only to gas-fired products. Although electric pool heaters are available, no Federal energy conservation standards currently exist for other pool heaters, and today's final rule contains no such standard. For a more detailed discussion of pool heater coverage, *see* 74 FR 65852, 65866–67 (Dec. 11, 2009).)

TABLE II.1—CURRENT FEDERAL ENERGY CONSERVATION STANDARDS FOR RESIDENTIAL WATER HEATERS

Product class	Energy factor as of January 20, 2004
Gas-Fired Storage Water Heater	EF = 0.67—(0.0019 × Rated Storage Volume in gallons)
Oil-Fired Storage Water Heater	EF = 0.59—(0.0019 × Rated Storage Volume in gallons)
Electric Storage Water Heater	EF = 0.97—(0.00132 × Rated Storage Volume in gallons)
Tabletop Water Heater	EF = 0.93—(0.00132 × Rated Storage Volume in gallons)
Gas-Fired Instantaneous Water Heater	EF = 0.62—(0.0019 × Rated Storage Volume in gallons)
Instantaneous Electric Water Heater	EF = 0.93—(0.00132 × Rated Storage Volume in gallons)

TABLE II.2—CURRENT FEDERAL ENERGY CONSERVATION STANDARDS FOR DIRECT HEATING EQUIPMENT

Direct heating equipment design type	Product class *Btu/h*	Annual fuel utilization efficiency, as of Jan. 1, 1990 %
Gas Wall Fan	Up to 42,000	73
	Over 42,000	74
Gas Wall Gravity	Up to 10,000	59
	Over 10,000 and up to 12,000	60
	Over 12,000 and up to 15,000	61
	Over 15,000 and up to 19,000	62
	Over 19,000 and up to 27,000	63
	Over 27,000 and up to 46,000	64
	Over 46,000	65
Gas Floor	Up to 37,000	56
	Over 37,000	57
Gas Room	Up to 18,000	57
	Over 18,000 and up to 20,000	58
	Over 20,000 and up to 27,000	63
	Over 27,000 and up to 46,000	64
	Over 46,000	65

TABLE II.3—CURRENT FEDERAL ENERGY CONSERVATION STANDARDS FOR POOL HEATERS

Product class	Thermal efficiency as of January 1, 1990
Gas-Fired Pool Heater	Thermal Efficiency = 78%

2. History of Standards Rulemaking for the Three Heating Products

Prior to being amended in 1987, EPCA included water heaters and home heating equipment as covered products. The amendments to EPCA effected by the National Appliance Energy Conservation Act of 1987 (NAECA; Pub. L. 100–12) included replacing the term "home heating equipment" with "direct heating equipment," adding pool heaters as a covered product, establishing standards for the three heating products, and requiring that DOE determine whether these standards should be amended. (42 U.S.C. 6295(e)(1)–(4)) As indicated above, DOE amended the statutorily-prescribed standards for water heaters in 2001 (66 FR 4474 (Jan. 17, 2001)), but has not amended the statutory standards for DHE or pool heaters.

DOE commenced this rulemaking on September 27, 2006, by publishing on its Web site its "Rulemaking Framework for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters." (A PDF of the framework document is available at *http://www.eere.energy.gov/buildings/appliance_standards/residential/pdfs/heating_equipment framework_092706.pdf.*) DOE also published a notice announcing the availability of the framework document and a public meeting and requesting comments on the matters raised in the document. 71 FR 67825 (Nov. 24, 2006). The framework document described the procedural and analytical approaches that DOE anticipated using to evaluate potential energy conservation standards for the three heating products and identified various issues to be resolved in conducting the rulemaking. DOE held the framework document public meeting on January 16, 2009.

On January 5, 2009, having considered these comments, gathered additional information, and performed preliminary analyses as to standards for the three heating products, DOE announced an informal public meeting and the availability on its Web site of a preliminary technical support document (preliminary TSD). 74 FR 1643 (Jan. 13, 2009). The preliminary TSD is available at: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/water_pool_heaters_prelim_tsd.html.* The preliminary TSD discussed the comments DOE had received at the framework stage of this rulemaking and described the actions DOE had taken, the analytical framework DOE was using, and the content and results of DOE's preliminary analyses. *Id.* at 1644, 1645. DOE convened the public meeting to discuss and receive comments on: (1) These subjects, (2) DOE's proposed product classes, (3) potential standard levels that DOE might consider, and (4) other issues participants believed were relevant to the rulemaking. *Id.* at 1643, 1646. DOE also invited written comments on these matters. The public meeting took place on February 9, 2009. Many interested parties participated, and submitted written comments during the comment period.

On December 11, 2009, DOE published a NOPR to consider amending the existing residential water heater, direct heating equipment, and pool heater energy conservation standards. 74 FR 65852. Shortly after, DOE also published on its Web site the complete TSD for the proposed rule, which incorporated the completed analyses DOE conducted and technical documentation for each analysis. The TSD included the LCC spreadsheet, the national impact analysis spreadsheet, and the manufacturer impact analysis (MIA) spreadsheet—all of which are available at: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/water_pool_heaters_nopr.html.* In the December 2009 NOPR, DOE proposed amended energy conservation standards for the three heating products as follows:

TABLE II.4—PROPOSED AMENDED ENERGY CONSERVATION STANDARDS FOR RESIDENTIAL WATER HEATERS, DIRECT HEATING EQUIPMENT, AND POOL HEATERS

Product Class	Proposed Standard Level	
Residential Water Heaters*		
Gas-fired Storage	For tanks with a Rated Storage Volume at or below 60 gallons: EF = 0.675 − (0.0012 × Rated Storage Volume in gallons).	For tanks with a Rated Storage Volume above 60 gallons: EF = 0.717 − (0.0019 × Rated Storage Volume in gallons).
Electric Storage	For tanks with a Rated Storage Volume at or below 80 gallons: EF = 0.96 − (0.0003 × Rated Storage Volume in gallons).	For tanks with a Rated Storage Volume above 80 gallons: EF = 1.088 − (0.0019 × Rated Storage Volume in gallons).
Oil-fired Storage	EF = 0.68 − (0.0019 × Rated Storage Volume in gallons).	
Gas-fired Instantaneous	EF = 0.82 − (0.0019 × Rated Storage Volume in gallons).	

Direct Heating Equipment**

Product Class	Proposed Standard Level
Gas wall fan type up to 42,000 Btu/h	AFUE = 76%.
Gas wall fan type over 42,000 Btu/h	AFUE = 77%.
Gas wall gravity type up to 27,000 Btu/h	AFUE = 70%.
Gas wall gravity type over 27,000 Btu/h up to 46,000 Btu/h	AFUE = 71%.
Gas wall gravity type over 46,000 Btu/h	AFUE = 72%.
Gas floor up to 37,000 Btu/h	AFUE = 57%.
Gas floor over 37,000 Btu/h	AFUE = 58%.
Gas room up to 20,000 Btu/h	AFUE = 62%.
Gas room over 20,000 Btu/h up to 27,000 Btu/h	AFUE = 67%.
Gas room over 27,000 Btu/h up to 46,000 Btu/h	AFUE = 68%.
Gas room over 46,000 Btu/h	AFUE = 69%.

Gas hearth up to 20,000 Btu/h	AFUE = 61%.
Gas hearth over 20,000 Btu/h and up to 27,000 Btu/h	AFUE = 66%.
Gas hearth over 27,000 Btu/h and up to 46,000 Btu/h	AFUE = 67%.
Gas hearth over 46,000 Btu/h	AFUE = 68%.

Pool Heaters

Product Class	Proposed Standard Level
Gas-fired	Thermal Efficiency = 84%.

* EF is the "energy factor," and the "Rated Storage Volume" equals the water storage capacity of a water heater (in gallons), as specified by the manufacturer.

** Btu/h is "British thermal units per hour," and AFUE is "Annual Fuel Utilization Efficiency."

In the December 2009 NOPR, DOE identified 24 specific issues on which it was particularly interested in receiving the comments and views of interested parties. 74 FR 65852, 65994–95 (Dec. 11, 2009). In addition, DOE also specifically requested comments and data that would allow DOE to further bring clarity to the issues surrounding heat pump water heaters and condensing water heaters, and determine how the issues discussed in the December 2009 NOPR could be adequately addressed prior to the compliance date of an amended national energy conservation standard for water heaters that would effectively require the use of such technology. 74 FR 65852, 65966–67 (Dec. 11, 2009). DOE also held a public meeting in Washington, DC, on January 7, 2010, to hear oral comments on and solicit information on the issues just mentioned and any other matters relevant to the proposed rule. Finally, DOE received many written comments on these and other issues in response to the December 2009 NOPR, which are further presented and addressed throughout today's notice. The December 2009 NOPR included additional, detailed background information on the history of this rulemaking. *See* 74 FR at 65852, 65859–60 (Dec. 11, 2009).

III. General Discussion

A. Test Procedures

As noted above, DOE's test procedures for residential water heaters, vented DHE, and pool heaters are set forth at 10 CFR part 430, subpart B, appendices E, O, and P, respectively. These test procedures are currently used to determine whether the three heating products comply with applicable energy conservation standards and as a basis for manufacturers' representations as to the energy efficiency of these products.

During this rulemaking, interested parties have asserted that the residential water heater test procedure does not: (1) Reflect actual use of these water heaters by consumers; (2) permit accurate (*i.e.,* consistent and repeatable) measurement of the efficiencies of electric resistance water heaters that have an EF of 0.95 EF and above; or (3) include all of the cost-effective efficiency measures available for water heaters. 74 FR 65852, 65860–61 (Dec. 11, 2009).

As to the first point, DOE believes the test procedure does reflect actual use of water heaters. It employs a hot water draw model, and data that incorporate correction factors that account for actual use of water heaters in U.S. homes. 74 FR 65852, 65860 (Dec. 11, 2009). As to the second point, concerning accuracy of the test procedure, DOE explains in the December 2009 NOPR that manufacturer certification of several electric resistance water heaters with EFs of 0.95, as well as DOE testing of such models, demonstrate that the DOE test procedure can accurately measure the efficiencies of units at that level that use conventional, electric resistance technologies. 74 FR 65852, 65680–81 (Dec. 11, 2009). As the December 2009 NOPR also indicates, units with efficiencies significantly above that level must use advanced technologies, for which the test procedure also permits accurate measurement of EF levels. 74 FR 65852, 65681 (Dec. 11, 2009). Thus, because today's standards for electric water heaters have two substantially different tiers—for capacities at or below 55 gallons, minimum EF levels equivalent to 0.95 at the representative storage capacity, and for larger capacities substantially higher minimum EF levels—DOE confirms that the existing test procedure will accurately determine the efficiencies of both models using conventional technologies to meet the lower tier and models that will have to use advanced technologies to meet the higher tier. Finally, the only specific cost-effective efficiency measure that commenters cited as being absent from DOE's water heater test procedure is insulation on the tank bottom. 74 FR 65852, 65861 (Dec. 11, 2009). To the contrary, however, the test procedure addresses and gives credit for inclusion of such insulation in water heaters. 10 CFR part 430, subpart B, appendix E, section 5. Although DOE recognizes that the test procedure does not reflect certain recent advances in energy saving technology, it is aware of no evidence that such technologies actually do or would result in significant, cost-effective energy savings under normal operating conditions for water heaters. Hence, omission of these technologies from the test procedure does not affect the efficiency levels considered in this rulemaking. DOE received no comments on this issue at the NOPR stage. Thus, DOE continues to believe, as stated in the December 2009 NOPR, that the appropriate time to address such omission is during the next revision of the test procedure.

As to the DHE and pool heater test procedures, in the December 2009 NOPR, DOE proposed that its test procedures for vented DHE be applied to establish the efficiencies of vented gas hearth DHE. 74 FR 65852, 65861 (Dec. 11, 2009). DOE received no comments from interested parties raising any concern in this rulemaking about application of the DOE test procedures for vented DHE to other types of this product. In addition, DOE received no comments regarding application of its test procedures for pool heaters.

EPCA, as amended by EISA 2007, requires DOE to amend the test procedures for the three types of heating products to include provisions for measurement of the products' standby mode and off mode energy consumption. (42 U.S.C. 6295(gg)(2)(B)(v)) DOE is actively working on a separate rulemaking to amend its test procedures for the three types of heating products to incorporate these measurements of standby mode and off mode energy consumption in the future.

B. Technological Feasibility

1. General

As stated above, any standard that DOE establishes for any of the three heating products must be technologically feasible. (42 U.S.C. 6295(o)(2)(A) and (3)(B)) DOE considers a design or technology option to be technologically feasible if it is in use by the respective industry or if research has progressed to the development of a

working prototype. "Technologies incorporated in commercial products or in working prototypes will be considered technologically feasible." 10 CFR part 430, subpart C, appendix A, section 4(a)(4)(i). Once DOE has determined that particular technology options are technologically feasible, it evaluates each technology option in light of the following additional screening criteria: (1) Practicability to manufacture, install, or service; (2) adverse impacts on product utility or availability; and (3) adverse impacts on health or safety.

This final rule considers the same technology options as those evaluated in the December 2009 NOPR. (*See* chapter 3 and 4 of the TSD accompanying this notice.) All of these technologies have been used or are in use in commercially-available products, or exist in working prototypes. Also, these technologies all incorporate materials and components that are commercially available in today's supply markets for the products covered by this final rule. DOE received several comments on the technology options considered in the rulemaking and the preliminary conclusions drawn by applying the four screening criteria to them. A detailed discussion of the comment and response can be found in section IV.B. Therefore, DOE determined that all of the efficiency levels evaluated in this notice are technologically feasible.

2. Maximum Technologically Feasible Levels

As required by 42 U.S.C. 6295(p)(1), in developing the December 2009 NOPR, DOE identified the efficiency levels that would achieve the maximum improvements in energy efficiency that are technologically feasible (max-tech levels) for the three heating products. 74 FR 65852, 65861–62 (Dec. 11, 2009). (*See* chapter 5 of the TSD.) Except for the levels for electric and gas-fired storage water heaters and gas wall gravity DHE, DOE received no comments on the December 2009 proposed rule to lead DOE to consider changes to these levels. Therefore, for today's final rule, the max-tech levels for all classes of the three heating products, except for the electric and gas-fired water heaters and gas wall gravity DHE, are the max-tech levels identified in the December 2009 NOPR.

The max-tech levels considered for today's rule are provided in Table III.1. *See* section IV.C.2 for additional details of the max-tech efficiency levels and discussion of related comments from interested parties on the December 2009 NOPR.

TABLE III.1—MAX-TECH EFFICIENCY LEVELS FOR THE RESIDENTIAL HEATING PRODUCTS RULEMAKING FOR THE REPRESENTATIVE PRODUCTS

Product class	Representative product	Max-Tech efficiency level
Residential Water Heaters		
Gas-Fired Storage Water Heater	Rated Storage Volume = 40 Gallons	EF = 0.77.
Electric Storage Water Heater	Rated Storage Volume = 50 Gallons	EF = 2.35.
Oil-Fired Storage Water Heater	Rated Storage Volume = 32 Gallons	EF = 0.68.
Gas-Fired Instantaneous Water Heater	Rated Storage Volume = 0 Gallons, Rated Input Capacity = 199,999 Btu/h.	EF = 0.95.
Direct Heating Equipment		
Gas Wall Fan Type	Rated Input Capacity = Over 42,000 Btu/h	AFUE = 80%.
Gas Wall Gravity Type	Rated Input Capacity = Over 27,000 Btu/h and up to 46,000 Btu/h.	AFUE = 70%.
Gas Floor Type	Rated Input Capacity = Over 37,000 Btu/h	AFUE = 58%.
Gas Room Type	Rated Input Capacity = Over 27,000 Btu/h and up to 46,000 Btu/h.	AFUE = 83%.
Gas Hearth Type	Rated Input Capacity = Over 27,000 Btu/h and up to 46,000 Btu/h.	AFUE = 93%.
Pool Heaters		
Gas-Fired	Rated Input Capacity = 250,000 Btu/h	Thermal Efficiency = 95%.

C. Energy Savings

DOE forecasted energy savings over a 30-year analysis period in its national impact analysis (NIA) through the use of an NIA spreadsheet tool, as discussed in the December 2009 NOPR. 74 FR 65862, 65908–14, 65954 (Dec. 11, 2009).

One of the criteria that governs DOE's adoption of standards for covered products is that the standard must result in "significant conservation of energy." (42 U.S.C. 6295(o)(3)(B)) While EPCA does not define the term "significant," the U.S. Court of Appeals for the District of Columbia Circuit, in *Natural Resources Defense Council* v. *Herrington,* 768 F.2d 1355, 1373 (DC Cir. 1985), indicated that Congress intended "significant" energy savings in this context to be savings that were not "genuinely trivial." DOE's estimates of the energy savings for energy conservation standards at each of the TSLs considered for today's rule indicate that the energy savings each would achieve are nontrivial. Therefore, DOE considers these savings "significant" within the meaning of Section 325 of EPCA.

D. Economic Justification

The following section discusses how DOE has addressed each of the seven factors that it uses to determine if energy conservation standards are economically justified. The comments DOE received on specific analyses and DOE's response to those comments are summarized and presented throughout section IV.

1. Specific Criteria

As noted earlier, EPCA provides seven factors to evaluate in determining whether an energy conservation standard for covered products is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)) The following sections summarize how DOE has addressed each of those seven factors in evaluating efficiency standards for the three heating products.

a. Economic Impact on Consumers and Manufacturers

As required by EPCA, DOE considered the economic impact of potential standards on consumers and manufacturers of the three heating products. (42 U.S.C. 6295(o)(2)(B)(i)(I)) For consumers, DOE measured the economic impact as the change in installed cost and life-cycle operating costs (*i.e.,* the change in LCC). (*See* section IV.F and VI.C.1.a, and chapter 8 of the final rule TSD.) DOE investigated the impacts on manufacturers through the manufacturer impact analysis (MIA). (*See* sections IV.I and VI.C.2 of today's final rule, and chapter 12 of the final rule TSD.) The economic impact on consumers and manufacturers is discussed in detail in the December 2009 NOPR. 74 FR 65852, 65862–63, 65897–908, 65915–22, 65932–54, 65984–92 (Dec. 11, 2009).

b. Life-Cycle Costs

As required by EPCA, DOE considered the life-cycle costs of the three heating products. (42 U.S.C. 6295(o)(2)(B)(i)(II)) LCC is discussed at length in the December 2009 NOPR. 74 FR 65852, 65863, 65897–908, 65915, 65932–35 (Dec. 11, 2009). DOE calculated the sum of the purchase price (including associated installation costs) and the operating expense (including energy, maintenance, and repair expenditures), discounted over the lifetime of the equipment, to estimate the range in LCC benefits that consumers would expect to achieve due to standards.

c. Energy Savings

Although significant conservation of energy is a separate statutory requirement for imposing an energy conservation standard, EPCA also requires DOE, in determining the economic justification of a proposed standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III)) As in the December 2009 NOPR, for today's final rule, DOE used the NIA spreadsheet results in its consideration of total projected savings that are directly attributable to the standard levels DOE considered. 74 FR 65852, 65862, 65908–14, 65954 (Dec. 11, 2009).

d. Lessening of Utility or Performance of Products

In selecting today's standard levels, DOE did not consider trial standard levels for the three heating products that would lessen the utility or performance of such products. (42 U.S.C. 6295(o)(2)(B)(i)(IV)). As explained in the December 2009 NOPR, DOE determined that none of the trial standard levels under considerations would reduce the utility or performance of the products subject to this rulemaking. 74 FR 65852, 65863, 65956 (Dec. 11, 2009).

e. Impact of Any Lessening of Competition

DOE considers any lessening of competition that is likely to result from standards. Accordingly, as discussed in the December 2009 NOPR (74 FR 65852, 65863, 65956 (Dec. 11, 2009)), DOE requested that the Attorney General transmit to the Secretary, not later than 60 days after publication of the proposed rule, a written determination of the impact, if any, of any lessening of competition likely to result from the standards proposed in the December 2009 NOPR, together with an analysis of the nature and extent of such impact. (42 U.S.C. 6295(o)(2)(B)(i)(V) and (B)(ii))

To assist the Attorney General in making such a determination, DOE provided the U.S. Department of Justice (DOJ) with copies of the December 2009 proposed rule and the NOPR TSD for review. The Attorney General's determination is discussed in section VI.C.5 below, and is reprinted at the end of this rule. DOJ did not believe the standards proposed in the December 2009 NOPR for water heaters and pool heaters would likely lead to a lessening of competition. However, DOJ was concerned about the potential of the proposed standards to impact competition in the traditional DHE categories if no more than one or two DHE manufacturers chose to continue to produce products in any one of the categories. DOJ requested that DOE consider the potential impact on competition in determining the final standards for these categories. (DOJ, No. 99 at pp. 1–2) [2] DOJ's comment and DOE's response are further described in section VI.C.5.

f. Need of the Nation To Conserve Energy

In considering standards for the three heating products, the Secretary must consider the need of the Nation to conserve energy. (42 U.S.C. 6295(o)(2)(B)(i)(VI)) The Secretary recognizes that energy conservation benefits the Nation in several important ways. The non-monetary benefits of standards are likely to be reflected in improvements to the security and reliability of the Nation's energy system. Today's standards will also result in environmental benefits. As discussed in detail in the December 2009 NOPR (74 FR 65852, 65863, 65923–29, 65956–61 (Dec. 11, 2009)) and in sections IV.K, IV.L, and IV.M, DOE has considered these factors in considering whether to adopt standards for the three heating products, primarily through its utility impact analysis, environmental assessment, and monetization of anticipated emissions reductions.

g. Other Factors

EPCA directs the Secretary of Energy, in determining whether a standard is economically justified, to consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) In adopting today's standards, the Secretary considered the potential impact of standards on certain identifiable groups of consumers who might be disproportionately impacted by any national energy conservation standard level. For certain water heaters and DHE, DOE considered the impacts of standards on low-income households and senior-only households, and of these water heaters, DOE also considered the impacts of standards on households in multi-family housing and in manufactured homes. 74 FR 65852, 65863, 65934–35, 65961–62 (Dec. 11, 2009).

In addition, DOE considered the uncertainties associated with whether, in order to adequately serve the water heater market: (1) Manufacturers could ramp up production of heat pump water heaters; (2) heat pump component manufacturers could increase production; and (3) enough servicers and installers of water heaters could be retrained. 74 FR 65852, 65863–64, 65877–78, 65962, 65965–66 (Dec. 11, 2009). Lastly, DOE considered the issues identified in the December 2009 NOPR surrounding the product division used in the two-slope energy-efficiency equations, promulgation of different standards for a subset of products, the heat pump water heater market, as well as the condensing water heater market. 74 FR 65852, 65966–67 (Dec. 11, 2009). These issues are addressed as presented below in section VI.D.2.

2. Rebuttable Presumption

As set forth in 42 U.S.C. 6295(o)(2)(B)(iii), EPCA states that there is a rebuttable presumption that an energy conservation standard is economically justified if the increased

[2] "DOJ, No. 99 at pp. 1–2" refers to: (1) To a statement that was submitted by the U.S. Department of Justice. It was recorded in the Resource Room of the Building Technologies Program in the docket under "Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters," Docket Number EERE–2006–BT–STD–0129, as comment number 99; and (2) a passage that appears on pages 1 through 2 of that statement.

installed cost for a product that meets the standard is less than three times the value of the first-year energy (and, as applicable, water) savings resulting from the standard, as calculated under the applicable DOE test procedure. DOE's LCC and payback period (PBP) analyses generate values that calculate the payback period for consumers of potential energy conservation standards, which include, but are not limited to, the payback period contemplated under the rebuttable presumption test described above. However, DOE routinely conducts a full economic analysis that considers the full range of impacts, including those to the consumer, manufacturer, Nation, and environment, as required under 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE to definitively evaluate the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). The results of DOE's PBP analysis can be found in sections VI.C.1.a and VI.C.1.c.

IV. Methodology and Discussion of Comments on Methodology

DOE used several analytical tools that it developed previously and adapted for use in this rulemaking. One is a spreadsheet that calculates LCC and PBP. Another tool calculates national energy savings and national NPV that would result from the adoption of energy conservation standards. DOE also used the Government Regulatory Impact Model (GRIM), along with other methods, in its MIA to determine the impacts on manufacturers of standards for the three heating products. Finally, DOE developed an approach using the Energy Information Administration's (EIA) National Energy Modeling System [3] (NEMS) to estimate the impacts of such standards on utilities and the environment. Chapters 3 through 16 of the TSD and the December 2009 NOPR discuss each of these analytical tools in detail. 74 FR 65852, 65897–919, 65923–29 (Dec. 11, 2009).

As a basis for this final rule, DOE has continued to use the spreadsheets and approaches explained in the December 2009 NOPR. DOE used the same general methodology as applied in the December 2009 NOPR, but revised some of the assumptions and inputs for the final rule in response to stakeholder comments. The following sections discuss these comments and revisions.

A. Market and Technology Assessment

When beginning an energy conservation standards rulemaking, DOE develops information that provides an overall picture of the market for the products concerned, including the purpose of the products, the industry structure, and market characteristics. This activity includes both quantitative and qualitative assessments based primarily on publicly-available information. DOE presented its market and technology assessment for this rulemaking in the December 2009 NOPR and chapter 3 of the NOPR TSD. 74 FR 65852, 65864–72 (Dec. 11, 2009). The assessment included product definitions, delineation of the products included in the rulemaking, product classes, manufacturers, quantities and types of products offered for sale, retail market trends, and regulatory and non-regulatory initiative programs. As discussed below, commenters raised a variety of issues related to the market and technology assessment, to which DOE responds in the following sections.

1. DOE's Determinations as to the Inclusion of Products in This Rulemaking

a. Whether Certain Products Are Covered Under the Act

i. Solar-Powered Water Heaters and Pool Heaters

As fully explained in the December 2009 NOPR, DOE has concluded that it presently lacks authority to prescribe standards for these products because EPCA currently covers only water heaters and pool heaters that use electricity or fossil fuels, and because any energy conservation standard currently adopted under EPCA for these two products must address or be based on the quantity of these fuels, but not solar power, that the product consumes. 74 FR 65852, 65864 (Dec. 11, 2009). In addition, DOE currently lacks authority to adopt standards for solar-powered water heaters because EPCA's definition of "water heater" includes only products that use "oil, gas, or electricity to heat potable water." (42 U.S.C. 6291(27); 10 CFR 430.2) Because DOE did not receive additional feedback from interested parties, DOE did not change its position on solar-powered water heaters and pool heaters as presented in the December 2009 NOPR and summarized above.

ii. Add-On Heat Pump Water Heaters

DOE did not propose in the December 2009 NOPR to adopt standards for a residential product that is commonly known as an add-on heat pump water heater. This product typically is marketed and used as an add-on component to a separately manufactured, fully-functioning electric storage water heater. The add-on device, by itself, is not capable of heating water and lacks much of the equipment necessary to operate as a water heater. DOE has concluded, therefore, that the device does not meet EPCA's definition of a "water heater" and currently is not a covered product. 74 FR 65852, 65865 (Dec. 11, 2009).

In response to DOE's preliminary conclusions set forth in the December 2009 NOPR regarding add-on heat pump water heaters, the American Council for an Energy Efficient Economy (ACEEE) stated that add-on heat pump water heaters should not have been excluded from the rulemaking. (ACEEE, No. 79 at p. 5) According to the commenter, the December 2009 NOPR language used to exclude them could as readily be used to exclude split system air conditioners as add-ins to furnace systems, since they are not fully functional without the furnace's air handler. ACEEE argued that add-on heat pump water heaters could provide an important opportunity for cost-effective resistive unit retrofits, and standards are required to help exclude low-performance units that will not meet consumer needs. Otherwise, ACEEE asserted that there is danger that failures of low-performance add-on units will damage the reputation of the integral heat pump water heater product class, as it is not clear that consumers will easily differentiate the two product subclasses.

In response, DOE does not agree with ACEEE's comparison of add-on heat pump water heaters to central air conditioning and heating systems. Unlike components in a split air-conditioning system, add-on heat pump water heaters are paired to an electric storage water heater which is fully functional when it leaves the manufacturing facility. Components in a split air-conditioning system do not work independently until paired

[3] The NEMS model simulates the energy sector of the U.S. economy. EIA uses NEMS to prepare its *AEO,* a widely-known energy forecast for the United States. The EIA approves the use of the name NEMS to describe only an *AEO* version of the model without any modification to code or data. For more information on NEMS, refer to The National Energy Modeling System: An Overview 1998. DOE/EIA–0581 (98) (Feb. 1998) (available at: *http://tonto.eia.doe.gov/FTPROOT/forecasting/058198.pdf).* The version of NEMS used for appliance standards analysis is called NEMS–BT. Because the present analysis entails some minor code modifications and runs the model under various policy scenarios that deviate from *AEO* assumptions, the name "NEMS–BT" refers to the model as used here. ("BT" stands for DOE's Building Technologies Program.) NEMS–BT offers a sophisticated picture of the effect of standards because it accounts for the interactions between the various energy supply and demand sectors and the economy as a whole.

together in the field. As DOE previously stated, the add-on device, by itself, is not capable of heating water and lacks much of the equipment necessary to operate as a water heater. DOE is not swayed by the commenter's speculative assertions regarding the future performance of add-on heat pump water heaters. Accordingly, DOE has concluded that an add-on heat pump water heater does not meet EPCA's definition of a "water heater" and currently is not a covered product.

iii. Gas-Fired Instantaneous Water Heaters With Inputs Above and Below Certain Levels

During this rulemaking, DOE considered whether to evaluate for standards gas-fired instantaneous water heaters with inputs greater than 200,000 Btu/h or less than 50,000 Btu/h. DOE determined that the former do not meet EPCA's definition of a "water heater," given the specific portions of the definition pertaining to "instantaneous type units." (42 U.S.C. 6291(27)(B)) As to the latter, DOE determined that manufacturers are not currently producing any gas-fired instantaneous water heaters with an input capacity less than 50,000 Btu/h. Therefore, DOE did not propose standards for products with an input capacity above 200,000 Btu/h or below 50,000 Btu/h. 74 FR 65852, 65865 (Dec. 11, 2009). DOE did not receive any comments on this issue at the NOPR stage, so the above approach has been retained for this final rule, and accordingly, no standards are being adopted for gas-fired instantaneous water heaters with inputs greater than 200,000 Btu/h or less than 50,000 Btu/h.

iv. Residential Pool Heaters With Input Capacities Above Certain Levels and Coverage of Spa Heaters

At the framework stage of this rulemaking, DOE considered excluding pool heaters with an input capacity greater than 1 million Btu/h, and commenters suggested that DOE should exclude products with an input capacity greater than 400,000 Btu/h. The rulemaking covers pool heaters that meet EPCA's definitions of "pool heater" (which provides no capacity limitation) and of "consumer product." (42 U.S.C. 6291(25); 42 U.S.C. 6291(1)). DOE tentatively concluded that these provisions, and standards adopted under them, would apply to any pool heater distributed to any significant extent as a consumer product for residential use, regardless of input capacity. In addition, DOE tentatively concluded that pool heaters marketed as commercial equipment, which contain additional design modifications related to safety requirements for commercial installation, would not be covered by such standards. Therefore, DOE did not propose to limit application of the standards developed in this rulemaking to pool heaters with an input capacity below a specified level. 74 FR 65852, 65865 (Dec. 11, 2009).

In response to this position in the December 2009 NOPR, DOE received three comments urging DOE to establish an input capacity limit for residential pool heaters.

Zodiac Pool Systems (Zodiac) asserted that DOE should consider setting different minimum efficiency levels for pool heaters with input ratings of up to 400,000 British thermal units per hour (Btu/h) and for those with input ratings above 400,000 Btu/h. Zodiac stated its belief that there may be some benefits to be gained if what Zodiac referred to as "commercial" pool heaters (*i.e.,* those units rated above 400,000 Btu/h input) required a higher minimum efficiency level than that for "residential" pool heaters (*i.e.,* those units rated up to 400,000 Btu/h input). According to the commenter, commercial-type units are operated longer and in general, continuously, thereby increasing the potential payback in efficiency and energy savings over the life of the product. (Zodiac, No. 68 at p. 2)

Lochinvar asserted that DOE should limit the input capacity for residential pool heaters to 400,000 Btu/h and that DOE should add an additional classification for commercial pool heaters above 400,000 Btu/h. According to the commenter, practically all of the residential pool heaters sold today have pool heater inputs of 400,000 Btu/h and below. Lochinvar stated that residential pool heater sales by pool heater manufacturers do not include pumps. Residential pool heaters are designed to accept a wide range of water flows to meet the customers' demands because the residential market is mature with a wide variety of pool distribution accessories (*e.g.,* pumps that mate with water filtration systems, water temperature controls, and valving components). Therefore, pumps are not supplied because this is a variable that cannot be anticipated by the pool heater manufacturer. Thus, for efficiency rating purposes, pool heater thermal efficiency, as calculated by DOE's test procedure, does not include the pump energy. In contrast, Lochinvar pointed out that commercial pool heater applications require much higher volumes of water to be circulated in a primary pool loop that incorporates large filtration systems and pool water conditioning and monitoring equipment. Commercial pool heaters are designed to tap off of the primary pool loop and, via means of a separate pump, circulate pool water through the commercial pool heater to be heated and then delivered back to the pool loop. The ratio of water flow through commercial pool loop systems to that flowing through the pool heater is anywhere from 5 to 15 times. In these applications, commercial pool heater sales always provide or specify matching pumps to ensure sufficient water flow through the heat exchanger. Accordingly, the contribution of pump energy is included in the industry commercial pool heater test procedure and combustion efficiency metric. (Lochinvar, No. 56.6 at p. 2)

AHRI recommended that consideration be given in the future to creating separate subclasses to distinguish between commercial and residential pool heaters from a market perspective. Comments have previously been provided noting the major differences between pool heaters for commercial applications versus residential applications, specifically in terms of construction, control schemes, and how they go to market. (AHRI, No. 91 at p. 10)

As DOE discussed in the December 2009 NOPR, EPCA places no capacity limit on the pool heaters it covers in terms of its definition of "pool heater." (42 U.S.C. 6291(25)) Furthermore, EPCA covers pool heaters as a "consumer product," (42 U.S.C. 6291(2), 6292(a)(11)) and defines "consumer product," in part, as an article that "to any significant extent, is distributed in commerce for personal use or consumption by individuals." (42 U.S.C. 6291(1)) These provisions establish that EPCA, and standards adopted under it, apply to any pool heater distributed to any significant extent as a consumer product for residential use, regardless of input capacity. In light of the above and based upon the distinct differences articulated by commenters between the residential and commercial pool heater markets and products, DOE has concluded that further delineation by adding an input capacity limit is not necessary. Specifically, pool heaters marketed as commercial equipment, which contain additional design modifications related to safety requirements for installation in commercial buildings, are not covered by this standard. This would include pool heating systems that are designed to meet a high volume flow and are matched with a pump from the point of manufacture to accommodate the needs of commercial facilities. DOE believes manufacturers can distinguish those

units from pool heaters distributed to any significant extent as a consumer product for residential use, regardless of input capacity.

As to spa heaters, the EPCA definition for "pool heater" clearly encompasses them. (42 U.S.C. 6291(25)) Therefore, in the December 2009 NOPR, DOE tentatively concluded that they are covered by EPCA, and included them in this rulemaking. Furthermore, DOE tentatively concluded that because spa heaters and pool heaters perform similar functions, include similar features, and lack performance or operating features that would cause them to have inherently different energy efficiencies, a separate product class for such units is not warranted. 74 FR 65852, 65865–66 (Dec. 11, 2009). DOE did not receive any comments in response to its proposed treatment of spa heaters in the December 2009 NOPR. Consequently, DOE has concluded that spa heaters are included within EPCA under the definition of "pool heater" and do not warrant a separate product class.

v. Vented Hearth Products

The following two paragraphs summarize DOE's reasons, explained in greater detail in the December 2009 NOPR for concluding that EPCA covers vented hearth products and for including them in this rulemaking. 74 FR 65852, 65866 (Dec. 11, 2009).

When EPCA was amended to include energy conservation standards for "direct heating equipment," that term replaced the term "home heating equipment" in the Act. However, EPCA has never defined either of these terms. Instead, DOE regulations define "home heating equipment," stating that the term includes "vented home heating equipment." 10 CFR 430.2. These definitions inform the meaning of "direct heating equipment," but, to provide clarity in the future, in today's rule DOE is incorporating into its regulations a definition of this term that is identical to the existing definition of "home heating equipment."

Vented hearth products include gas-fired products such as fireplaces, fireplace inserts, stoves, and log sets that typically include aesthetic features and that provide space heating. DOE has concluded that such products meet its definition of "vented home heating equipment," because they are designed to furnish warmed air to the living space of a residence. DOE has also concluded, therefore, that they are covered products under EPCA and are properly classified as DHE. Accordingly, DOE proposed and today is adopting standards for vented hearth products.

In the December 2009 NOPR, DOE also pointed out that vented hearth products would be subject to the same product testing and certification requirements that currently apply to DHE. 74 FR 65852, 65866 (Dec. 11, 2009). In order to help manufacturers determine more easily whether their vented hearth direct heating equipment is covered under DOE's regulations, DOE proposed to adopt the following definition of "vented hearth heater":

> *Vented hearth heater* means a vented, freestanding, recessed, zero clearance fireplace heater, a gas fireplace insert or a gas-stove, which simulates a solid fuel fireplace and is designed to furnish warm air, without ducts to the space in which it is installed.

74 FR 65852, 65867–68 (Dec. 11, 2009).

The Air-Conditioning, Heating, and Refrigerating Institute (AHRI), the Hearth, Patio, and Barbeque Association (HPBA), and Empire Comfort Systems (Empire) do not support DOE's proposed definition "vented hearth heater" as presented above and in the December 2009 NOPR. However, these three interested parties do support DOE's decision to establish vented gas fireplace heaters as a separate type of direct heating equipment. AHRI, HPBA, and Empire urged DOE to use the definition of "vented gas fireplace heater" as presented in the American National Standards Institute (ANSI) Standard Z21.88, *Vented Gas Fireplace Heaters,* so as to directly connect it to this safety standard. By law, manufacturers are required to list and label these types of appliances to approved safety standards such as ANSI Z21.88. By using this safety standard reference, the interested parties argued that DOE and others would be able to distinguish vented gas fireplace heaters from decorative gas appliances certified to ANSI Z21.50, *Vented Gas Fireplaces,* and ANSI Z21.60, *Decorative Gas Appliances for Installation in Solid-Fuel Burning Fireplaces,* thereby eliminating a significant opportunity for confusion in the marketplace after the new energy conservation standards take effect. The interested parties argued that when the National Appliance Energy Conservation Act was being developed, it was recognized that there were decorative gas appliances that were marketed based on the aesthetic appeal of a simulated solid fuel fireplace or stove. The interested parties asserted that those same products are available in the marketplace today and need to be excluded from inclusion in this rulemaking in a proactive manner, preferably by using the consensus safety standard designation in the definition and adding an explanatory note to the definition stating that ANSI Z21.50 and ANSI Z21.60 appliances are not vented gas fireplace heaters. The interested parties suggested the following definition of "vented gas fireplace heater":

> *Vented Gas Fireplace Heater.* A vented appliance which simulates a solid fuel fireplace and furnishes warm air, with or without duct connections, to the space in which it is installed. A vented gas fireplace heater is such that it may be controlled by an automatic thermostat. The circulation of heated room air may be by gravity or mechanical means. A vented gas fireplace heater may be freestanding, recessed, zero clearance, or a gas fireplace insert.

(AHRI, No. 91 at pp. 13–14; HPBA, No. 75 at p. 1; Empire, No. 100 at p. 3; AHRI, Public Meeting Transcript, No. 57.4 at pp. 48–49; HPBA, Public Meeting Transcript, No. 57.4 at pp. 42 and 51; and Empire, Public Meeting Transcript, No. 57.4 at pp. 50)

ACEEE also suggested that it would be reasonable for DOE to not set efficiency regulations for purely decorative products with an output capacity less than or equal to 6,000 Btu/h. However, ACEEE asserted that an upper limit is necessary to prevent subterfuge and confusion with actual heating appliances. (ACEEE, No. 79 at p. 6)

DOE agrees with the interested parties that further modification to the definition of "vented hearth heater" is necessary to provide clear guidance to the industry regarding which products are covered under DOE's regulations. DOE's definition of "vented home heating equipment" limits the coverage of vented home heating equipment to include only those units "designed to furnish warmed air to the living space of a residence." 10 CFR 430.2. DOE notes that it is often difficult to determine the intended purpose of fireplace product currently sold. Units designed to furnish warmed air to the living space and purely decorative units often share very similar external appearances, unit construction, and input capacities. Some interested parties suggested DOE use the ANSI safety standards to distinguish coverage in the marketplace. DOE does not believe that using ANSI safety standards would be a suitable solution to this problem since many of those products classified as "decorative fireplaces" under the ANSI safety standards are very similar in construction to fireplace heaters and provide warm air to the residence.

DOE notes that the primary difference between the two types of hearth products is that decorative units are intended only to provide the ambiance and aesthetic utility associated with a

solid fuel (*e.g.,* wood-burning) fireplace with little or no heat output to the living space, while heating hearth products are intended to provide heat to the living space along with the aesthetic utility. Heating-type products are often shipped with additional accessories that decorative products do not have, such as thermostats to control the heat output and blowers that distribute hot air to the room. DOE research suggests that this additional equipment is typically optional and hence not very useful to distinguish between heaters and decorative units.

After carefully considering the public comments and conducting additional research, DOE believes implementing a maximum input capacity limit will likely result in a clear distinguishable way for DOE, manufacturers, and consumers to identify which products provide "warmed air to the residence," as compared with those designed purely for aesthetic purposes. Because of the nature of hearth products (*i.e.,* the presence of a flame), all hearth products create heat and nearly all of the hearth products provide some amount of that heat, however small that may be, to the surrounding living space.

Unlike fireplace heaters, decorative hearth products provide a unique utility, specifically offering the ambiance and aesthetic appeal provided by the flame without adding significant heat to the conditioned space. By way of explanation, some consumers that wish to purchase purely decorative hearth products live in warmer climates where any additional heat provided to the residence would be undesirable. However, these consumers still want the aesthetic appeal provided by the flame. As the efficiency of the vented hearth product is increased, the more useful heat is provided to the space. So in response to comments, DOE is adopting an approach that would maintain the utility and availability of decorative hearth products.

In order to determine whether a maximum input capacity limit is a good indicator of intended use, DOE reviewed the market for vented hearth products, including those products marketed as heaters and decorative appliances. DOE research identified products marketed for heating and decorative purposes offered across the entire range of input capacities. Many of the units produced solely for decorative purposes come with the capability to vary the input capacity in order to change the magnitude of the flame. Since manufacturers provide consumers, installers, and contractor with a means to change the input capacity of the unit to better match consumers' aesthetic desires and heating needs, DOE believes input capacity is indicative of the type of intended use of the vented hearth heater.

DOE believes that consumers desiring a purely decorative unit will chose to buy units which minimize the heat furnished to their living space, thereby reducing the impacts on the cooling loads of their house for those living in warmer climates. DOE contacted several contractors in warmer climates, where decorative appeal is presumably the consumers' top priority. From these discussions and further review of the product literature, DOE found that many hearth products allow the input capacity to be modulated via the gas valve. In warmer climates, contractors frequently suggest to their customer to turn down the gas supply to minimize the amount of heat radiated and convected to the air within the residence. Some installation companies even offer optional venting products and dampers, which attempt to direct the heat to other parts of the residence or outdoors. Even though decorative hearth products are offered with a large range of input capacities, DOE research hence suggests that the input rating is typically significantly reduced for applications in conditions in which the flames are purely ornamental to minimize heat provided to the residence. This is shown by the variability in the input ratings offered for a given model as described in manufacturer catalog data, which can be field-adjusted based on the amount of heat desired within the residence.

DOE believes that hearth products intended for decorative purposes provide a specific aesthetic utility that consumers value. In its analysis, DOE considered the value of this aesthetic quality and the additional heat load that such systems produce. DOE believes that a maximum input capacity of 9,000 Btu/h is an appropriate cut-off for decorative appliances since existing hearth-type DHE units featuring adjustable input capacities operate at or below this input capacity limit. DOE chose 9,000 Btu/h because other gas appliances found in a house, which may have unintended heating loads, such as a burner on a gas-cook top, are also found at this input capacity. By allowing manufacturers the option of producing vented hearth heaters that are excluded from the standards amended in today's final rule, DOE is preserving the ability of manufacturers to continue selling decorative units, consumers can continue to enjoy them, and unintended heat loads are limited to no more than ½ of a ton of heating capacity per decorative unit. DOE research suggests that manufacturers can comply relatively inexpensively with the coverage established by the "vented hearth heater" definition by reducing the maximum input capacity of the gas delivery system through the use of a restrictor plate, modifying the gas valve, or altering the flame orifice. All of these options are currently available or utilized within the industry today. DOE believes the most likely solution that will be used by hearth manufacturers to meet DOE's restriction on input capacity would be to use a restrictor plate because it is the most inexpensive. A restrictor plate would ensure that limitations were placed upon the gas line such that the maximum input capacity of the fireplace is less than 9,000 Btu/h. DOE notes that all vented hearth heaters which manufacturers produce to be purely decorative units must be designed so that the consumer cannot override this 9,000 Btu/h maximum input capacity limit in the field.

DOE chose to include a maximum input capacity limitation, instead of an output capacity limit as ACEEE suggested, because a very inefficient unit could have a very high input capacity and use a lot of energy, while meeting DOE's limitation on output capacity.

DOE realizes its amended definition of "vented hearth heater" will include all types of hearth units with maximum input capacities above the specified limit, including all products that are currently referred to as fireplace heaters and some products that are currently deemed as decorative within the marketplace. DOE also notes that this maximum input capacity corresponds to the output capacity suggested by ACEEE, assuming the unit is about two-thirds efficient, which is an efficiency that is comparable to the standard level being adopted today for vented gas hearth heaters. Therefore, DOE is modifying the "vented hearth heater" definition to include a maximum input capacity limit of 9,000 Btu/h for purely decorative units.

AHRI, HBPA, and Empire asserted that DOE should amend its definition of "vented hearth heater" to include duct connections. While duct connections were excluded from the original "direct heating equipment" definition, the interested parties stated that this exclusion is unnecessary for vented gas fireplace heaters because they are allowed to have duct connections by design. The interested parties argued that there is no reason for DOE to exclude these currently-available appliances merely based upon the

presence of ducting, particularly given that the limiting definition of "vented home heating equipment" was written before the products were introduced. (AHRI, No. 91 at pp. 13–14; HPBA, No. 75 at pp. 1–2; Empire, No. 100 at p. 3)

DOE agrees with these interested parties and is extending coverage to both ducted and ductless vented hearth heater products. DOE believes this modification will provide equal treatment to similar products offered on the market today. DOE's research confirmed that some vented hearth heater models have the ability to connect to ducts and distribute the heat furnished to the space throughout the house. In order to include both ducted and ductless vented hearth products, DOE is amending the definitions of "vented hearth heater" and "vented home heating equipment" for inclusion at 10 CFR 430.2. Lastly, DOE is making a number of editorial changes to the definition of "vented hearth heater" proposed in the December 2009 NOPR, in order to make the definition easier to read. As adopted, these definitions read as follows:

Vented hearth heater means a vented appliance which simulates a solid fuel fireplace and is designed to furnish warm air, with or without duct connections, to the space in which it is installed. The circulation of heated room air may be by gravity or mechanical means. A vented hearth heater may be freestanding, recessed, zero clearance, or a gas fireplace insert or stove. Those heaters with a maximum input capacity less than or equal to 9,000 British thermal units per hour (Btu/h), as measured using DOE's test procedure for vented home heating equipment (10 CFR part 430, subpart B, appendix O), are considered purely decorative and are excluded from DOE's regulations.

DOE is also amending its definition of "*vented home heating equipment* or *vented heater*" in 10 CFR 430.2 to include vented hearth heaters with duct connections. This modification is necessary in order for the definition of "vented home heating equipment or vented heater" to be consistent with the definition of "vented hearth heater." DOE is also amending this definition to add "vented hearth heater" to the list of products—"vented wall furnace, vented floor furnace, and vented room heater"—that the definition currently states are included as vented home heating equipment. As stated in the December 2009 NOPR and above, vented hearth products already meet DOE's definition for "vented home heating equipment." This is true regardless of whether the term "vented hearth heater" is added to that definition. Thus, the addition of that term merely clarifies the existing definition, and is a technical correction that does not alter the substance of the definition. As amended, the definition reads as follows:

Vented home heating equipment or *vented heater* means a class of home heating equipment, not including furnaces, designed to furnish warmed air to the living space of a residence, directly from the device, without duct connections (except that boots not to exceed 10 inches beyond the casing may be permitted and except for vented hearth heaters, which may be with or without duct connections) and includes: vented wall furnace, vented floor furnace, vented room heater, and vented hearth heater.

b. Covered Products Not Included in This Rulemaking

As the December 2009 NOPR explains in detail, unvented direct heating equipment, electric pool heaters, and combination water heating/space heating products all are covered products under EPCA, but no Federal energy conservation standards exist for them. 74 FR 65852, 65866–76 (Dec. 11, 2009). DOE did not propose standards for them in this rulemaking, because, in the case of unvented DHE, a standard could produce little energy savings (largely due to the fact that any heat losses are dissipated directly into the conditioned space) and because of limitations in the applicable DOE test procedure, and in the case of the other two products, because of the lack of an appropriate DOE test procedure. *Id.*

By contrast, standards currently apply to tabletop and electric instantaneous water heaters. (10 CFR 430.32(d)) But, as explained in the December 2009 NOPR, an increase in the current standard levels for tabletop products is not feasible, and would force them off the market, and an increase in the levels for electric instantaneous products would, at best, save little energy. 74 FR 65852, 65867 (Dec. 11, 2009). Therefore, DOE also did not propose amended standards for these products.

With regard to these five covered products, DOE sees no reason to change the conclusions expressed in the December 2009 NOPR, and takes no further action in today's final rule. DOE did not receive any comments in response to its proposed treatment of these five covered products in the December 2009 NOPR. Consequently, DOE is not adopting standards for these products in today's final rule.

2. Product Classes

In evaluating and establishing energy conservation standards, DOE generally divides covered products into classes by the type of energy used or by capacity or other performance-related feature that justifies a different standard for products having such feature. (*See* 42 U.S.C. 6295(q)) In deciding whether a feature justifies a different standard, DOE must consider factors such as the utility of the feature to users. *Id.* DOE normally establishes different energy conservation standards for different product classes based on these criteria.

Table IV.1 presents the product classes for the three types of heating products under consideration in this rulemaking. The subsections below provide additional details and a discussion of comments relating to the product classes for the three heating products in response to the December 2009 NOPR proposals.

TABLE IV.1—PRODUCT CLASSES FOR THE THREE HEATING PRODUCTS

Residential water heater type	Characteristics
Gas-Fired Storage Type	Nominal input of 75,000 Btu/h or less; rated storage volume from 20 to 100 gallons.
Oil-Fired Storage Type	Nominal input of 105,000 Btu/h or less; rated storage volume of 50 gallons or less.
Electric Storage Type	Nominal input of 12 kW (40,956 Btu/h) or less; rated storage volume from 20 to 120 gallons.
Gas-Fired Instantaneous	Nominal input of over 50,000 Btu/h up to 200,000 Btu/h; rated storage volume of 2 gallons or less.
Direct heating equipment type	**Heating capacity (Btu/h)**
Gas Wall Fan Type	Up to 42,000.
	Over 42,000.

TABLE IV.1—PRODUCT CLASSES FOR THE THREE HEATING PRODUCTS—Continued

Gas Wall Gravity Type	Up to 27,000. Over 27,000 and up to 46,000. Over 46,000.
Gas Floor	Up to 37,000. Over 37,000.
Gas Room	Up to 20,000. Over 20,000 and up to 27,000. Over 27,000 and up to 46,000. Over 46,000.
Gas Hearth	Up to 20,000. Over 20,000 and up to 27,000. Over 27,000 and up to 46,000. Over 46,000.
Pool heater type	Characteristics
Residential Pool Heaters	Gas-fired.

a. Water Heaters

As presented in the December 2009 NOPR, residential water heaters can be divided into various product classes categorized by physical characteristics that affect product efficiency. Key characteristics affecting the energy efficiency of the residential water heater are the type of energy used and the volume of the storage tank. 74 FR 65852, 65868–71 (Dec. 11, 2009). These product classes are differentiated by the type of energy used (*i.e.,* electric, gas, or oil) and the type of storage for the water heater (*i.e.,* storage, tabletop, or instantaneous). In this rulemaking, DOE has excluded tabletop water heaters and electric instantaneous water heaters from consideration for the reasons discussed above. 74 FR 65852, 65868 (Dec. 11, 2009).

In response to the December 2009 NOPR analysis and the issues for which DOE specifically sought comment, DOE received several comments from interested parties about DOE's proposed product classes and their organization for residential water heaters. These comments are summarized and addressed immediately below.

i. Low-Boy Water Heaters

General Electric (GE), A.O. Smith Corporation (A.O. Smith), Bradford White Corporation (BWC), and AHRI supported the need for a separate product class for low-boy water heaters, which are electric storage water heaters that are shorter in height and wider in diameter than traditional water heaters. (GE, No. 84 at p. 1; A.O. Smith, No. 76 at p. 2; BWC, No. 61 at p. 3; AHRI, No. 91 at p. 3; Rheem, No. 89 at p. 11; and A. O. Smith, Public Meeting Transcript, No. 57.4 at pp. 55–56) ACEEE, EarthJustice, and ASAP disagreed and supported DOE's position in the December 2009 NOPR, which did not establish a separate product class for low-boy electric storage water heaters. (ACEEE, No. 79 at p. 8; EarthJustice, No. 83 at p. 1; and ASAP, Public Meeting Transcript, No. 57.4 at p. 60) The individual commenters' rationales and further justification are presented below.

GE asserted the low-boy water heaters should be separated into their own product class, because in some categories, the benefits of unique size, configuration, and functionality are very important to consumers. In this product category, the unique functionality of a low-boy water heater happens to focus on the physical dimensions of the product. GE asserted that some consumers prefer or require the lower overall product height, as they do not have the space available for a standard-sized water heater. (GE, No. 84 at p. 1)

A.O. Smith strongly asserted that a separate class for low-boy water heaters is justified, for many of the same reasons that a separate class is already established for table-top water heaters. According to the commenter, low-boy water heaters are predominately used in installations where height is a constraint, such as where a furnace or air-handler is mounted on a rack above the low-boy water heater in an equipment closet. Because low-boy water heaters are already a larger diameter unit than the baseline design, increasing the diameter even more by requiring additional insulation thickness would make the heater too large to fit into the space available in most replacement situations (again, such as the closet/rack example above). A.O. Smith stated its belief that there will be a loss of utility for low-boy heaters if they are not put into a separate class with an EF less than proposed for the "standard" heater. (A.O. Smith, No. 76 at p. 2)

BWC supports a separate product class for low-boy water heaters because they have very specific applications. Low-boy water heaters are frequently used in condominiums where additional space is unavailable and a gas water heater cannot be used due to venting limitations. When used in these applications, BWC claimed that low-boys use less water than typical standard electric water heaters. Therefore, BWC asserted low-boy water heaters have a different utility than standard electric water heaters. (BWC, No. 61 at p. 3)

AHRI asserted that low-boy water heaters use electricity, but are not offered in the same range of volumes as standard electric storage water heaters. Most low-boys are offered in 30-gallon and 40-gallon sizes. AHRI asserted that the December 2009 NOPR mischaracterizes the functionality or utility of these products. Low-boy models have the unique feature of being able to be installed in short, confined spaces in a dwelling. But, as is the case with countertop electric water heaters, the constraints dictated by the spaces in which these products are installed affect the options for increasing the efficiency of low-boy electric models. Many low-boy models today may have efficiencies comparable to standard size electric water heaters, but they do not have the same potential for further increasing their efficiency. Accordingly, AHRI argued that this separate product class should have a minimum EF standard that is 0.01 less than that proposed for electric storage water heaters. (AHRI, No. 91 at p. 3)

Rheem asserted that low-boy electric water heaters (*i.e.,* electric storage water heaters ranging from 20 to 50 gallons) are typically installed under a counter or stacked (air handler) in high-density housing, such as apartment and condominium communities. According to Rheem, any size increase driven by a significant change in the EF

requirements would affect the product geometry (diameter and height) and drive the potential use of multiple, smaller, point-of-use electric or instantaneous electric water heaters. (Rheem, No. 89 at p. 11)

ACEEE asserted that low-boy water heaters designed to fit beneath conventional cabinets are similar to "table-top" units, with similar trade-offs in terms of capacity and improved efficiency (through thicker insulation). ACEEE agrees with DOE's reasoning in the December 2009 NOPR that low-boys can be designed to meet the proposed standards by using thicker insulation, higher set-point settings, and a tempering valve, and, therefore, ACEEE opined that, in general, no special product class is needed. However, as a compromise, ACEEE stated that it could support a special class for low-boys designed for small living units, but with an upper capacity limit of 30 gallons, in order to prevent "leakage" of lower-efficiency units into the general water heater applications. If larger units are also included, ACEEE expressed concern that significant growth in low-boy sales would be expected, leading to a significant loss in energy savings relative to use of higher-efficiency conventional units. (ACEEE, No. 79 at pp. 8–9)

EarthJustice stated that a separate product class for low-boy water heaters is not justified. According to the commenter, DOE's analyses demonstrate that water heaters in these configurations can meet the efficiency standards under consideration for electric-storage and gas-storage water heaters, respectively (*see* 74 FR 65852, 65869 (Dec. 11, 2009)). (EarthJustice, No. 83 at p. 1)

NRDC also stated that "low-boy" water heaters do not warrant a separate product class, because these products could become a low-cost loophole to the standard if allowed to be less efficient than traditional tank-type water heaters. (NRDC, No. 85 at p. 6)

ASAP agreed with DOE's position not to establish a separate product class for low-boy water heaters, as presented in the December 2009 NOPR. ASAP warned DOE to keep a close eye on lower standards for particular product classes, which can result in market shares for those products increasing and reduction of the overall energy savings associated with the energy conservation standards. (ASAP, Public Meeting Transcript, No. 57.4 at p. 60)

After careful consideration, DOE does not agree with certain commenters that a separate product class needs to be established for low-boy water heaters. As noted above, in evaluating and establishing energy conservation standards, DOE generally divides covered products into classes by the type of energy used, or by capacity or another performance-related feature that justifies a different standard. (*See* 42 U.S.C. 6295(q)) DOE notes that low-boy water heaters use the same type of energy as other water heaters (*i.e.,* gas or electricity) and are offered in a range of storage volumes. Thus, the type of energy used and the functionality of low-boy units are similar to other types of water heaters. DOE acknowledges that low-boy water heaters are only offered in certain volume sizes, which tend to be at the lower end of the range (*i.e.,* below 50 gallons). While many of the commenters pointed to specific size-constrained applications where low-boy water heaters are installed, DOE reviewed the market and found that low-boy water heaters are generally classified as water heaters that have a shorter height and wider diameter. However, unlike tabletop water heaters, low-boy water heaters did not seem to have a uniform or common platform size. Instead, the physical dimensions of low-boy water heaters varied by manufacturer, model, and efficiency, but this is also true of the entire electric storage water heating market. Water heater manufacturers offer a range of options to consumers, including various physical dimensions that are not unique to low-boy units. (*See* chapter 3 of the TSD.) Furthermore, DOE does not believe each different combination of physical dimensions currently available on the market warrants a separate product class. DOE reaffirmed its position in the December 2009 NOPR that the size constraints of these units do not appear to impact energy efficiency, since many "low-boy" models have efficiencies that are comparable to standard-size water heaters currently available on the market. DOE's research suggests that there are currently multiple low-boy units offered that will meet the standards being adopted in today's final rule for electric storage water heater less than 55 gallons. Specifically, DOE found multiple low-boy models at 0.95 EF with a rated storage volume of 50 gallons. Consequently, for the reasons above, DOE is not establishing a separate product class for low-boy water heaters.

ii. Ultra-Low NO_X Water Heaters

In the December 2009 NOPR analysis, DOE did not propose to establish a separate product class for ultra-low NO_X gas-fired storage water heaters. 74 FR 65852, 65869–70 (Dec. 11, 2009). However, DOE did specifically analyze these water heaters as compared to traditional gas-fired storage water heaters with standard burners. 74 FR 65852, 65882–83 (Dec. 11, 2009). In response to the treatment of ultra-low NO_X gas-fired storage water heaters in the December 2009 NOPR, DOE received a number of different comments. A.O. Smith, BWC, AHRI, and Rheem urged DOE to establish a separate product class for ultra-low NO_X gas-fired water heaters. (A.O. Smith, No. 76 at p. 2; BWC, 61 at p. 3; AHRI, No. 91 at p. 3; A.O. Smith, Public Meeting Transcript, No. 57.4 at pp. 56–57; and AHRI, Public Meeting Transcript, No. 57.4 at pp. 57–58) On the other hand, ACEEE, EarthJustice, and NRDC agreed with DOE's position in the December 2009 NOPR that ultra-low NO_X gas-fired water heaters should not have their own product class. Further details provided by each commenter are presented below.

A.O. Smith asserted that the burner technology needed to comply with the South Coast Air Quality Management District's (SCAQMD) ultra-low NO_X requirements and the changes to the water heater technology that are needed to meet increased efficiency requirement are "operationally contradictory" with each other. The types of burners currently used to comply with the ultra-low NO_X requirement in atmospheric heaters are much more restrictive (higher pressure drop) than conventional burners. Since these ultra-low NO_X heaters also must comply with the flammable vapor ignition resistance requirements, they also have flame arrestors on the air inlet, which add more restriction (pressure drop) to the system. In order to boost the efficiency, the flue baffle must be made more effective, which means making it more restrictive. The increased pressure drops due to all three components taken together is enough to offset the thermal buoyancy of the atmospheric venting design, and cause the heater to no longer work. The only way to overcome the additional restriction would be to add a blower and/or power-burner to the heater, which would greatly increase the manufacturing and installation costs of the heater. (A.O. Smith, No. 76 at p. 2)

BWC asserted that ultra-low NO_X gas-fired water heaters should be a separate product class because they have distinct design differences compared to standard atmospheric gas water heaters. The unique design requirements for ultra-low NO_X gas-fired water heaters greatly limit their capacity to increase the efficiency while maintaining a lower level of emissions. (BWC, 61 at p. 3)

AHRI challenged the December 2009 NOPR's tentative conclusions that ultra-low NO_X gas-fired models provide the same utility as standard gas-fired storage water heaters, while simply using a distinct burner to achieve the ultra-low NO_X emissions. AHRI argued that standard gas-fired water heaters do not offer the same utility as the ultra-low NO_X models because the standard gas-fired water heater cannot heat water efficiently while also emitting NO_X at a very low rate. Regardless of its efficiency, a standard residential gas-fired water heater cannot be sold or installed in many areas in California. According to AHRI, the feature of ultra-low NO_X emissions is a unique performance characteristic that imposes different conditions on how, and at what expense, the efficiency of these models can be increased. As is the case with low-boy electric models, AHRI asserted that ultra-low NO_X water heaters should have a separate product class with a minimum EF standard that is 0.01 less than that proposed for gas-fired storage water heaters. (AHRI, No. 91 at p. 4)

ACEEE stated that there is no reason for a separate product class with separate standards for ultra-low NO_X water heaters. According to ACEEE, these units can meet the same standards as conventional equipment, if they incorporate induced draft (power vent) to compensate for the combined pressure drop of the better baffle, FVIR, and ultra-low NO_X burner. If stakeholders want an exception, the commenter suggested that this should be dealt with by the waiver process rather than by establishing another dead-end class of atmospherically vented equipment. (ACEEE, No. 79 at p. 9)

EarthJustice stated that a separate product class for ultra-low NO_X gas-fired water heaters is not justified. The commenter pointed to DOE's own analysis, which arguably demonstrates that water heaters in these configurations can meet the efficiency standards under consideration for electric storage and gas storage water heaters, respectively (*see* 74 FR 65852, 65869, 65881 (Dec. 11, 2009)). (EarthJustice, No. 83 at p. 1)

NRDC likewise argued that there should not be a separate product class for ultra-low NO_X gas-fired water heaters. NRDC stated that the efficiency requirements considered in the rulemaking can be met in ultra-low NO_X gas-fired units by moving to power vent technology and probably with other routes. Therefore, the commenter concluded that there is no need to allow a less-stringent standard for these products when the proposed requirements can be met. (NRDC, No. 85 at p. 6)

After considering public comments on this issue, DOE has decided not to change its position from the December 2009 NOPR and continues to believe that a separate product class does not need to be established for ultra-low NO_X gas-fired storage water heaters. As noted above, in evaluating and establishing energy conservation standards, DOE generally divides covered products into classes by the type of energy used, or by capacity or other performance-related feature that justifies a different standard for products having such feature. (*See* 42 U.S.C. 6295(q)) Ultra-low NO_X gas-fired storage water heaters use the same type of energy (*i.e.,* gas) and are offered in comparable storage volumes to traditional gas-fired storage water heaters using standard burners. In deciding whether the product incorporates a performance feature that justifies a different standard, DOE must consider factors such as the utility of the feature to users. *Id.* In terms of water heating, DOE believes ultra-low NO_X water heaters provide the same utility to the consumer. However, DOE also notes that ultra-low NO_X water heaters do incorporate a specific burner technology allowing these units to meet the strict emissions requirements of local air quality management districts. Some of the commenters pointed out that the increased pressure drops could adversely impact the efficiency levels. DOE agreed with this assertion and maintained its methodology for handling ultra-low NO_X gas-fired storage water heaters, which included development of a separate analysis for these products, as detailed in the December 2009 NOPR. 74 FR 65852, 65881–82 (Dec. 11, 2009). *See* section IV.C.2.a for additional details. This analysis showed that implementing power venting and the same insulation increases as those for standard gas-fired water heaters would result in slightly lower efficiencies due to the additional pressure restrictions resulting from the addition of the ultra-low NO_X burner. Therefore, DOE implemented technologies at lower efficiency levels for ultra-low NO_X gas-fired storage water heaters in order to achieve the same efficiencies as those identified for standard gas-fired storage water heaters. Based on the teardown analysis of ultra-low NO_X water heaters, DOE believes that ultra-low NO_X gas-fired storage water heaters will be able to meet the standards that are being adopted in today's final rule using available technologies currently on the market. Therefore, for the above reasons, DOE has decided not to establish a separate product class for ultra-low NO_X gas-fired storage water heaters in this final rule.

iii. Heat Pump Water Heaters

Throughout the rulemaking, DOE has treated heat pump water heaters as a design option for electric storage water heaters rather than a separate product class, as further explained and detailed in the preliminary analysis. (*See* Chapter 2 of the preliminary analysis TSD and the discussion in the December 2009 NOPR (74 FR 65852, 65870–81 (Dec. 11, 2009).) A heat pump water heater represents a merging of two technologies: (1) An electric resistance storage water heater with tank and controls; and (2) a refrigeration circuit similar to that found in a residential air-conditioner. Heat pump water heaters use existing heat pump technology to extract heat from the surrounding air (typically at room temperature) for heating stored water. For electric water heaters, this is an alternative to resistive heating, which transfers heat from the electric resistance element to the water. DOE received several comments from interested parties in response to its treatment of heat pump water heaters and its request for comment on some of the issues identified surrounding heat pump water heaters. Some commenters urged DOE to establish separate product classes for traditional electric resistance storage water heaters and heat pump water heaters, while others agreed with DOE's classification of heat pump water heaters. Their specific comments and DOE's response are presented below.

General Electric stated support for DOE's proposal to not create a separate product class for heat pump water heaters, as they are designed to replace traditional electric water heaters in most residences, and have similar consumer functionalities. (GE, No. 84 at p. 1)

Daikin asserted that electric resistance water heaters should be placed in the same product class as heat pump water heaters. Anecdotally, Daikin stated that in the European Union, the European Parliament has classified both of these products in the same category for energy efficiency regulatory purposes, and the commenter further stated that in Japan, electric resistance water heaters have practically disappeared from the market as of 2010. In addition, Daikin stated that heat pump water heaters usually have a back-up electric heater. If heat pump water heaters are classified separately, there will be a difficult question about whether the back-up electric heater requires heat pump water heating systems to remain in the other

category for some purposes. However, Daikin suggested that if DOE decides to establish a heat pump water heater product class, then it should be subdivided based on the following three criteria: (1) Refrigerant type; (2) heat source (*i.e.,* air to water heat pump); and (3) add-on or integrated type system (*i.e.,* heat pump system and a tank). (Daikin, No. 82 at pp. 1–2)

Northwest Energy Efficiency Alliance (NEEA) stated there is not a need for a separate class of water heaters based on heat pump versus resistance elements. According to NEEA, all of the current product offerings have a first-hour rating that is equivalent to an electric resistance heated product of the same size. From a consumer utility standpoint, the products are equivalent in terms of delivery of hot water for an equivalent tank size. These products are all designed as integrated, "drop-in" replacement units according to product literature that NEAA has reviewed from A.O. Smith, Rheem, and General Electric. (NEEA, No. 88 at p. 2)

In its comments, EarthJustice opposed establishing a separate product class for heat pump water heaters, based on the following rationale. EarthJustice asserted that EPCA provides both mandatory and permissive authority for DOE to establish new product classes for covered products. (*See* 42 U.S.C. 6295(o)(4) and (q)(1)) However, aside from the unique situation of a covered product capable of consuming different kinds of energy (42 U.S.C. 6295(q)(1)(A)), EarthJustice argued that EPCA only mandates the creation of multiple product classes when the failure to do so would eliminate certain truly unique product attributes from the market. (42 U.S.C. 6295(o)(4)) In contrast, while DOE does have discretion to create separate classes for products based on the presence of "a capacity or other performance-related feature," the Department may exercise this authority only if "such feature justifies a [different] standard." 42 U.S.C. 6295(q)(1)(B)) For the reasons explained below, EarthJustice argued that the plain language of EPCA forecloses an interpretation that the establishment of separate product classes for electric resistance and heat pump water heaters is warranted or required. First, EarthJustice stated that as DOE notes in the December 2009 NOPR, there is no distinction between heat pump and electric resistance water heaters with regard to operational utility. Accordingly, EarthJustice argued that because heat pump and electric resistance water heaters provide identical service, there is no basis for DOE to conclude that separate product classes for these technologies are necessary to preserve the availability in the market of a distinct "feature" with utility to the user of the product (*see* 42 U.S.C. 6295(o)(4)).

At the public hearing on the December 2009 NOPR, representatives from some manufacturers asserted that a separate product class for heat pump water heaters was needed to address the fraction of households that would otherwise experience higher-than-normal installation costs to replace a water heater using electric resistance heating with one using a heat pump. However, EarthJustice stated that even if DOE's analysis confirms that there is a cost penalty to install a heat pump water heater in some applications, this fact, standing alone, would not support the creation of separate product classes for heat pump and electric resistance water heaters. In all standards rulemakings, EarthJustice reasoned that some households will face higher incremental costs to install products meeting revised standards, but the proper approach under EPCA is to consider these impacts in calculating consumers' average lifecycle cost and payback period for the standard levels under consideration (*see* 42 U.S.C. 6295(o)(2)(B)(i)(II)). According to EarthJustice, to use an increase in the installed cost for a portion of shipments as the basis for a separate product class would be an end-run around the other factors Congress required DOE to consider in assessing the economic justification for a standard (*see* 42 U.S.C. 6295(o)(2)(B)(i)). The commenter suggested that DOE's recent statements in the commercial clothes washers rulemaking reinforce this point. There, an industry commenter argued that a particular product design merited a separate product class on the basis of its low installed cost. 75 FR 1122, 1130 (Jan. 8, 2010). In response, DOE explained that it "does not consider first cost a 'feature' that provides consumer utility for purposes of EPCA. DOE acknowledges that price is an important consideration to consumers, but DOE accounts for such consumer impacts in the [lifecycle cost] and [payback period] analyses conducted in support of this rulemaking." *Id.* at 1134. EarthJustice stated that DOE's refusal to use installed costs as the basis for a separate product class for commercial clothes washers is faithful to EPCA's text, and there is no justification for adopting a contrary approach for water heaters. (EarthJustice, No. 73 at pp. 1–3)

NRDC also stated that heat pump water heaters do not warrant a separate product class since heat pump water heater and an electric tank type water heater provide the same consumer utility. (NRDC, No. 85 at p. 5)

On the other hand, Southern Company (Southern) stated its belief that there is more of a functional difference between heat pump water heaters and electric resistance water heaters than with other products for which DOE has established separate product classes, including refrigerators (top freezer versus side-by-side), window air conditioners (for location of louvers), and transformers (a multitude of different phases and sizes). Southern Company argued that heat pump water heaters should be treated as a separate product class because the heat pump water heater transfers cold air from the heat pump to the surrounding space and are noisier than electric resistance water heaters. (Southern, No. 90 at p. 5)

BWC recommended a separate product class be established for heat pump water heaters because the primary fuel source is air instead of electricity. Heat pump water heaters can attain greater efficiencies, because while electricity is being converted to heat the water like a typical electric resistance water heaters, heat is also being moved from the surrounding environment to the stored water via the heat pump. In order for heat pump water heaters to maximize efficiency, they must recover slowly, which changes the utility of the water heater. According to BWC, the same size heat pump water heater is not providing the same performance as the equivalent size electric resistance heater. (BWC, No. 61 at p. 4)

AHRI reaffirmed its position that heat pump water heaters should be a separate product class. AHRI argued that DOE's tentative conclusion that heat pump water heaters do not require a separate product class because they provide hot water just like a traditional electric storage water heater is invalid because it fails to recognize how the heat pump water heater produces that hot water and how the heat pump water heater's performance is effected by the environment in which it is installed. AHRI asserted that the following characteristics make heat pump water heaters unique: (1) Water is heated by energy extracted from the air; (2) the heating capacity is variable depending on the temperature of the air provided to the heat pump; (3) the unit cannot heat water above approximately 135 degrees Fahrenheit; (4) the unit must be installed in a space large enough to provide the necessary volume of air for the unit to adequately heat water; (5) the unit cools the air in the household; (6) the unit requires a condensate drain as part of the installation; (7) the unit cannot be adjusted to meet increases in

demand without relying on the electric resistance elements; (8) the unit can heat water as long as there is adequate airflow through the heat pump, and thus, a heat pump with electrical power but with a clogged air filter will not heat water; and (9) the unit needs a back up water heating means that can operate when the heat pump cannot meet the load. (AHRI, No. 91 at pp. 4–6)

In response to these NOPR comments, DOE does not agree that heat pump water heaters meet the requirements for establishing a separate product class. Specifically, DOE does not believe heat pump water heaters provide a different utility from traditional electric resistance water heaters. Heat pump water heaters provide hot water to a residence just as a traditional electric storage water heater does. While AHRI noted that heat pump water heaters utilize heat extracted from the air to heat the water, both heat pump water heaters and traditional electric resistance storage water heaters use electricity as the primary fuel source. AHRI's recitation of operational differences associated with water heaters that utilize heat pump technology does not establish that the mode of heating water is performance-related feature or provides a unique utility. As pointed out by GE, current manufacturers of heat pump water heaters are marketing these products as direct replacements for traditional electric resistance water heaters. The rated storage volumes and first hour ratings of the heat pump water heaters currently on the market are comparable to the traditional electric resistance water heaters. Some of the commenters pointed out that heat pump water heaters require special installation considerations, but to account for this, DOE applied in its analysis specific installation costs, where applicable, to heat pump water heaters. (*See* section IV.F.2 of today's notice for more details on treatment of the installation costs.) Consequently, DOE has concluded that heat pump water heaters can replace traditional electric resistance storage water heaters in most residences, although the installation requirements may be quite costly. For these reasons, DOE has decided not to establish a separate product class for heat pump water heaters.

iv. Unpowered Gas-Fired Water Heaters

The American Gas Association (AGA) asserted that unpowered gas-fired storage water heaters should be an independent product class. An unpowered gas-fired storage water heater is one that does not utilize line electricity in order to provide hot water to the residence. For many customers during a power outage, unpowered gas-fired water heaters are the only utility system that provides a source of heat. AGA believes that this occurrence is sufficiently frequent to justify the treatment of unpowered gas-fired storage water heaters as an independent product class, consistent with DOE's charge to establish product classes based on type of energy used, capacity, and in this case, "other performance-related feature" such as those that provide utility to consumers. (AGA, No. 78 at pp. 6–7)

DOE does not agree with AGA's assertion that unpowered gas-fired storage water heaters meet the criteria for the establishment of a separate product class. Both powered and unpowered gas-fired storage water heaters use gas as the primary fuel source, and both provide the same basic utility to consumers, which is to supply hot water to the residence. DOE does not believe that having the ability to maintain hot water during power outages when the electricity is not working provides enough additional utility to consumers to warrant a separate product class. DOE believes that power outages are infrequent events that can be handled by a number of different market solutions such as back-up power systems.

b. Direct Heating Equipment

DHE can be divided into various product classes categorized by physical characteristics and rated input capacity, both of which affect product efficiency and function. Key characteristics affecting the energy efficiency of DHE are the physical construction (*e.g.,* fan wall units contain circulation blowers), intended installation (*e.g.,* floor furnaces are installed with the majority of the unit outside of the conditioned space), and input capacity.

In the December 2009 NOPR, DOE proposed consolidating the product classes for four types of DHE and adding product classes for one type of DHE. DOE discusses the full details of its proposals in the December 2009 NOPR. 74 FR 65852, 65871–72 (Dec. 11, 2009). In response to the proposed product class consolidation, AHRI took the position that the Federal energy conservation standards should not change for direct heating equipment, which would include not consolidating any of the existing BTU range categories or range levels. (AHRI, Public Meeting Transcript, No. 57.4 at p. 85)

Empire Comfort Products (Empire) stated that if DOE condenses the product classes for direct heating equipment, it will reduce the manufacturers' flexibility to increase efficiency. (Empire, Public Meeting Transcript, No. 57.4 at p. 86)

Neither AHRI nor Empire provided any additional insight to explain why the proposed reduction in product classes would limit a manufacturer's ability to increase the efficiency of direct heating equipment. DOE believes the consolidation of product classes reflects the current models offered by manufacturers. As discussed in the December 2009 NOPR, DOE carefully reviewed product catalogs and performance directories to determine the relationship between AFUE and input rating found among products listed in the AHRI Directory. For each of the five types of DHE, DOE found that manufacturers do not produce products in some of the input capacity ranges or that some of the efficiency characteristics of these products are similar. DOE explained each of these changes in the NOPR along with its proposal to further consolidate the product classes, where applicable. 74 FR 65852, 65871–72 (Dec. 11, 2009). For each product class, DOE characterized this relationship, and the commenters have provided no data or rationale as to why DOE's characterization was incorrect. Consequently, DOE is adopting the consolidated product classes as proposed in the December 2009 NOPR. Table IV.2 presents the product classes for DHE being adopted by this rulemaking.

TABLE IV.2—PRODUCT CLASSES FOR DIRECT HEATING EQUIPMENT

Direct heating equipment type	Input heating capacity *Btu/h*
Gas Wall Fan Type	Up to 42,000.
	Over 42,000.
Gas Wall Gravity Type	Up to 27,000.
	Over 27,000 and up to 46,000.

TABLE IV.2—PRODUCT CLASSES FOR DIRECT HEATING EQUIPMENT—Continued

Direct heating equipment type	Input heating capacity *Btu/h*
Gas Floor	Over 46,000.
	Up to 37,000.
	Over 37,000.
Gas Room	Up to 20,000.
	Over 20,000 and up to 27,000.
	Over 27,000 and up to 46,000.
	Over 46,000.
Gas Hearth	Up to 20,000.
	Over 20,000 and up to 27,000.
	Over 27,000 and up to 46,000.
	Over 46,000.

c. Pool Heaters

As discussed in the December 2009 NOPR, the existing Federal energy conservation standards for pool heaters correspond to the efficiency levels specified by EPCA, as amended (42 U.S.C. 6295(e)(2)), and codified in 10 CFR 430.32(k), classifying residential pool heaters with one product class. This product class is distinguished by fuel input type (*i.e.,* gas-fired). 74 FR 65852, 65872 (Dec. 11, 2009).

B. Screening Analysis

The purpose of the screening analysis is to evaluate the technology options identified in the market and technology assessment as having the potential to improve the efficiency of products and to determine which technologies to consider further and which to screen out based on the four screening criteria. DOE consulted with industry, technical experts, and other interested parties to develop a list of technologies for consideration. DOE then applied the following four screening criteria to determine which design options are suitable for further consideration in the standards rulemaking:

1. *Technological feasibility.* DOE considers technologies incorporated in commercial products or in working prototypes to be technologically feasible.

2. *Practicability to manufacture, install, and service.* If mass production and reliable installation and servicing of a technology in commercial products could be achieved on the scale necessary to serve the relevant market at the time the standard comes into effect, then DOE considers that technology practicable to manufacture, install, and service.

3. *Adverse impacts on product utility or product availability.* If DOE determines a technology would have a significant adverse impact on the utility of the product to significant subgroups of consumers, or would result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time, it will not consider this technology further.

4. *Adverse impacts on health or safety.* If DOE determines that a technology will have significant adverse impacts on health or safety, it will not consider this technology further.

See 10 CFR part 430, subpart C, appendix A, (4)(a)(4) and (5)(b).

As presented in the December 2009 NOPR, DOE identified a number of technology options that might be used to improve the efficiency of residential heating products during the market and technology assessment. 74 FR 65852, 65872–79 (Dec. 11, 2009). *See* chapter 3 of the December 2009 NOPR and final rule TSDs for more information and the complete list of technologies identified by DOE. DOE then applied the screening criteria listed above to determine which technologies would be carried through the analysis. Table IV.3 through Table IV.5 show the technology options that were screened-in during the December 2009 NOPR screening analysis.

TABLE IV.3—TECHNOLOGIES DOE CONSIDERED FOR THE WATER HEATER ENGINEERING ANALYSIS

Technology	Water heater type by fuel source			
	Storage			Instantaneous
	Gas-fired	Electric	Oil-fired	Gas-fired
Increased Jacket Insulation	X	X	X	
Foam Insulation			X	
Improve/Increased Heat Exchanger Surface Area	X	X	X	X
Enhanced Flue Baffle	X		X	
Direct-Vent (Concentric Venting)				X
Power Vent	X		X	X
Electronic (or Interrupted) Ignition	X		X	X
Heat Pump Water Heater		X		
Condensing	X		X	X

TABLE IV.4—TECHNOLOGIES DOE CONSIDERED FOR THE DIRECT HEATING EQUIPMENT ENGINEERING ANALYSIS

Technology
Increased Heat Exchanger Surface Area.
Direct-Vent (Concentric Venting).
Electronic Ignition.
Induced Draft.
Two Stage and Modulating Operation.
Condensing.

TABLE IV.5—TECHNOLOGIES DOE CONSIDERED FOR THE POOL HEATER ENGINEERING ANALYSIS

Technology
Increased Heat Exchanger Surface Area.
More Effective Insulation (Combustion Chamber).
Power Venting.
Sealed Combustion.
Condensing.

1. Comments on the Screening Analysis

In response to the screening analysis presented in the December 2009 NOPR, DOE received several comments from interested parties.

In the December 2009 NOPR, CO_2 heat pump water heaters were a technology option screened out by DOE for electric storage water heaters, because DOE research suggests U.S. manufacturers do not have the necessary infrastructure to support manufacturing, installation, and service of CO_2 heat pump water heaters on the scale necessary to serve the relevant market by the compliance date of an amended energy conservation standard. 74 FR 65852, 65873 (Dec. 11, 2009). In general, ACEEE stated that it strongly objected to the screening analysis because DOE considered only technologies available in U.S.-manufactured water heaters and screened out technologies used in other domestic products, as well as ones used in the global market. (ACEEE, No. 79 at p. 2) ACEEE stated that DOE's screening out of CO_2 as a heat pump water heater refrigerant is absurd, given the fact that 1.7 million of them had been sold worldwide through the end of 2008, and that there is a 5-year lead time before the standards compliance date in which manufacturers could design a CO_2 heat pump water heater. (ACEEE, No. 79 at p. 2)

Conversely, Rheem commented that CO_2 refrigerants were appropriately screened out. (Rheem, No. 89 at p. 8) AHRI noted that there is a huge heat pump business in the U.S. for air conditioning and space heating, and no significant percentage of those products use CO_2 as the refrigerant. DOE believes AHRI is using the air conditioning and space heating industry as an example of an industry with significant expertise in working refrigerants, but that still does not use CO_2 refrigerants in its heating and cooling products. Even though DOE is investigating the use of CO_2 as a refrigerant in water heating applications, AHRI's example demonstrates that U.S. manufacturers and service industries do not have the expertise in using or handling CO_2 as a typical refrigerant in cooling applications. Therefore, AHRI stated its belief that CO_2 heat pumps have been properly screened out because it is not the prevailing technology in North America. Further, AHRI stated that for standards that will apply to U.S. industry, DOE should not unnecessarily expand this rulemaking by looking at what might be happening in other parts of the world. (AHRI, Public Meeting Transcript, No. 57.4 at pp. 133–134) A.O. Smith stated that CO_2 heat pump water heaters sold and installed in Japan are certified to different levels of standards requirements than those that exist in the U.S., and those heat pump water heaters would not be certifiable in the U.S. (A.O. Smith, Public Meeting Transcript, No. 57.4 at pp. 134–135)

In response, DOE believes that CO_2 heat pump water heaters were properly screened out during the December 2009 NOPR analysis. DOE notes that technologies are not screened out solely because they are not yet available in the U.S. market. Technologies, such as CO_2 heat pump water heaters, which are available overseas, are screened out if the U.S. does not have the necessary infrastructure to support such a technology on the scale necessary by the compliance date of the standard. As described in chapter 4 of the final rule TSD (Screening Analysis), CO_2 heat pump water heaters were screened out because the necessary infrastructure to support manufacturing, installation, and service of CO_2 heat pump water heaters is not available in the United States, and will not be available on the scale necessary to serve the relevant market at the time of the compliance date of the standard. ACEEE did not provide any new evidence that would cause DOE to change its position on this issue, and, therefore, DOE continued to screen out CO_2 heat pump water heaters for the final rule analysis. DOE notes that pursuant to Section 612 of the Clean Air Act, the U.S. EPA has found CO_2 an acceptable refrigerant for use in the U.S. in certain applications (*e.g.,* retail food refrigeration), but has not made such a ruling on the use of CO_2 in water heating heat pumps. EPA indicates that to date it has not received any submission under the SNAP program for the use of CO_2 in such devices. For additional information on EPA's Significant New Alternative Policy (SNAP) program (*see http://www.epa.gov/ozone/snap/.*)

ACEEE asserted that DOE fails to differentiate between low-voltage (*i.e.,* 24 volt) and line-voltage (*i.e.,* 120 volt) power requirements for gas-fired equipment auxiliaries such as igniters, controls, and fans. The commenter stated that line voltage requires a power outlet reachable by a 6 foot power cord on the water heater, which would require a new outlet in some retrofits, while a remote low-voltage plug-in power supply can use much longer supply lines that could support electronic ignition and electro-mechanical flue dampers. ACEEE stated that a recent study of standby losses of atmospheric water heaters shows losses large enough that ACEEE infers that these features would be quite cost-effective, and that such products have been demonstrated in the past (for the SCAQMD) and in gas stoves. (ACEEE, No. 79 at p. 3) ACEEE stated that requiring gas-fired appliances to have an electrical connection does not diminish utility because it is not an issue in the minds of the public, and if the capability of gas-fired products to operate during power outages was important, then local building codes would require backup non-electric heating capabilities for houses with electric water heaters. (ACEEE, Public Meeting Transcript, No. 57.4 at pp. 38–39)

In response, DOE agrees with ACEEE that requiring gas-fired appliances to have an electrical connection does not diminish utility, and DOE notes that this rationale was not provided for screening out any of the technologies that DOE did not consider in the analysis. Further, DOE notes that many of the design options for gas-fired appliances included electronic components, such as electronic ignitions and power venting.

Louisville Tin & Stove (LTS) commented that the proposed standards for DHE would reduce consumer utility because they would lose the ability to heat without electricity and/or lose the ability to retrofit. (LTS, No. 56.7 at p. 2) Empire stated adding components that require electricity would cause the elimination of the gas wall gravity, gas room, gas floor, and gas hearth categories because their main purpose is to provide efficient heating and be able to provide heat during a power outage

or for consumers who do not have electricity. (Empire, No. 100 at p. 2)

Although DOE recognizes the consumer utility of direct heating equipment that can be operated in the event of a power outage, DOE also notes that there are direct heating equipment available on the market equipped with an electronic ignition that utilize battery backup systems to allow for operation during power outages. As a result, DOE does not believe the use of an electronic ignition would reduce the consumer utility of direct heating equipment. DOE also does not believe that adding electrical components would reduce the ability to retrofit these products, thereby causing the elimination of product classes. The addition of certain electrical components (*e.g.,* an electronic ignition) does not require products to be any larger than products currently available that have no electric components, and thus, DOE does not believe this will prevent products from being retrofitted. DOE also does not believe adding larger electrical components (*e.g.,* blower fans) would cause the elimination of any products, because DOE only considers the addition of blower fans for certain product classes which have products that have demonstrated that the technology is possible (*i.e.,* gas wall fan DHE, gas room DHE, and gas hearth DHE). For gas wall gravity DHE, where the inclusion of a fan would shift products into the gas wall fan DHE product class, DOE does not consider a fan as a design option.

However, DOE does recognize that in certain instances, consumers will have to install electrical power outlets near the heating equipment, thereby increasing the cost of retrofitting the product. These costs are addressed during DOE's analysis of installation costs and are described in section IV.F.2 of this document. Accordingly, DOE continued to screen-in electronic ignition and other electronic components for the final rule analysis of direct heating equipment.

2. Heat Pump Water Heater and Condensing Gas-Fired Storage Water Heater Discussion

In the December 2009 NOPR, DOE specifically requested comment regarding the screening process for the advanced technologies used as the basis for the max-tech levels for gas-fired storage and electric storage water heater (*i.e.,* heat pump water heaters and condensing gas-fired storage water heaters). 74 FR 65852, 65878 (Dec. 11, 2009). DOE received a multitude of comments on this topic, which are summarized below.

a. Condensing Gas-Fired Water Heaters

DOE received several comments specifically related to condensing gas-fired water heater technology. ACEEE noted that all three of the full-line water heater manufacturers in the U.S. currently manufacture commercial condensing products. (ACEEE, Public Meeting Transcript, No. 57.4 at p. 127) Further, ACEEE stated that at least one condensing gas-fired storage water heater is actively marketed for residential applications and is shipped with a residential thermostat. ACEEE recognized that this product is easy to install, with height, diameter, and installation requirements similar to standard power-vent units. ACEEE asserted that the only skills required for installing condensing gas-fired water heaters, beyond those already required for installing conventional gas-fired water heaters, are those common to the installation of condensing furnaces and air conditioners—cutting and gluing PVC pipe, and hooking up a condensate pump, if required. (ACEEE, No. 79 at p. 11)

ASAP stated that the manufacturing capacity required for condensing gas-fired storage water heaters at TSL 5 (*i.e.,* approximately 4 percent, as estimated in the December 2009 NOPR) would be well within the capacity of manufacturers to serve the market. (ASAP, Public Meeting Transcript, No. 57.4 at p. 126) AHRI stated that manufacturers could probably convert their production of 75-gallon gas-fired water heaters to make only condensing 75-gallon gas-fired storage water heaters within five years. (AHRI, Public Meeting Transcript, No. 57.4 at p. 119)

In addition, A.O. Smith stated that they manufacture commercial condensing gas-fired water heaters that are ultra-low NO_X, and, therefore, it is technologically feasible to have an ultra-low NO_X condensing water heater. (A.O. Smith, Public Meeting Transcript, No. 57.4 at p. 123)

In light of the comments above from interested parties supporting the technologically feasibility and the practicability of manufacturing, installing, and servicing condensing gas-fired water heaters, DOE has concluded that this technology option was appropriately screened-in and considered during the December 2009 NOPR analysis, and DOE continued to consider condensing gas-fired water heaters in the final rule analysis.

b. Heat Pump Water Heaters

DOE received several comments specifically related to the screening analysis for heat pump water heater technology. These comments related to adverse impacts on product utility, as well as the practicability to manufacture, install, and service heat pump water heaters.

Regarding adverse impacts on product utility, the American Public Power Association (APPA) commented that for electric storage water heaters at TSL 5 and TSL 6 (*i.e.,* levels requiring heat pump water heater technology), the utility of the product would be lessened, although no further explanation was provided. (APPA, No. 92 at p. 3) Rheem stated that the utility of heat pump water heaters is not equivalent to electric storage water heaters because of the reduced delivery performance of heat pump water heaters. As evidence of the reduced delivery performance, Rheem cited ENERGY STAR's requirement of a minimum first hour rating of 50 gallons for heat pump water heaters, which is below the 67 gallons that Rheem claimed is typical for conventional technologies at that capacity. (Rheem, No. 89 at p. 8) The first hour rating is the amount of hot water in gallons the heater can supply per hour (starting with a tank full of hot water). If the first hour rating were reduced for heat pump water heaters, this would impact consumer utility because the water heater would not provide the consumer with the same amount of hot water as with a traditional electric resistance water heater.

In response, DOE does not believe that any lessening of utility will occur for electric storage water heaters that use heat pump water heater technology, as asserted by APPA and Rheem. In response to APPA's comment (as explained in the December 2009 NOPR), DOE does not believe the use of heat pump technology will diminish the utility of electric storage water heaters, and DOE believes that these products will provide the same utility to the consumer as electric storage water heaters using traditional electric resistance technology. 72 FR 65852, 65876–77 (Dec. 11, 2009). In response to Rheem's assertion that heat pump water heaters provide a reduced first hour rating, and thereby reduce consumer utility, DOE examined the first hour ratings of heat pump water heaters available on the market. DOE identified heat pump water heaters currently available on the market that have first hour ratings of up to 67 gallons, which Rheem states is typical for an electric resistance water heater. DOE also notes that electric storage water heater models in the AHRI Directory of certified equipment at the representative 50-gallon storage volume have first hour

ratings ranging from 48 to 68 gallons, and for 50-gallon heat pump water heaters currently available on the market, the first hour ratings range from 63 to 67 gallons. Thus, DOE has concluded that the integrated heat pump water heater technology does not cause any lessening of utility since it provides similar first hour ratings as water heaters that utilize electric resistance technology.

Regarding practicability to manufacture, install, and service heat pump water heaters, DOE received numerous comments from interested parties. The views of interested parties are summarized below, along with DOE's conclusions based on the results of the comments received.

AHRI stated that to convert the U.S. water heater industry from producing four million electric resistance units per year to all heat pump water heaters is an unreasonable expectation. (AHRI, Public Meeting Transcript, No. 57.4 at p. 90) AHRI pointed out that converting existing product lines to manufacturing of heat pump water heaters would be difficult, because manufacturers would continue to manufacture electric resistance water heaters in order to meet consumer demand before the compliance date of the standard. (AHRI, Public Meeting Transcript, No. 57.4 at pp. 101–103)

Bock asserted that with heat pump water heaters, there is no infrastructure to teach and train technicians to properly install and maintain those units. Bock asserted that training technicians of electric resistance, gas-fired, and oil-fired water heaters to install and maintain heat pump water heaters could not be done quickly. (Bock, Public Meeting Transcript, No. 57.4 at p. 96) Similarly, Bradford White stated that there is no infrastructure to repair and maintain heat pump water heaters. Bradford White stated that water heater service contractors would need to be extensively retrained, and that it would be impossible for them to train plumbers to install and maintain heat pump water heaters in sufficient time. (Bradford White, No. 61 at p. 3)

In support of heat pump water heaters, GE stated that it does believe that heat pump water heaters are manufacturable in a reasonable timeframe. (GE, No. 84 at p. 1) Further, GE commented that it currently has a nationwide network for heat pump water heater product service, and is developing a nationwide installation base to ensure that its consumers can readily purchase, install, and repair their heat pump water heaters. (GE, No. 84 at p. 1) The commenter noted that it is currently working with two national partners and numerous regional distributors to have its heat pump water heater available in most markets and to develop its water heater installation network. GE forecasted that the availability, service, installation, and manufacturability of heat pump water heaters will not present a significant obstacle to the market acceptance of such units. (GE, No. 84 at p. 2) The commenter stated that installation of a heat pump water heater is only slightly more complex than installing an electric resistance water heater, and is easily within the capabilities of any residential plumber. GE did acknowledge that service of the sealed refrigeration system can be more complex, but stated that it believes that this can be adequately handled by the national network of appliance technicians and plumbers. (GE, No. 84 at p. 2)

NPCC commented that several manufacturers already have heat pump water heater products and business plans to sell heat pump water heaters over the next five years, a schedule well before the compliance date of the relevant amended energy conservation standards. Therefore, NPCC believes that it is within the ability of manufacturers to produce heat pump water heater units on the scale necessary to serve the market for large-volume products. (NPCC, Public Meeting Transcript, No. 57.4 at p. 107) NPCC also stated that it believes there is adequate lead time for those manufacturers who still must develop new products, since standards will not take effect for five years. (NPCC, No. 87 at p. 5) Further, NPCC stated that DOE's concern about the manufacturability of heat pump water heaters and the capacity of manufacturers to ramp up production are overstated, because two major manufacturers already appear committed to manufacturing significant quantities of heat pump water heaters and a third manufacturer also appears likely to do the same. NPCC asserted that because new energy conservation standards for water heaters will not go into effect for five years, manufacturers will have ample time to "ramp up" the production of these high-efficiency models to meet the limited market expected at TSL 5. (NPCC, No. 87 at pp. 5–6) Regarding practicability to install heat pump water heaters, the commenter stated that heat pump water heaters currently on the market are drop-in replacements for electric resistance water heaters, and are advertised as such by manufacturer literature. NPCC commented that this fact, along with the fact that a national home improvement chain has agreed to sell Rheem's heat pump water heater unit, are evidence that both manufacturers and retailers believe that the installation of "advanced" water heater technology is not a significant barrier to its adoption. (NPCC, No. 87 at pp.3–4) NPCC stated that DOE's concern regarding whether the service infrastructure's lack of familiarity with advanced technologies would act as a deterrent to their adoption also appears unwarranted, due to the fact that: (1) Manufacturers are already offering these products; (2) manufacturers will have 5 years to train and deploy a service force; (3) major manufacturers with product on the market offer a 10-year warranty; (4) GE has a set up a nationwide network of authorized service technicians who are being trained to both install and service its "advanced technology" water heaters; and (5) Rheem has stated that its heat pump water heater uses a sealed heat pump and that no HVAC experience is needed, so no additional service technician training is required. (NPCC, No. 87 at p. 4)

NEEP stated that based on the documented ENERGY STAR-qualified water heating units on the market, heat pump water heaters and condensing gas water heaters are commercially viable, manufacturable, and have a growing infrastructure of service and maintenance professionals. (NEEP, No. 86 at p.1) NEEP stated that according to a recent advertisement by Rheem and the Home Depot, their ENERGY STAR-qualified heat pump water heater "installs as easily as a standard electric storage water heater," and thus, NEEP commented that installation issues are clearly not as serious as many manufacturers claim. (NEEP, No. 86 at p. 2)

NEEA commented that regarding a potential scale-up in response to a large utility program opportunity that was being considered for heat pump water heaters, major manufacturers assured them that scale-up to large manufacturing numbers is not a limiting factor. (NEEA, No. 88 at pp. 2–3) The commenter stated all of the heat pump water heater units being offered for sale are designed as drop-in integrated units that require no more connections than a conventional electric resistance tank. NEEA asserted that there is nothing in principle about heat pump water heater technology that makes it substantively more difficult than a current replacement with a standard electric tank. NEEA also stated that all heat pump water heaters offered for sale in 2010 have sealed refrigeration components (similar to a refrigerator or a room air-conditioner that do not

require service) and have 10-year warranties, an indication of manufacturers' confidence in the long-term reliability of the systems. NEEA commented that a duct to vent cold air to the outdoors is required in some heat pump water heater installations, and that installing such a duct is no more complicated than installing a flue for a gas-fired water heater, which is well within the skill set of existing water heater installers. (NEEA, No. 88 at p. 3)

ACEEE commented that five years from final rule publication to the compliance date is sufficient time to design, test, tool up, manufacture, and certify a brand new product. (ACEEE, No. 79 at pp. 13) ACEEE stated that manufacturing capacity should not be a concern for heat pump water heaters, given the five-year lead time between the standards' effective date and compliance date. The commenter also stated that resistive tank water heaters and refrigeration engines like the ones used in heat pump water heaters are mature technologies that can be integrated to manufacture heat pump water heaters. (ACEEE, No. 79 at p. 4) ACEEE commented that TSL 5 would require new production lines for about 9 percent of the product, which should be manageable and in the scale of expected investments in new production lines. (ACEEE, No. 79 at p. 10) Regarding practicability to install heat pump water heaters, ACEEE stated that the arguments regarding training time for installers and servicers are vastly overblown. The commenter noted further that the Web sites of the leading providers of ENERGY STAR heat pump water heaters do not contain language that would void warrantees if such units are home-owner installed, and such units are now sold by major "big box" retailers and Internet sales outlets. (ACEEE, No. 79 at p. 10) With regard to servicing, ACEEE stated that although a heat pump water heater operates more hours per year than a room air conditioner, it is basically the same kind of technology, and will require no routine service beyond that which can be done by the homeowner (*i.e.,* filter cleaning). Thus, ACEEE argued that at least for heat pump water heaters with appropriate diagnostics, there are no skills required beyond those one would expect from a typical refrigerator repair person. (ACEEE, No. 79 at p. 10) ACEEE stated that in January 2010, the GE Hybrid electric heat pump water heater will be sold at Lowe's, Sears, and other locations, presumably to do-it-yourself installers, and in examining the warranties available on-line, ACEEE found no restrictions as would limit product installation to certified or qualified trades people. From this, the commenter inferred that there are no special skills expected for installation of these heat pump water heater products. (ACEEE, No. 79 at p. 12) ACEEE asserted that the skill set required to service heat pump water heaters is the same as the skill set associated with fixing the refrigeration engines of room air conditioners, refrigerators, and similar light equipment. Similarly, the commenter argued that servicing of condensing gas water heaters uses the same skill sets as condensing boilers. Thus, ACEEE stated that it believes that over the next five years, the emergence and market penetration of incentive programs for both types of products will lead to adequate supplies of servicers with the requisite skills. (ACEEE, No. 79 at p. 12)

The Joint Advocacy comment [4] (submitted by ASAP) stated that the limited scope of the December 2009 NOPR TSL 5 (*i.e.,* the TSL requiring electric storage water heaters larger than 55 gallons to use heat pump water heater technology), combined with the five-year lead time before the compliance date, will make the new standards more manageable for manufacturers, equipment installers, and servicers than standards which effectively require heat pump water heaters and condensing gas products in all sizes. (The Joint Advocacy Comment, No. 102 at p. 2)

ASE stated that for the December 2009 NOPR's TSL 5, the advanced technology requirements are limited to a modest share of total water heater shipments, which is a sensible means of addressing the issue of manufacturers being able to scale up the production of these products to meet the needs of the market. (ASE, No. 77 at p. 2)

A.O. Smith stated that a facility to produce 2 million heat pump water heaters per year (*i.e.,* A.O. Smith's approximate share of the entire electric storage water heater market) would take 2–3 years to implement. (A.O. Smith, No. 76 at p. 3)

Daikin stated that heat pump technology can be easily introduced to existing electric resistance water heater manufacturers from the air conditioning and refrigerator manufacturing sectors. The commenter noted that European and Japanese electric resistance heat pump manufacturers have already obtained the necessary heat pump technology and have heat pump water heater manufacturing lines up and running. Daikin stated its belief that taking into account the significance of the introduction of heat pump technology to unfamiliar manufacturers, at least one to two years would be required for this change to be implemented after publication of the final rule. (Daikin, No. 82 at p. 2)

After reviewing the comments from interested parties above, DOE believes that integrated heat pump water heaters and condensing gas-fired storage water heaters were properly screened in for the December 2009 NOPR analysis, and DOE continued to consider this technology for the final rule analysis. Based on the comments of interested parties, including those from manufacturers, DOE has concluded that given the five-year lead time, the practicability to manufacture, install, and service heat pump water heaters and condensing gas-fired storage water heaters is not a concern that would justify eliminating these technologies from consideration in this analysis. However, DOE further considered the concerns of interested parties regarding heat pump water heaters and condensing gas-fired storage water heaters for the selection of the final standard level.

Because DOE did not change any of its conclusions about the screening analysis for technologies for the December 2009 NOPR analysis, DOE screened in the same technologies for the final rule (shown in Table IV.3 through Table IV.5). For more information about the technologies that were screened out, and the reasoning for those options being screened out, *see* chapter 4 of the final rule TSD.

DOE believes that all of the efficiency levels discussed in today's notice are technologically feasible. The technologies that DOE examined have been used (or are being used) in

[4] The joint advocacy comment was submitted by ASAP on behalf of multiple organizations, including: ACEEE, National Association of State Energy Officers, California Energy Commission, Consumer Federation of America, PG&E, ASE, ASAP, National Consumer Law Foundation, NRDC, National Grid, National Insulation Association, North American Insulation Manufacturers Association, NEEP, NPCC, Sierra Club, Iowa Office of Energy, New Hampshire Office of Energy and Planning, Office of the Ohio Consumers' Council, California Public Utilities Commission, New Mexico Public Regulation Commission, Public Utility Commission of Oregon, New Jersey Board of Public Utilities, Community Environmental Center, Conservation Law Foundation, Environmental Defense Fund, Environment America, Environmental Law and Policy Center, Environmental and Energy Study Institute, Midwest Energy Efficiency Alliance, Southern Alliance for Clean Energy, Southwest Energy Efficiency Project, Urban Green Council (U.S. Green Building Council of New York), Arizona PIRG, Energy Coordinating Agency of Philadelphia, Environment Illinois, Environment Texas, Michigan Environmental Council, NW Energy Coalition, Ohio Environmental Council, Oklahoma Sustainability Network, Texas Ratepayer's Organization to Save Energy, National Community Action Foundation, and Fresh Energy.

commercially-available products or working prototypes. Furthermore, these technologies all incorporate materials and components that are commercially available in today's supply markets for the residential heating products that are the subject of this final rule.

C. Engineering Analysis

The engineering analysis develops cost-efficiency relationships to show the manufacturing costs of achieving increased efficiency. As explained in the December 2009 NOPR, DOE conducted the engineering analysis for heating products using both the efficiency level approach to identify incremental improvements in efficiency for each product and the cost-assessment approach to develop the manufacturer production cost (MPC) at each efficiency level. 74 FR 65852, 65879–96 (Dec. 11, 2009). DOE first identified the most common residential heating products on the market and determined their corresponding efficiencies and the distinguishing technology features associated with those levels. After identifying the most common products that represent a cross-section of the market, DOE gathered information about these selected products using reverse-engineering methodologies, product information from manufacturer catalogs, and discussions with manufacturers and other experts of water heaters, DHE, and pool heaters. This approach provided useful information, including identification of potential technology paths manufacturers use to increase energy efficiency.

DOE used information gathered by reverse-engineering multiple manufacturers' products spanning the range of efficiency levels for each of the three product categories to generate bills of materials (BOMs), which describe each product in detail, including all manufacturing steps required to make and/or assemble each part. DOE developed a cost model that converted the raw information BOMs into MPCs. By applying derived manufacturer markups to the MPCs, DOE calculated the manufacturer selling prices (MSPs) and constructed industry cost-efficiency curves.

In response to the December 2009 NOPR, DOE received comments from interested parties on various aspects of the engineering analysis, including: (1) Efficiency levels analyzed and technology options; (2) manufacturer production costs; (3) shipping costs; (4) scaling of storage water heater MPCs to other storage volumes; and (5) the energy efficiency equations. A further discussion of the engineering analysis methodology, a discussion of the comments DOE received, DOE's response to those comments, and any changes DOE made to the engineering analysis methodology or assumptions as a result of those comments is presented in the sections below. *See* chapter 5 of the final rule TSD for additional details about the engineering analysis.

1. Representative Products for Analysis

As explained in the December 2009 NOPR, DOE reviewed all of the product classes of residential water heaters, DHE, and pool heaters for the engineering analysis. Within each product type, DOE chose units for analysis that represent a cross-section of the residential heating products market. The December 2009 NOPR contains specific details about DOE's selection of representative units for each type of heating product. 74 FR 65852, 65879–81 (Dec. 11, 2009). The analysis of these representative products allowed DOE to identify specific characteristics that could be applied to all of the products across a range of storage and input capacities, as appropriate. In response to the December 2009 NOPR, DOE did not receive any comments regarding the representative units analyzed, and as a result, DOE did not change the representative units from the December 2009 NOPR analysis. The representative units for each product class are shown in Table IV.6 below. For more details about the selection of the representative units for each product class, *see* chapter 5 of the final rule TSD.

TABLE IV.6—REPRESENTATIVE PRODUCTS ANALYZED

Residential Water Heaters	
Residential water heater class	Representative storage volume (*gallons*)
Gas-Fired Storage Type	40.
Electric Storage Type	50.
Oil-fired Storage Type	32.
Instantaneous Gas Fired	0. (199,000 Btu/h input capacity).
Direct Heating Equipment	
Direct heating equipment design type	Representative input rating range (Btu/h)
Gas Wall Fan	Over 42,000.
Gas Wall Gravity	Over 27,000 and up to 46,000.
Gas Floor	Over 37,000.
Gas Room	Over 27,000 and up to 46,000.
Gas Hearth	Over 27,000 and up to 46,000.
Residential Pool Heaters	
Pool heaters product class	Representative input rating (Btu/h)
Gas-fired Pool Heaters	250,000.

2. Efficiency Levels Analyzed

For each of the representative products, DOE analyzed multiple efficiency levels and estimated manufacturer production costs at each efficiency level. These efficiency levels were presented in detail in the December 2009 NOPR. 74 FR 65852, 65881–89 (Dec. 11, 2009). DOE analyzed

from the baseline efficiency level to the maximum technologically feasible (max-tech) efficiency level for each product class. The baseline units in each product class were used as reference points against which DOE measured changes resulting from potential amended energy conservation standards. These units generally represent the basic characteristics of equipment in that product class, just meet current Federal energy conservation standards, and provide basic consumer utility. DOE established intermediate energy efficiency levels for each of the product classes that are representative of efficiencies that are typically available on the market through a complete review of AHRI's product certification directory, manufacturer catalogs, and other publicly-available literature. DOE determined the maximum improvement in energy efficiency that is technologically feasible (max-tech) for water heaters, DHE, and pool heaters, as required by section 325(o) of EPCA. (42 U.S.C. 6295(o)). For the representative product within a given product class, DOE could not identify any working products or prototypes at higher efficiency levels that were currently available beyond the identified max-tech level at the time the analysis was performed.

a. Water Heaters

Table IV.7 through Table IV.11 in this section show the efficiency levels analyzed at the representative rated storage volume for each of the water heater product classes for the final rule. These tables also show the technology pathways identified by DOE which could be used to reach the identified efficiency levels. DOE received several comments (discussed below) in response to the efficiency levels and possible technology pathways presented in the December 2009 NOPR for gas-fired storage water heater.

Rheem stated that for 40-gallon gas-fired storage water heaters at TSL 4 (*i.e.,* 0.63 EF), DOE underestimates the insulation thickness that would be required. Rheem asserted that 3 inches of insulation would be required to reach this efficiency level, instead of the 2 inches that DOE estimated in the December 2009 NOPR. In addition, Rheem stated that for 50-gallon electric storage water heaters, DOE estimates 4 inches of foam insulation are needed to achieve TSL 4 (*i.e.,* 0.95 EF) but that DOE should recognize there are diminishing returns for added foam insulation. Further, Rheem asserted that the increased insulation requirements will result in increased product cost, shipping cost, life-cycle cost, space constraint frequency, and reduce consumer payback. (Rheem, No. 89 at p. 10) Similarly, Bradford White stated that when increasing insulation thickness to improve water heater efficiency, there is a diminishing return and a point at which increasing insulation does not result in any further efficiency gain. Bradford White asserted that to attain the efficiencies in the December 2009 NOPR, additional changes would be required besides increasing insulation thickness. (Bradford White, No. 61 at p. 1)

As described in the December 2009 NOPR, DOE performed extensive research regarding the technologies required to reach each efficiency level for the representative rated storage volumes analyzed. 74 FR 65852, 65884 (December 11, 2009). DOE research suggested that the insulation thicknesses listed at various efficiency levels identified are consistent with products available on the market. DOE reviewed manufacturer literature (which typically includes information on energy factor and insulation thicknesses) and then reverse-engineered several gas-fired water heaters to verify the technologies used to improve energy efficiency, including insulation thicknesses. For the December 2009 NOPR analysis, DOE also hired an independent testing facility to determine the EF of a representative sample of water heaters across multiple efficiency levels. (*See* chapter 5 of the December 2009 NOPR TSD for additional details.) These water heaters were subsequently disassembled to verify the technologies used to increase energy efficiency. DOE was able to measure the insulation thicknesses on the sides, top, and bottom of each water heater unit disassembled. For these reasons, DOE believes the results of its assessment of insulation thicknesses at various efficiency levels are accurate and maintained the same insulation thicknesses for the final rule analysis.

AGA stated that efficiency level 2 for gas-fired storage water heaters should include power venting, because according to industry testing and research, the prevailing technology at that level will be a power-vented design, not an atmospheric design. (AGA, Public Meeting Transcript, No. 57.4 at pp. 35–36) Further, AGA stated that the majority of the models on the market rated at this efficiency level are not atmospherically vented, and contended that atmospherically-vented models at 0.63 EF would have recovery efficiencies high enough such that they require venting modifications because of the possibility for corrosive condensate to occur. (AGA, No. 78 at p. 8) If proper venting is not installed, corrosion from condensate can cause leaks in the venting system, which in turn can allow combustion by-products (*e.g.,* carbon monoxide) to infiltrate into areas where such by-products are not desirable, possibly leading to serious injury or death. Thus, AGA recommended that DOE should consider only power-venting technology as the design option at efficiency level 2 for reasons of installation safety and practicality, and asserted that continuing to rely upon atmospheric technology for the efficiency level 2 design would violate statutory requirements for DOE to avoid implementing efficiency standards that would pose an increased safety risk to consumers. (AGA, No. 78 at p. 10)

In response, DOE notes that there are products currently available on the market at efficiency level 2 that do not use a power-venting design. The manufacturer literature for these products does not indicate that there are certain instances in which the installation of these products would be unsafe. Therefore, DOE did not change its technology options at efficiency level 2. However, DOE does recognize the venting concerns of gas-fired storage water heaters at efficiency level 2 with high recovery efficiencies. DOE addresses this issue in section IV.F.2 (Installation Cost).

A.O. Smith strongly recommended that DOE lower the max-tech level for gas-fired storage water heaters from the 0.80 EF level identified in the December 2009 NOPR for the representative 40-gallon storage volume. A.O. Smith stated that the 0.80 EF level identified as the max-tech for gas-fired storage water heaters by the Super Efficient Gas Water Heating Appliance Initiative (SEGWHAI) program and in a presentation by A.O. Smith at the 2009 ACEEE Hot Water Forum were based on theoretical modeling, and not operational prototypes. A.O. Smith also commented that the ENERGY STAR level of 0.80 EF is based on similar modeling, and stated that discussions are underway with DOE regarding the need to lower the Energy Star level to 0.77 EF. A.O. Smith stated they have recently built and tested a number of condensing gas-fired water heater prototypes that result in actual performance that is somewhat lower than predicted by the models. Consequently, A.O. Smith expressed support for 0.77 EF as the max-tech level for 40 gallon gas-fired storage water heaters. (A.O. Smith, No. 76 at pp. 1–2)

In the preliminary analysis, DOE proposed to use 0.77 EF as the max-tech level for gas-fired storage water heaters at the representative rated storage volume (*see* chapter 5 of the preliminary analysis TSD for more details). In response to this proposal in the preliminary analysis, DOE received comments from interested parties stating that the max-tech efficiency level considered for gas-fired storage water heaters in this rulemaking should be harmonized with the ENERGY STAR level for residential condensing gas-fired storage water heaters, and DOE subsequently revised the max-tech level to 0.80 EF for the December 2009 NOPR analysis. 74 FR 65852, 65883 (Dec. 11, 2009). DOE believes there is some uncertainty regarding the efficiencies that can be achieved by gas-fired storage water heaters because there are no products currently available on the market and to date only prototypes have been developed for residential applications. For the final rule, DOE has reviewed confidential data characterizing the performance of residential gas-fired storage water heater prototypes and has concluded that 0.77 EF is more representative of the condensing water heaters likely to enter the market. As such, DOE has revised its max-tech efficiency level for the final rule so that at the 40-gallon representative capacity, the efficiency level is 0.77 EF, as shown in Table IV.7.

TABLE IV.7—FORTY-GALLON GAS-FIRED STORAGE WATER HEATER (STANDARD BURNER) EFFICIENCY LEVELS

Efficiency level (EF)	Technology
Baseline (EF = 0.59)	Standing Pilot and 1" Insulation.
Efficiency Level 1 (EF = 0.62)	Standing Pilot and 1.5" Insulation.
Efficiency Level 2 (EF = 0.63)	Standing Pilot and 2.0" Insulation.
Efficiency Level 3 (EF = 0.64)	Electronic Ignition, Power Vent and 1" Insulation.
Efficiency Level 4 (EF = 0.65)	Electronic Ignition, Power Vent and 1.5" Insulation.
Efficiency Level 5 (EF = 0.67)	Electronic Ignition, Power Vent and 2" Insulation.
Efficiency Level 6—Max-Tech (EF = 0.77)	Condensing, Power Vent, 2" Insulation.

Regarding the technology options for ultra-low NO_X gas-fired storage water heaters, ACEEE stated that once an inducer fan is added to an ultra-low NO_X product, the ultra-low NO_X design factor is not a prohibitive feature. (ACEEE, Public Meeting Transcript, No. 57.4 at pp. 127) A.O. Smith stated that the only way for ultra-low NO_X water heaters to overcome the additional restriction added by increased flue baffling (needed to promote heat exchange and increase efficiency) would be to add a blower and/or power-burner to the heater, which would greatly increase the manufacturing and installation costs of the heater. (A.O. Smith, No. 76 at p. 2)

DOE tentatively concluded in the December 2009 NOPR that ultra-low NO_X gas-fired water heaters require the introduction of additional technologies to achieve the same efficiency as standard gas-fired water heaters. For the December 2009 NOPR, DOE performed a teardown analysis of ultra-low NO_X gas-fired storage water heaters. 74 FR 65852, 65881 (Dec. 11, 2009). (Details about DOE's December 2009 NOPR analysis of ultra-low NO_X storage water heaters are available in chapter 5 of the December 2009 NOPR TSD.) DOE research showed that implementing power venting and the same insulation increases as those for standard gas-fired water heaters would result in slightly lower efficiencies due to the additional pressure restrictions resulting from the addition of the ultra-low NO_X burner. Therefore, DOE implemented technologies at lower efficiency levels for ultra-low NO_X gas-fired storage water heaters in order to achieve the same efficiencies as those identified for standard gas-fired storage water heaters. Based on the teardown analysis of ultra-low NO_X water heaters, DOE believes that the levels identified for ultra-low NO_X gas-fired storage water heaters are achievable using the technologies identified in Table IV.8. In its comments, ACEEE does not present any new data or evidence to support its assertion that once a power venting design is implemented, ultra-low NO_X gas-fired storage water heaters can achieve the same efficiencies as gas-fired water heaters with standard burners. As a result, DOE maintained the technologies and efficiency levels identified in the December 2009 NOPR for the final rule, with the exception of the max-tech level, which was reduced to 0.77 EF for the reasons described above.

TABLE IV.8—FORTY-GALLON GAS-FIRED STORAGE WATER HEATER (ULTRA-LOW NO_X BURNER) EFFICIENCY LEVELS

Efficiency level (EF)	Technology
Baseline (EF = 0.59)	Standing Pilot and 1″ Insulation.
Efficiency Level 1 (EF = 0.62)	Standing Pilot and 2″ Insulation.
Efficiency Level 2 (EF = 0.63)	Electronic Ignition, Power Vent, and 1″ Insulation.
Efficiency Level 3 (EF = 0.64)	Electronic Ignition, Power Vent and 1.5″ Insulation.
Efficiency Level 4 (EF = 0.65)	Electronic Ignition, Power Vent and 2″ Insulation.
Efficiency Level 5 (EF = 0.67)	Not Attainable (would go to condensing).
Efficiency Level 6—Max-Tech (EF = 0.77)	Condensing, Power Vent, 2″ Insulation.

DOE also received several comments relating to the max-tech efficiency levels for electric storage water heaters, which was identified as 2.2 EF at the 50-gallon representative rated storage volume in the December 2009 NOPR. 74 FR 65852, 65884 (Dec. 11, 2009). GE stated that the heat pump water heater it has in production has an EF of 2.35 at standard DOE test conditions, which is higher than the max-tech level identified in the December 2009 NOPR for electric storage water heaters. (GE, No. 84 at p. 1) A.O. Smith also stated that the 2.2 EF max-tech in the December 2009 NOPR is too low, citing the GE heat pump water heater that is rated at 2.3 EF as evidence. A.O. Smith stated that the heat pump water heater max-tech level should be increased to 2.3 EF or higher if there is data available showing higher

levels are feasible. (A.O. Smith, No. 76 at p. 2) Further, A.O. Smith stated that because of heat pumps using CO_2 as a refrigerant and because other heat pump technologies exist, the max-tech possibly is higher than 2.2 EF. (A.O. Smith, Public Meeting Transcript, No. 57.4 at p. 131) ACEEE stated that DOE does not have an appropriate max-tech for electric storage water heaters because it inappropriately screened out CO_2 heat pump water heaters, which are commercially available in other countries. (ACEEE, Public Meeting Transcript, No. 57.4 at p. 130) Additionally, ACEEE stated that the GE product with an EF of 2.35 exceeds DOE's December 2009 NOPR max-tech level of 2.2 EF (ACEEE, No. 79 at p. 8)

Daikin stated that DOE's proposed max-tech for heat pump water heaters of 2.2 EF is reasonable and appropriate, and is an achievable standard for heat pump water heaters. (Daikin, No. 82 at p. 1)

In response, DOE estimated the max-tech efficiency for electric storage water heaters for the December 2009 NOPR before any integrated heat pump water heaters were commercially available on the market. In the time since the December 2009 NOPR's publication, several heat pump water heater models have become available to consumers. The highest EF of the heat pump water heater models currently available on the market is 2.35 EF at 50 gallons. While DOE does acknowledge A.O. Smith's and ACEEE's point that a CO_2 heat pump water heater could provide an even higher EF, that technology was screened out during the screening process (*see* section IV.B.1), and DOE is not considering that technology as a viable way of reaching the max-tech level. As a result, DOE has revised the max-tech level for the final rule to be 2.35 EF at the representative 50-gallon rated storage volume, as shown in Table IV.9.

TABLE IV.9—FIFTY-GALLON ELECTRIC STORAGE WATER HEATER EFFICIENCY LEVELS

Efficiency level (EF)	Technology
Baseline (EF = 0.90)	1.5″ Foam Insulation.
Efficiency Level 1 (EF = 0.91)	2″ Foam Insulation.
Efficiency Level 2 (EF = 0.92)	2.25″ Foam Insulation.
Efficiency Level 3 (EF = 0.93)	2.5″ Foam Insulation.
Efficiency Level 4 (EF = 0.94)	3″ Foam Insulation.
Efficiency Level 5 (EF = 0.95)	4″ Foam Insulation.
Efficiency Level 6 (EF = 2.0)	Heat Pump Water Heater.
Efficiency Level 7—Max-Tech (EF = 2.35)	Heat Pump Water Heater, More-Efficient Compressor.

DOE received only one comment in response to the efficiency levels and technology pathways presented in the December 2009 NOPR for oil-fired storage water heaters. In the December 2009 NOPR, DOE determined that oil-fired storage water heaters would have to use a multi-flue design to achieve efficiency levels 6 and 7 (*i.e.,* 0.66 and 0.68 EF for the 32-gallon representative rated storage volume). 74 FR 65852, 65885–86 (Dec. 11, 2009). Bradford White stated that at the efficiency level proposed in the December 2009 NOPR for oil-fired storage water heaters (*i.e.,* efficiency level 5, or 0.62 EF for the 32-gallon representative rated storage volume), reaching the required efficiency will likely require the use of multi-flue designs, thereby adding tremendous cost to residential designs. (Bradford White, No. 61 at p. 2)

In response, DOE identified the technologies at each efficiency level by examining the designs of products currently available on the market at each efficiency level. Oil-fired storage water heaters are currently available on the market at 0.62 EF, which do not utilize a multi-flue design or other proprietary technology. As a result, DOE believes that the technology options identified in the December 2009 NOPR at efficiency level 5 are appropriate, and has retained the same efficiency levels and technologies for the final rule. Accordingly, DOE did not include a multi-flue design at efficiency level 5 for the final rule analysis.

TABLE IV.10—THIRTY-TWO-GALLON OIL-FIRED STORAGE WATER HEATER WITH BURNER ASSEMBLY

Efficiency level (EF)	Technology
Baseline (EF = 0.53)	1″ Fiberglass Insulation.
Efficiency Level 1 (EF = 0.54)	1.5″ Fiberglass Insulation.
Efficiency Level 2 (EF = 0.56)	2″ Fiberglass Insulation.
Efficiency Level 3 (EF = 0.58)	2.5″ Fiberglass Insulation.
Efficiency Level 4 (EF = 0.60)	2″ Foam Insulation.
Efficiency Level 5 (EF = 0.62)	2.5″ Foam Insulation.
Efficiency Level 6 (EF = 0.66)	1″ Fiberglass Insulation, and Multi-Flue Design.
Efficiency Level 7—Max-Tech (EF = 0.68)	1″ Foam Insulation, and Multi-Flue Design.

DOE did not receive any comments in response to the efficiency levels and technology options presented in the December 2009 NOPR analysis for gas-fired instantaneous water heaters. 74 FR 65852, 65886–87 (Dec. 11, 2009). DOE believes that the efficiencies and technology options presented for gas-fired instantaneous water heaters in the December 2009 NOPR are still valid and continued to use the same technologies and efficiency levels in the final rule analysis.

TABLE IV.11—ZERO-GALLON GAS-FIRED INSTANTANEOUS WATER HEATER, 199,000 BTU/H INPUT CAPACITY

Efficiency level (EF)	Technology
Baseline (EF = 0.62)	Standing Pilot.
Efficiency Level 1 (EF = 0.69)	Standing Pilot and Improved Heat Exchanger Area.
Efficiency Level 2 (EF = 0.78)	Electronic Ignition And Improved Heat Exchanger.
Efficiency Level 3 (EF = 0.80)	Electronic Ignition and Power Vent.
Efficiency Level 4 (EF = 0.82)	Electronic Ignition, Power Vent, Improved Heat Exchanger Area.
Efficiency Level 5 (EF = 0.84)	Electronic Ignition, Power Vent, and Improved Heat Exchanger Area.
Efficiency Level 6 (EF = 0.85)	Electronic Ignition, Power Vent, Direct Vent, and Improved Heat Exchanger Area.
Efficiency Level 7 (EF = 0.92)	Electronic Ignition, Power Vent, Direct Vent, Condensing.
Efficiency Level 8—Max Tech (EF = 0.95)	Electronic Ignition, Power Vent, Direct Vent, Condensing (Max-Tech).

b. Direct Heating Equipment

Table IV.12 through Table IV.16 present the efficiency levels DOE examined for the final rule analysis for DHE. In the December 2009 NOPR analysis, DOE identified various efficiency levels for gas wall fan DHE. 74 FR 65852, 65887 (Dec. 11, 2009). DOE did not receive any comments pertaining to its efficiency levels or technologies identified for the gas wall fan product in the December 2009 NOPR analysis. After reviewing the efficiency levels and technologies, DOE has determined that the same efficiency levels and technologies are still appropriate and continued to use them in the final rule analysis.

TABLE IV.12—GAS WALL FAN-TYPE DHE (OVER 42,000 Btu/h) EFFICIENCY LEVELS

Efficiency level (AFUE)	Technology
Baseline (AFUE = 74)	Standing Pilot.
Efficiency Level 1 (AFUE = 75)	Intermittent Ignition and Two-Speed Blower.
Efficiency Level 2 (AFUE = 76)	Intermittent Ignition and Improved Heat Exchanger.
Efficiency Level 3 (AFUE = 77)	Intermittent Ignition, Two-Speed Blower, and Improved Heat Exchanger.
Efficiency Level 4—Max-Tech (AFUE = 80)	Induced Draft and Electronic Ignition.

For gas wall gravity DHE, DOE identified efficiency levels and technology options in the December 2009 NOPR analysis, which included a 72-percent AFUE level as the max-tech that could be achieved using electronic ignition. 74 FR 65852, 65887–88 (Dec. 11, 2009). DOE received several comments in response to the efficiency levels and technologies for gas wall gravity DHE presented in the December 2009 NOPR. These comments and DOE's response are discussed below.

Williams stated that due to factors such as interior stud-wall installation, the lack of an electricity requirement, and limited height footprint, gravity wall heaters do not lend themselves to the addition of a fan, and the commenter asserted that the TSD recommendations centered almost exclusively on the incorporation of a fan for improving efficiency of DHE. (Williams, No. 96 at p. 2) Further, Williams stated that a three-percent AFUE difference between a gravity wall and fan wall heater is not plausible. Williams also commented that DOE's assumption that increased efficiencies of three percent to nine percent can be attained by using an electronic ignition is unproven. (Williams, No. 96 at p. 2)

Empire stated that to improve efficiency of DHE, larger heat exchanger surface areas would be needed and, as a result, the overall size of the unit may increase. Furthermore, Empire stated that many of the modifications necessary to improve the efficiency of gas wall gravity DHE would require electricity. (Empire, Public Meeting Transcript, No. 57.4 at p. 166) LTS stated that it is not optimistic that it could manufacture gravity wall furnaces at the proposed level, because meeting that level would require a larger heat exchanger and cabinet and, consequently, the product would lose its retrofit ability. (LTS, No. 56.7 at p. 1)

In consideration of the comments above, DOE reevaluated its efficiency levels and technologies for gas wall gravity DHE for the final rule. After reexamining the current market for gas wall gravity DHE for the final rule, DOE concluded that at the efficiency levels analyzed by DOE in the December 2009 NOPR, some gas wall gravity DHE models are available on the market, but these models are not in the representative rated capacity range. Therefore, DOE revised the efficiency levels analyzed for the final rule to more accurately reflect the current market for products within the representative rated capacity. DOE notes that the revised efficiency levels do not require the use fans, and allow for heat exchangers to be sized so that the units can be easily retrofitted. In addition, although no gas wall gravity products that use an electronic ignition system are available on the market, DOE maintained the assumption from the December 2009 NOPR that an electronic ignition could be added to gas wall gravity products to improve the AFUE by 1 percent. DOE does not believe that a reduction of consumer utility will occur by requiring electrical power for an electronic ignition because these products could incorporate a battery backup to mitigate any concerns about operation during power outages.

Regarding Williams' assertion that the AFUE increases from an electronic ignition have not been proven, DOE agrees that the actual AFUE increase resulting from the addition of an electronic ignition will be highly variable based on the characteristics of each individual product, and the results of this have not been demonstrated in gas wall gravity DHE on the market. Because no products are available on the market in this product class that utilize electronic ignition, it is difficult to determine the exact impact of utilizing an electronic ignition for gas wall gravity DHE. However, consideration under the DOE test procedures for vented home heating

equipment (10 CFR part 430, subpart B, appendix O) led DOE to believe it is reasonable to assume that a 1-percent increase in AFUE would be achieved with the addition of an electronic ignition. Section 4.1.17 of DOE's test procedures for vented home heating equipment lists the AFUE equation as:

$$AFUE = 0.968\eta_{ss\text{-}wt} - 1.78D_F - 1.89D_S - 129P_F - 2.8L_J + 1.81$$

Of particular relevance in the AFUE equation above is the P_F term, which is the pilot fraction and accounts for the AFUE reduction caused by the standing pilot. P_F is defined as the ratio of the pilot light input to the total input of the product. If DOE assumes a typical pilot light input of 400 Btu/h, the minimum pilot fraction for the representative input range for gas wall gravity DHE would be 0.009. When multiplied by the 129 coefficient provided in the equation, a pilot fraction of 0.009 would yield slightly over a 1-percent AFUE reduction according to the equation. Therefore, DOE assumes that the elimination of a standing pilot would provide about a 1-percent AFUE increase for the representative capacity range. DOE used gas wall gravity DHE with an electronic ignition to represent the max-tech efficiency level because the incorporation of electronic ignition does not require significant modifications to the installation space that would limit consumers' ability to retrofit the product. Table IV.13 shows the revised efficiency levels for gas wall gravity DHE that were used in the final rule analysis.

TABLE IV.13—GAS WALL GRAVITY DHE (OVER 27,000 Btu/h AND UP TO 46,000 Btu/h) EFFICIENCY LEVELS

Efficiency level (AFUE)	Technology
Baseline (AFUE = 64)	Standing Pilot.
Efficiency Level 1 (AFUE = 66)	Standing Pilot and Improved Heat Exchanger.
Efficiency Level 2 (AFUE = 68)	Standing Pilot and Improved Heat Exchanger.
Efficiency Level 3 (AFUE = 69)	Standing Pilot and Improved Heat Exchanger.
Efficiency Level 4—Max Tech (AFUE = 70)	Electronic Ignition.

For gas floor DHE, gas room DHE, and gas hearth DHE, DOE surveyed the market and identified a number of efficiency levels for these products based on the technologies available for each product class in the December 2009 NOPR analysis. 74 FR 65852, 65888 (Dec. 11, 2009). DOE did not receive any comments about the efficiency levels and technologies identified for these products. After reviewing the efficiency levels and technologies for each of these three product classes, DOE determined that the efficiency levels and technologies examined in the December 2009 NOPR are still appropriate and maintained them for the final rule analysis. Table IV.14 through Table IV.16 show the efficiency levels analyzed for gas floor, gas room, and gas hearth DHE.

TABLE IV.14—GAS FLOOR DHE (OVER 37,000 Btu/h) EFFICIENCY LEVELS

Efficiency level (AFUE)	Technology
Baseline (AFUE = 57)	Standing Pilot.
Efficiency Level 1—Max Tech (AFUE = 58)	Standing Pilot and Improved Heat Exchanger.

TABLE IV.15—GAS ROOM DHE (OVER 27,000 Btu/h AND UP TO 46,000 Btu/h) EFFICIENCY LEVELS

Efficiency level (AFUE)	Technology
Baseline (AFUE = 64)	Standing Pilot.
Efficiency Level 1 (AFUE = 65)	Standing Pilot and Improved Heat Exchanger.
Efficiency Level 2 (AFUE = 66)	Standing Pilot and Improved Heat Exchanger.
Efficiency Level 3 (AFUE = 67)	Standing Pilot and Improved Heat Exchanger.
Efficiency Level 4 (AFUE = 68)	Standing Pilot and Improved Heat Exchanger.
Efficiency Level 5—Max Tech (AFUE = 83)	Electronic Ignition and Multiple Heat Exchanger Design.

TABLE IV.16—GAS HEARTH DHE (OVER 27,000 Btu/h AND UP TO 46,000 Btu/h) EFFICIENCY LEVELS

Efficiency level (AFUE)	Technology
Baseline (AFUE = 64)	Standing Pilot.
Efficiency Level 1 (AFUE = 67)	Electronic Ignition.
Efficiency Level 2 (AFUE = 72)	Fan Assisted.
Efficiency Level 3—Max Tech (AFUE = 93)	Condensing.

c. Pool Heaters

Table IV.17 shows the efficiency levels analyzed for the final rule analysis for pool heaters. In response to the December 2009 NOPR analysis, DOE received several comments related to the efficiency levels and technologies identified for pool heaters, particularly for efficiency level 5 (*i.e.,* 84-percent thermal efficiency).

AHRI asserted that DOE has incorrectly analyzed the measures required to manufacture gas-fired pool heaters capable of achieving a minimum thermal efficiency of 84 percent. Further, AHRI stated that manufacturers must design products to address the entire range of installation situations that the product could experience, and if a particular replacement installation presents concerns about possible

excessive condensation for a heater with 83- or 84-percent thermal efficiency, the option currently exists to install a slightly less efficient pool heater and minimize this concern. However, AHRI asserted that because this option will no longer exist if DOE adopts TSL 4, manufacturers will have to use more corrosion-resistant (and more expensive) stainless steel in the heat exchangers. (AHRI, No. 91 at p. 9)

Similarly, Raypak stated its belief, based on their own testing conducted to evaluate ways to achieve higher efficiency from their products that more-expensive stainless steel materials will be required to properly deal with the increased amount of condensate at higher efficiency levels (*i.e.,* anything greater than TSL 2). Further, Raypak stated that atmospheric products currently on the market do condense (although they are designed to minimize condensation), so increasing the efficiency level will both increase the amount of condensation and reduce the life of the product, unless more-expensive stainless steel materials are used to manage condensate more effectively. (Raypak, No. 67 at p. 3)

Zodiac also stated that 84-percent thermal efficiency for gas-fired pool heaters approaches the point at which condensing occurs, and that condensation as a byproduct of combustion is acidic and can cause corrosion to important components of the heater, including the venting material if the proper type of venting is not installed. Zodiac stated that corrosion from condensate can lead to leaks in the venting system, which in turn can allow combustion by-products to infiltrate into areas where such by-products are not desirable. Zodiac asserted this can subsequently contribute to creating a carbon monoxide hazard in the event that abnormal combustion ever occurs, which can lead to serious injury or death. (Zodiac, No. 68 at pp. 1–2)

In response to these comments, DOE notes that in the engineering analysis, DOE examined pool heaters that are currently available on the market at 84-percent thermal efficiency. DOE determined that these products did not incorporate stainless steel heat exchangers. In addition, manufacturer literature does not specify instances when these products could cause unsafe installations, and where less-efficient products should be used to minimize corrosive condensate. Instead, manufacturer literature advertises safety features that minimize condensate, such as a manual bypass that will raise the incoming water temperature to reduce the formation of corrosive condensate. Because these products currently exist on the market and seem to be capable of safe operation with condensate being mitigated using less expensive methods than incorporating stainless steel materials, DOE did not consider stainless steel heat exchangers at 84-percent thermal efficiency for the final rule. Additionally, DOE notes that typically pool heaters are installed outdoors or outside of the living space, so these products are unlikely to cause safety concerns in most installations. DOE does not believe manufacturers would largely deviate from the designs currently on the market in the event of a standard at this efficiency level, and, thus, DOE based its technologies on products currently available on the market at 84-percent thermal efficiency. As a result, DOE maintained the pool heater efficiency levels analyzed for the December 2009 NOPR in the final rule analysis.

TABLE IV.17—GAS-FIRED POOL HEATER (250,000 Btu/h) EFFICIENCY LEVELS

Efficiency level (thermal efficiency)	Technology
Baseline (Thermal Efficiency = 78)*.	
Efficiency Level 1 (Thermal Efficiency = 79)*	Improved Heat Exchanger Design.
Efficiency Level 2 (Thermal Efficiency = 81)*	Improved Heat Exchanger Design.
Efficiency Level 3 (Thermal Efficiency = 82)*	Improved Heat Exchanger Design, More Effective Insulation (Combustion Chamber).
Efficiency Level 4 (Thermal Efficiency = 83)	Power Venting.
Efficiency Level 5 (Thermal Efficiency = 84)	Power Venting, Improved Heat Exchanger Design.
Efficiency Level 6 (Thermal Efficiency = 86)	Sealed Combustion, Improved Heat Exchanger Design.
Efficiency Level 7 (Thermal Efficiency = 90)	Sealed Combustion, Condensing.
Efficiency Level 8—Max-Tech (Thermal Efficiency = 95)	Sealed Combustion, Condensing, Improved Heat Exchanger Design.

*Technologies incorporating either a standing pilot or electronic ignition. Efficiency Levels above 3 include electronic ignition.

3. Cost Assessment Methodology

a. Manufacturer Production Cost

As explained in the December 2009 NOPR, DOE's process for developing manufacturer production costs (MPCs) consisted of several steps. First, DOE selected representative models that corresponded to the representative rated storage volumes and input capacities, and that represented the most common designs and characteristics available in products on the market. DOE then performed a teardown analysis of the selected models, which included disassembling the selected products into their base components and characterizing each component according to its weight, dimensions, material, quantity, and the manufacturing processes used to fabricate and assemble it. The teardown analysis for this rulemaking included a total of over 60 physical and virtual teardowns of water heaters, DHE, and pool heaters during the preliminary and NOPR analysis phases. 74 FR 65852, 65889–93 (Dec. 11, 2009).

DOE used the data gathered during the teardown analysis to generate bills of materials (BOMs) that incorporate all materials, components, and fasteners classified as either raw materials or purchased parts and assemblies, and characterize the materials and components by weight, manufacturing processes used, dimensions, material, and quantity. DOE developed a cost model using Microsoft Excel that converts the materials and components in the BOMs into dollar values based on the price of materials, labor rates associated with manufacturing and assembling, and the cost of overhead and depreciation. To convert the information in the BOMs to dollar values, DOE collected information on labor rates, tooling costs, raw material prices, and other factors. For purchased parts, the cost model estimates the purchase price based on volume-variable price quotations and detailed discussions with manufacturers and component suppliers. For fabricated parts, the prices of raw metal materials (*e.g.,* tube, sheet metal) are estimated on the basis of 5-year averages. The cost of transforming the intermediate materials into finished parts is estimated based on current industry pricing.

For the final rule analysis, DOE updated all of the labor rates, tooling costs, raw material prices, and the

purchased parts costs. DOE calculated new 5-year average materials prices using the U.S. Department of Labor's Bureau of Labor Statistics (BLS) Producer Price Indices (PPIs) for various raw metal materials from 2005 to 2009, which incorporate the changes within each material industry and inflation. DOE also used BLS PPI data to update current market pricing for other input materials such as plastic resins and purchased parts. Finally, DOE adjusted all averages to 2009$ using the gross domestic product implicit price deflator. Chapter 5 of the final rule TSD describes DOE's cost model and definitions, assumptions, and estimates.

Additionally, because integrated heat pump water heaters became available on the market before the completion of the final rule analysis, DOE was able to perform teardown analyses and develop detailed BOMs for multiple heat pump water heaters. DOE used the BOMs to develop the MPCs for heat pump water heaters, which DOE found affirmed the MPCs developed for the December 2009 NOPR analysis that were based on a theoretical heat pump water heater design (since no heat pump water heaters were available on the market at the time of the December 2009 NOPR analysis). The teardown analysis of heat pump water heaters allowed DOE to refine its MPCs for these products for the final rule analysis.

DOE received several comments in response to the manufacturer production costs and methodology presented in the December 2009 NOPR. ACEEE stated its disappointment that DOE did not perform retrospective analysis of the costs of products affected by changes in efficiency standards. ACEEE recommended that DOE balance the current approach to developing the cost-efficiency relationship by considering the historical results of rulemakings, arguing that manufacturer production costs for product redesigns almost inevitably result in lower consumer prices for more-efficient goods than DOE has typically estimated in its rulemaking analyses for energy conservation standards. Further, ACEEE stated that DOE's reasoning that it cannot speculate about specific changes manufacturers might adopt, is no reason to reject analysis of the historical pattern of manufacturer responses. ACEEE cited published work by a DOE contractor purportedly showing that most standards yield consumer prices lower than projected by the Department, and ACEEE stated that empirical results are simply more credible than those relied upon in DOE's rulemaking record, particularly for the future costs of products that include technology shifts and very low market shares today, such as heat pump water heaters. (ACEEE, No. 79 at p. 3)

In response, DOE reiterates its tentative conclusion in the December 2009 NOPR that DOE's manufacturing cost estimates seek to gauge the most likely industry response to meet the requirements of proposed energy conservation standards. DOE's analysis of manufacturing cost must be based on currently-available technology that would provide a nonproprietary pathway for compliance with a standard once it becomes effective, and, thus, DOE cannot speculate on future product and market innovation. In response to a change in energy conservation standards, manufacturers have made a number of changes to reduce costs in the past. DOE understands manufacturers have re-engineered products to reduce cost, made changes to manufacturing process to reduce labor costs, and moved production to lower-cost areas to reduce labor costs. However, these are individual company decisions, and it is impossible for DOE to forecast such decisions. DOE does not know of any data that would allow it to determine the precise course a manufacturer may take. Furthermore, while manufacturers have been able to reduce the cost of products that meet previous energy conservation standards, there are no data to suggest that any further reductions in cost are possible. Therefore, it would not be appropriate to speculate about cost reduction based upon prior actions of manufacturers of either the same or other products. Setting energy conservation standards based upon relevant data is particularly important given EPCA's anti-backsliding provision at 42 U.S.C. 6295(o)(1).

At the December 2009 NOPR public meeting, A.O. Smith stated that the cost impact studies for ultra-low NO_X in combination with condensing technology should be reworked extensively because it is significantly more complex to implement an ultra-low NO_X design with a condensing gas-fired water heater than a non-condensing gas-fired water heater. (A.O. Smith, Public Meeting Transcript, No. 57.4 at p. 124) A.O. Smith also commented at the public meeting that for ultra-low NO_X gas-fired storage water heaters, the MPC at efficiency level 6 for an ultra-low NO_X condensing gas water heater is considerably too low (A.O. Smith, Public Meeting Transcript, No. 57.4 at p. 139) However, in its written submission, A.O. Smith stated that they believe DOE's manufacturer production costs in the December 2009 NOPR are all reasonably accurate. (A.O. Smith, No. 76 at p. 3) DOE believes A.O. Smith's written statement clarified A.O. Smith's opinion regarding the manufacturer production costs, and thus, DOE did not change its approach to developing MPCs for ultra-low NO_X condensing water heaters.

Turning to pool heaters, AHRI stated that the manufacturing cost for pool heater models to comply with TSL 4 (*i.e.,* 84-percent thermal efficiency) is underestimated by DOE. (AHRI, No. 91 at p. 8) Similarly, Raypak asserted that DOE does not account for the stainless steel material improvements (a significant cost increase) at any TSL below fully condensing. (Raypak, No. 67 at p. 3)

In response, DOE did not include the cost of a stainless steel heat exchanger design in its analysis of pool heaters at 84-percent thermal efficiency, because DOE's MPC for this product is based on models at 84-percent thermal efficiency that are currently available on the market, as explained in section IV.C.2.c, DOE does not have sufficient reason to believe that in the event of a minimum energy conservation standard at this efficiency level, manufacturers would completely redesign their products at this efficiency. Thus, DOE disagrees with AHRI and Raypak, and does not believe that the pool heater MPC at 84-percent thermal efficiency was underestimated for the December 2009 NOPR and has continued to use that MPC for the final rule analysis.

b. Manufacturer Selling Price

The manufacturer selling price (MSP) is the price at which the manufacturer can recover all production and non-production costs and earn a profit. The MSP should be high enough to recover the full cost of the product (*i.e.,* full production and non-production costs), and yield a profit. For heating products, DOE calculates the MSP in one of two ways, depending on the product type. For gas-fired instantaneous water heaters, DHE, and pool heaters, the MSP is the MPC multiplied by a manufacturer markup. For gas-fired, electric, and oil-fired storage water heaters, the size of the unit is largely dependent on the final standard requirement, and as a result, the shipping costs are much different at each efficiency level. Therefore, in the December 2009 NOPR analysis, DOE separated the shipping costs of storage water heaters from the manufacturer markup to more transparently show the impacts of standards on the shipping costs of storage water heaters. The MSP for gas-fired, electric, and oil-fired storage water heaters was calculated as the MPC multiplied by the manufacturer markup (less the percentage of markup

usually attributed to shipping cost) plus the shipping cost per unit. *See* chapter 5 of the final rule TSD for more information regarding the manufacturer markup.

i. Manufacturer Markup

The manufacturer markup is a non-production cost multiplier that DOE applies to the full MPC to account for corporate non-production costs and profit. To calculate the manufacturer markups for the preliminary analysis, DOE used 10–K reports from publicly-owned residential heating products companies. DOE presented the calculated markups to manufacturers during interviews conducted for the December 2009 NOPR MIA analysis, and considered the feedback from manufacturers in order to supplement the calculated markup. DOE then refined the markups for each type of residential heating product to better reflect the residential heating products market. DOE used a constant markup to reflect the MSPs of the baseline products as well as more-efficient products. DOE used this approach because amended standards may result in high-efficiency products (which currently are considered premium products) becoming the baselines.

In regard to the manufacturer markups and methodology for determining manufacturer markups in the December 2009 NOPR, DOE did not receive any feedback from interested parties. After reviewing the manufacturer markups used for the December 2009 NOPR, DOE continued to use the same manufacturer markups for the final rule.

ii. Shipping Cost for Storage Water Heaters

The final step in DOE's cost-assessment methodology was to calculate the shipping cost for storage water heaters. Typically, the cost of shipping is fully accounted for in the manufacturer markup, and as noted above, this was DOE's approach for direct heating equipment, pool heaters, and gas-fired instantaneous water heaters. For storage water heaters, however, shipping costs are highly variable because the size of the unit is largely dependent upon the efficiency level being considered. Thus, DOE separated the shipping cost from manufacturer markup for storage water heaters.

For the final rule, DOE used many of the same assumptions used in the December 2009 NOPR to calculate shipping costs. DOE calculated shipping costs based on a typical 53-foot straight-frame trailer with a storage volume of 4,240 cubic feet, and assumed an average cost of $4,000 per trailer load. DOE examined the average sizes of water heaters at each efficiency level and storage volume, and determined the number of units that would fit in each trailer based on assumptions about the arrangement of water heaters in the trailer.

In response to the shipping costs presented in the December 2009 NOPR, Bradford White stated that the increases in shipping costs at higher efficiency levels are far too low. (Bradford White, Public Meeting Transcript, No. 57.4 at pp. 40–41) However, DOE notes that Bradford White did not provide any new data regarding shipping costs in response to the December 2009 NOPR. Further, Bradford White expressed strong disagreement with the shipping costs used for the December 2009 NOPR analysis, arguing that at the increased insulation thicknesses presented in the December 2009 NOPR, DOE's shipping costs are very much underestimated. (Bradford White, No. 61 at p. 1)

In response to these comments, DOE reexamined the shipping costs for the final rule analysis. DOE made several changes to its December 2009 NOPR assumptions for the final rule, including changes to the packaging dimensions of heat pump water heaters and changes to assumptions about the arrangement power vented gas-fired units on the trailer. For example, for the final rule analysis, DOE was able to examine actual heat pump water heaters available on the market, which allowed DOE to refine its estimated shipping dimensions of these units by increasing the dimensions to more accurately reflect the packaging of products that have recently become available to consumers. The increased shipping dimensions led to an increase the shipping cost (as manufacturers would be able to fit fewer units per shipping load). As a result, DOE was able to revise its shipping costs to more accurately reflect the cost to ship products currently available on the market. However, DOE notes that the shipping costs developed for the final rule represent estimates of the cost per unit shipped if the trailer were fully loaded with the same product (*i.e.,* same type of water heater at the same efficiency level and same storage volume). DOE recognizes that in reality, manufacturers will likely mix different products of various storage volumes and efficiencies to try to optimize the use of space within the trailer, which will cause some variation in the actual shipping costs per unit. For a full description of shipping costs for storage water heaters, *see* chapter 5 of the final rule TSD.

4. Engineering Analysis Results

The results of the engineering analysis are reported as cost-efficiency data in the form of MSP (in dollars) versus efficiency (EF for water heaters, AFUE for DHE, and thermal efficiency for pool heaters). The results from the engineering analysis are the basis for the subsequent analyses in the final rule and were used in the LCC analysis to determine consumer prices for residential heating products at the various potential standard levels. Chapter 5 of the final rule TSD provides the full list of MPCs and MSPs at each efficiency level for each analyzed representative product.

5. Scaling to Additional Rated Storage Capacities

As discussed in the December 2009 NOPR, to account for the large variation in the rated storage volumes of residential storage water heaters and differences in both usage patterns and first cost to consumers of water heaters larger or smaller than the representative capacity, DOE scaled its MPCs and efficiency levels for the representative rated storage volumes to several discrete rated storage volumes higher and lower than the representative storage volume for each storage water heater product class. 74 FR 65852, 65893–94 (Dec. 11, 2009) DOE developed the MPCs for water heaters at each of the rated storage volumes shown in Table IV.18. The MPCs developed for this analysis were used in the downstream LCC analysis, where a distribution of MPCs was used based on the estimated market share of each rated storage volume (*see* section IV.F).

TABLE IV.18—ADDITIONAL WATER HEATER STORAGE VOLUMES ANALYZED

Water heater product class	Storage volumes analyzed (gallons, U.S.)
Gas-fired Storage	30, 50, 65, 75.
Electric Storage	30, 40, 66, 80, 119.

TABLE IV.18—ADDITIONAL WATER HEATER STORAGE VOLUMES ANALYZED—Continued

Water heater product class	Storage volumes analyzed (gallons, U.S.)
Oil-fired Storage	50.

As described in the December 2009 NOPR, DOE developed the MPCs for the analysis of additional storage volumes by creating a cost model based on teardowns of products at nominal storage volumes outside the representative volume across a range of efficiencies and manufacturers. The cost model accounts for changes in the size of water heater components that would scale with tank volume, while assuming other components (*e.g.,* gas valves, thermostats, controls) remain largely the same across the different storage volume sizes. DOE estimated the changes in material and labor costs that occur at volume sizes higher and lower than the representative volume based on observations made during teardowns, which allowed DOE to accurately model certain characteristics that are not identifiable in manufacturer literature. Additional details and the results of DOE's analysis for the additional storage volumes are presented in chapter 5 of the final rule TSD (engineering analysis).

In response to the scaled MPCs developed for the December 2009 NOPR analysis, DOE received feedback from several interested parties. Southern Company and AHRI commented that DOE's assumption that for heat pump water heaters, the heat pump output capacity would not change as a function of tank size is likely incorrect. Southern Company stated that a heat pump with a higher capacity would be used on a 119-gallon tank than on a 30-gallon tank. As a result, the commenters stated their belief that DOE's scaling of costs for the heat pump water heater efficiency levels may be incorrect. (Public Meeting Transcript, No. 57.4 at pp. 152–155) Further, Southern Company stated that the reason the heating elements in electric resistance heaters have the same output capacity across the full range of gallon sizes is because they max-out the standard circuit. (Southern Company, Public Meeting Transcript, No. 57.4 at p. 155) A.O. Smith also commented that a 119-gallon heat pump water heater would likely have a higher-capacity refrigerant circuit than a 30-gallon heat pump water heater. (A.O. Smith, Public Meeting Transcript, No. 57.4 at p. 157)

DOE's analysis of electric storage water heaters currently available on the market revealed that electric storage water heaters use the same capacity heating elements across the range of storage volumes to provide the same amount of heat input to the water. DOE notes that for heat pump water heaters, the heat pump unit serves essentially the same function as the electric resistance element in electric storage water heaters (*i.e.,* heating the water). Because heat pump modules paired with electric water heaters currently available on the market demonstrate that the same amount of heating capability as compared to the electric elements found in conventional water heaters and both of these types of heaters can be used to satisfy the heating requirements of the full range of water heater storage volumes, DOE believes the same amount of heat input from a heat pump can also be used to satisfy the heating requirements for the full range of storage volumes. Therefore, DOE does not believe an increase in the heat pump capacity would be required at larger tank storage volumes. DOE believes that the same amount of heat pump heating capacity will be adequate to serve the water heating needs across the entire range of storage volumes, and as a result manufacturers would be unlikely to increase the size and capacity of the heat pump unit as the storage volume increases. Therefore, DOE maintained the assumption that the heat pump unit will not scale with storage volume for the final rule analysis.

EEI stated that for large water heaters (66 to 119 gallons), DOE's costs to go from TSL 4 (electric resistance) to TSL 5 (heat pump water heaters) are between $20 and $26, which are vastly understated. (EEI, No. 95 at p. 5)

In response, DOE believes that EEI misinterpreted the scaled MPCs presented in the December 2009 NOPR analysis. EEI appears to have been considering the MPC differences between TSLs, whereas the December 2009 NOPR only lists the cost differences between efficiency levels. Heat pump water heater technology is implemented for larger-storage-volume products at the December 2009 NOPR TSL 5; however, DOE does not consider heat pump water heater technology in the engineering analysis for efficiency level 5, but instead considers it at efficiency level 6 for all product classes. The December 2009 NOPR TSL 5 was a combination of efficiency level 5 for the smaller storage volume sizes (55 gallons or less), and efficiency level 6 for the larger storage volume sizes (greater than 55 gallons). Thus, DOE believes the scaled MPCs at the higher gallon sizes and higher efficiency levels presented in the December 2009 NOPR were correct.

6. Water Heater Energy Efficiency Equations

For this rulemaking, DOE reviewed the energy efficiency equations that define the existing Federal energy conservation standards for residential water heaters. The energy efficiency equations characterize the relationship between rated storage volume and energy factor and allow DOE to expand the analysis on the representative rated storage volume to the full range of storage volumes covered under the existing Federal energy conservation standards. The energy efficiency equations allow DOE to account for the increases in standby losses as tank volume increases. The current energy efficiency equations show that for each water heater class, the minimum energy factor decreases as the rated storage volume increases.

As described in the December 2009 NOPR, DOE reviewed market data and product literature for gas-fired and electric storage water heaters and developed two approaches for amending the existing energy efficiency equations for gas-fired and electric storage water heaters in the preliminary analysis. 74 FR 65852, 65894–96 (Dec. 11, 2009). One approach was to maintain the same slope used in the existing equations (found at 10 CFR 430.32(d)), but to incrementally increase the intercepts. The second approach was to adjust the slope of the energy efficiency equations based on the review of the storage water heater models currently on the market. The advantage of the second approach was to acknowledge the changes in the product efficiencies that have occurred since the previous standards were set, and to account for these changes. DOE examined the efficiencies of models with varying storage volumes, but with the same or similar design features and varied the slope of the line to maximize the number of models in the series that meet the efficiency levels that DOE is considering in the full range of rated storage volumes.

The standard levels proposed in the December 2009 NOPR were based on the results of the second approach for gas-fired and electric storage water heaters. For oil-fired storage water heaters and gas-fired instantaneous water heaters, DOE only used the first approach to develop energy efficiency equations due to the limited number of models available on the market and limited data to justify modifying the equations. In response to the energy efficiency equations presented in the December 2009 NOPR, DOE received feedback from several interested parties.

A.O. Smith stated it supports the energy-efficiency equations as generally being appropriate for the various efficiency levels. A.O. Smith endorsed the equations applicable to TSL 4, and strongly recommended that they not be revised from those proposed in the December 2009 NOPR. (A.O. Smith, No. 76 at p. 2)

Bradford White expressed its disagreement with the energy efficiency equations proposed for electric storage water heaters. In particular, Bradford White commented that the efficiency level 4 equation ($EF = -0.00060(V_R) + 0.965$) should be used for $V_R \leq 65$ gallons and that the efficiency level 3 equation ($EF = -0.00155(V_R) + 1.026$) should be used for $V_R > 65$ gallons. Bradford White asserted that these changes are necessary to prevent the disproportionate EF increase that was proposed on larger volumes that have to combat higher standby losses. (Bradford White, No. 61 at p. 4)

Similarly, AHRI recommended that DOE revise the energy efficiency equation for TSL 4 for electric storage water heaters above 65 gallons, because AHRI believes it represents a disproportionately large increase in the EF requirement for these units. AHRI asserts that because larger electric storage water heaters have a smaller surface-area-to-volume ratio, increased insulation is less effective in achieving energy efficiency gains, and as a result, the projected efficiencies are overstated. AHRI recommended that for electric storage water heaters above 65 gallons, DOE should select the equation for TSL 3 ($EF = 1.051 - (0.00168 * \text{Rated Storage Volume})$) as the standard. (AHRI, No. 91 at p. 2)

Rheem also stated that the energy-efficiency equation for gas-fired storage water heaters at TSL 4 disproportionately imposes higher minimum EF values for large-capacity gas-fired storage water heaters. Rheem expressed concern that the uneven treatment of large-capacity units would encourage work-around solutions and product shifts. In addition, Rheem stated that the energy efficiency equation for electric storage water heaters at TSL 4 disproportionately impacts large-capacity electric storage water heaters. Rheem recommends that the equation read $EF = 1.026 - (0.00155 \times \text{Rated Storage Volume in gallons})$ for capacities above 55 gallons, in order to yield balance for high-capacity units. (Rheem, No. 89 at p. 12)

In light of the comments above, DOE reexamined the energy efficiency equations proposed in the December 2009 NOPR for gas-fired and electric storage water heaters. The energy efficiency equations are intended to represent the relationship between efficiency and storage volume so that the same technology could be used to meet the EF requirement for the entire range of gallon capacities. After examining the characteristics of products on the market at each efficiency level and gallon size, and based on the results of the testing and teardown analysis done prior to the December 2009 NOPR, DOE believes that the energy efficiency equations, as presented in the December 2009 NOPR, accurately represent the relationship between efficiency and storage volume. The equations developed by DOE have two slopes and decline faster for the larger storage volumes than the smaller storage volumes. The slopes developed for the December 2009 NOPR incorporated the results of testing and a physical examination (through teardowns) of the features incorporated into units across various gallon sizes and efficiency levels. Through this process, DOE was able to determine the efficiencies that can be achieved using the same technologies across the range of rated storage volumes. DOE then developed equations based on the results of this analysis to create efficiency levels that allow products to utilize the same technology across the range of storage volumes.

DOE believes that the equations have a proportionate impact on both larger-storage-volume units and smaller-storage-volume units. While DOE acknowledges that the efficiency levels in the proposed TSLs (which are determined based on a variety of factors, *see* section VI.A for more details) may be paired in a way which requires different efficiency levels utilizing different technologies for water heaters at various storage volumes, DOE does not believe this applies for the energy efficiency equations in the engineering analysis, which are based on constant technologies across the full range of storage volumes. The commenters did not provide any new data or evidence to lead DOE to conclude that the outcome of its analysis for the December 2009 NOPR is not valid.

As a result, DOE is maintaining the energy efficiency equations presented in the December 2009 NOPR, with only minor changes to account for the new max-tech levels described in section IV.C.2. For the max-tech energy efficiency equation (*i.e.,* EL 6) for gas-fired storage water heaters, DOE maintained the slope used in the December 2009 NOPR, but shifted the efficiency requirements down so that the EF requirement at the 40-gallon representative rated storage volume is 0.77 EF instead of 0.80 EF. Similarly, for the max-tech equation (*i.e.,* EL 7) for electric storage water heaters, DOE maintained the same slope, but shifted the equation upwards so that the efficiency requirement at the 50-gallon representative rated storage volume is 2.35 EF instead of 2.2 EF. *See* section IV.C.2.a for discussion of the max-tech efficiency levels.

DOE did not receive any comments regarding the proposed approach for oil-fired storage water heater energy efficiency equations presented in the December 2009 NOPR and has used the same approach in the final rule. Similarly, DOE did not receive any comments objecting to the proposed approach for gas-fired instantaneous water heater energy efficiency equations presented in the December 2009 NOPR and has used the same approach in the final rule. Table IV.19 through Table IV.22 show the energy efficiency equations for residential water heaters. For more information on the energy efficiency equations, *see* chapter 5 of the final rule TSD.

TABLE IV.19—ENERGY EFFICIENCY EQUATIONS FOR GAS-FIRED STORAGE WATER HEATERS

Efficiency level	Minimum energy factor (20 to 60 gallons)	Minimum energy factor (Over 60 and up to 100 gallons)
Baseline Energy Efficiency Equation	$EF = -0.00190(V_R) + 0.670$	

TABLE IV.19—ENERGY EFFICIENCY EQUATIONS FOR GAS-FIRED STORAGE WATER HEATERS—Continued

Efficiency level	Minimum energy factor (20 to 60 gallons)	Minimum energy factor (Over 60 and up to 100 gallons)
EL 1 Energy Efficiency Equation	EF = $-0.00150(V_R) + 0.675$	EF = $-0.00190(V_R) + 0.699$.
EL 2 Energy Efficiency Equation	EF = $-0.00120(V_R) + 0.675$	EF = $-0.00190(V_R) + 0.717$.
EL 3 Energy Efficiency Equation	EF = $-0.00100(V_R) + 0.680$	EF = $-0.00190(V_R) + 0.734$.
EL 4 Energy Efficiency Equation	EF = $-0.00090(V_R) + 0.690$	EF = $-0.00190(V_R) + 0.750$.
EL 5 Energy Efficiency Equation	EF = $-0.00078(V_R) + 0.700$	EF = $-0.00190(V_R) + 0.767$.
EL 6 Energy Efficiency Equation	EF = $-0.00078(V_R) + 0.8012$	

TABLE IV.20—ENERGY EFFICIENCY EQUATIONS FOR ELECTRIC STORAGE WATER HEATERS

Efficiency level	Minimum energy factor (20 to 80 gallons)	Minimum energy factor (Over 80 and up to 120 gallons)
Baseline Energy Efficiency Equation	EF = $0.00132(V_R) + 0.97$.	
EL 1 Energy Efficiency Equation	EF = $-0.00113(V_R) + 0.97$	EF = $-0.00149(V_R) + 0.999$.
EL 2 Energy Efficiency Equation	EF = $-0.00095(V_R) + 0.967$	EF = $-0.00153(V_R) + 1.013$.
EL 3 Energy Efficiency Equation	EF = $-0.00080(V_R) + 0.966$	EF = $-0.00155(V_R) + 1.026$.
EL 4 Energy Efficiency Equation	EF = $-0.00060(V_R) + 0.965$	EF = $-0.00168(V_R) + 1.051$.
EL 5 Energy Efficiency Equation	EF = $-0.00030(V_R) + 0.960$	EF = $-0.00190(V_R) + 1.088$.
EL 6 Energy Efficiency Equation	EF = $-0.00113(V_R) + 2.057$	
EL 7 Energy Efficiency Equation	EF = $-0.00113(V_R) + 2.406$	

TABLE IV.21—ENERGY EFFICIENCY EQUATIONS FOR OIL-FIRED STORAGE WATER HEATERS

Efficiency level	Minimum energy factor
EL 1 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.60$.
EL 2 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.62$.
EL 3 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.64$.
EL 4 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.66$.
EL 5 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.68$.
EL 6 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.72$.
EL 7 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.74$.

TABLE IV.22—ENERGY EFFICIENCY EQUATIONS FOR GAS-FIRED INSTANTANEOUS WATER HEATERS

Efficiency Level	Minimum energy factor
EL 1 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.69$.
EL 2 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.78$.

TABLE IV.22—ENERGY EFFICIENCY EQUATIONS FOR GAS-FIRED INSTANTANEOUS WATER HEATERS—Continued

Efficiency Level	Minimum energy factor
EL 3 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.80$.
EL 4 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.82$.
EL 5 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.84$.
EL 6 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.85$.
EL 7 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.92$.
EL 8 Energy Efficiency Equation	EF = $-0.0019(V_R) + 0.95$.

D. Markups To Determine Product Price

DOE used manufacturer-to-consumer markups to convert the manufacturer selling prices estimated in the engineering analysis to customer prices, which then were used in the life-cycle cost (LCC), payback period (PBP), and manufacturer impact analyses. DOE calculates markups for baseline products (baseline markups) and for more-efficient products (incremental markups) based on the markups at each step in the distribution channel. The overall incremental markup relates the change in the manufacturer sales price of higher-efficiency models (the incremental cost increase) to the change in the retailer or distributor sales price.

In order to develop markups, DOE identifies how the products are distributed from the manufacturer to the customer (the distribution channels). DOE estimated manufacturer-to-customer markups for residential heating products based on separate distribution channels for water heaters, direct heating equipment, and pool heaters. After establishing appropriate distribution channels for each of the product classes, DOE relied on economic data from the U.S. Census Bureau and other sources to define how prices are marked up as the products pass from the manufacturer to the customer. A detailed description of the distribution channels and the markup applied at each step in the distribution process can be found in chapter 6 of the December 2009 NOPR TSD. DOE did not receive any comments on development of markups, and it used the same approach for the final rule as it used for the December 2009 NOPR.

E. Energy Use Characterization

The energy use characterization, which assesses the energy savings potential from adopting higher efficiency standards, provides the basis for the energy savings values used in the LCC and subsequent analyses. For each considered efficiency level within each heating product class, DOE calculated the potential energy savings compared to baseline models. As part of the characterization, DOE made certain engineering assumptions regarding product application, including how the products are operated and under what conditions. Those assumptions are documented in chapter 7 of the TSD, which also provides more detail about DOE's approach.

DOE determined the annual energy use in the field by using a nationally-representative set of housing units for each type of product. The housing units were selected from EIA's Residential Energy Consumption Survey (RECS). The December 2009 NOPR analysis and today's final rule used the 2005 RECS, which was the latest data set available. (*See http://www.eia.doe.gov/emeu/recs/.*)

1. Water Heaters

For residential storage-type water heaters, DOE relied on an energy use analysis tool, the water heater analysis model (WHAM), and a hot water draw model. For this rulemaking, DOE modified earlier versions of the tools, which were used to conduct the previous rulemaking that concluded in 2001. Combined with data from the 2005 RECS, these analytical tools enable DOE to establish the variation in water heater energy consumption in the United States.

DOE determined the annual energy consumption of water heaters in actual housing units by considering the primary factors that determine energy use: (1) Hot water use per household; (2) the energy efficiency characteristics of the water heater; and (3) water heater operating conditions other than hot water draws. DOE used a hot water draw model to determine hot water use for each household in the sample. The characteristics of each water heater's energy efficiency were taken from the engineering analysis. DOE developed water heater operating conditions (other than hot water draws) from weather data and other relevant sources. DOE calculated the energy use of water heaters using WHAM, which accounts for a range of operating conditions and energy efficiency characteristics of water heaters.

For heat pump water heaters that would be located indoors, overcooling of the indoor space as a result of the unit's operation is a potential problem. DOE assumed that the majority of households that would be affected by indoor operation of a heat pump water heater would not want to incur the cost of a venting system, and would instead operate their heating and cooling systems to compensate for the effects of the heat pump water heater. To account for this indirect increase in home heating (and the decrease in cooling during summer months), DOE estimated the associated energy consumption by space heating and air conditioning equipment for the appropriate homes in the RECS subsample for electric water heaters, and included this energy use in its analysis.

A.O. Smith stated that to replace an electric resistance water heater with a heat pump water heater, the heat pump water heater will either require a larger tank to effectively utilize the heat pump cycle, or if a larger tank is not provided, the unit will run in the electric resistance mode and diminish the benefits of having a heat pump water heater. (A.O. Smith, No. 76 at pp. 2–3) In the December 2009 NOPR analysis and the final rule analysis, DOE estimated the fraction of heat pump water heater operation that would be in electric resistance mode for each unit in the subsample. The fraction estimated to be in electric resistance mode varies from 10 to 50 percent in the subsample.

Southern stated that heat pump water heaters do not perform well in temperatures outside the 45°–120 °F range, and it pointed out that there are locations where ambient temperatures are outside this range. (Southern, No. 90 at p. 3) DOE accounted for the ambient temperatures likely to be faced in heat

pump water heater locations by assuming electric resistance heating operation under extreme temperatures.

For gas-fired instantaneous water heaters, DOE modified the approach used for storage water heaters to account for the absence of a storage tank. DOE applied a performance adjustment factor to account for evidence that the rated energy efficiency of instantaneous water heaters does not accurately portray actual performance.

2. Direct Heating Equipment

The household sample developed for DHE is comprised of 2005 RECS housing units that used a floor/wall furnace, fireplace, or heater as the primary or secondary source of heat. DOE relied on the assumptions in the DOE test procedure (10 CFR part 430, subpart B, appendix O) to establish the typical annual energy consumption of direct heating equipment. However, to better reflect actual operating conditions, DOE used home heating loads derived from RECS instead of the average assumptions in the test procedure.

Williams stated that DHE is used in many applications as a secondary heat source, where the primary heat source is turned down and the DHE provides heat to the occupied zone only. (Williams, No. 96 at p. 1) For the December 2009 NOPR and today's final rule, for those RECS households that used a gas furnace as the primary heating equipment and direct heating equipment as a secondary heat source, DOE adjusted the house heating load to estimate the portion of the load met by only the direct heating equipment.

DOE did not receive any other comments on its approach for estimating energy consumption of direct heating equipment, and it has used essentially the same approach and data for the final rule.

3. Pool Heaters

DOE estimated energy consumption of pool heaters in a representative sample of housing units from the 2005 RECS. DOE relied on the assumptions in the DOE test procedure (10 CFR part 430, subpart B, appendix P) to establish the typical annual energy consumption of pool heaters. However, to better reflect actual operating conditions, DOE used pool heater heating loads derived from RECS instead of the average test procedure assumptions.

The calculation of pool heater energy consumption at each considered efficiency level depends on the assumed fraction of products that use a pilot light. In the December 2009 NOPR analysis, DOE used data based on the number of models in the market to estimate that 26.5 percent of units use a pilot light. Raypak stated that 8 percent of pool heaters are millivolt pool heaters (*i.e.,* use a pilot light). (Raypak, No. 67 at p. 2) Given that Raypak's estimate is based upon actual shipments data, DOE believes that the value it cited likely better reflects the actual market than the NOPR estimate based on the number of models. Therefore, for the final rule analysis, DOE adopted the value cited by Raypak.

F. Life-Cycle Cost and Payback Period Analyses

DOE conducted LCC and PBP analyses to evaluate the economic impacts on individual consumers of potential amended energy conservation standards for the three types of residential heating products. The LCC represents total consumer expenses during the life of an appliance, including purchase and installation costs plus operating costs (expenses for energy use, maintenance, and repair). To compute LCCs for the three heating products, DOE discounted future operating costs to the time of purchase, and then summed those costs over the life of the appliances. The PBP is calculated using the change in purchase cost (normally higher) that results from an amended efficiency standard, divided by the change in annual operating cost (normally lower) that results from the standard.

DOE measures the changes in LCC and PBP associated with a given efficiency level relative to an estimate of base-case appliance efficiencies. The base-case estimate reflects the market in the absence of amended mandatory energy conservation standards, including the market for products that exceed the current standards.

For each set of heating products, DOE calculated the LCC and PBP for a nationally representative set of housing units, which were selected from the 2005 RECS. The housing units include five types: Single-family (attached), single-family (detached), multi-family (2–5 units), multi-family (more than 4 units), and manufactured homes. For each sample household, DOE determined the energy consumption for the heating product and the energy price faced by the household. By developing a representative sample of households, the analysis captured the variability in energy consumption and energy prices associated with the use of residential heating products. DOE determined the LCCs and PBPs for each sampled household using a heating product's unique energy consumption and the household's energy price, as well as other variables. DOE calculated the LCC associated with the baseline heating product in each household. To calculate the LCC savings and PBP associated with equipment that meets higher efficiency standards, DOE's analysis replaced the baseline unit with a range of more-efficient designs.

Inputs to the calculation of total installed cost include the cost of the product—which includes manufacturer costs, manufacturer markups, retailer or distributor markups, and sales taxes—and installation costs. Inputs to the calculation of operating expenses include annual energy consumption, energy prices and price projections, repair and maintenance costs, product lifetimes, discount rates, and the year that proposed standards take effect. For many of the above inputs, DOE created distributions of values to account for uncertainty and variability. Within each distribution, probabilities are attached to each value. As described above, DOE used samples of households to characterize the variability in energy consumption and energy prices for heating products. For the inputs to installed cost, DOE used probability distributions to characterize sales taxes. DOE also used distributions to characterize the discount rate and product lifetime that are inputs to operating cost.

The computer model DOE uses to calculate LCC and PBP, which incorporates Crystal Ball (a commercially-available software program), relies on a Monte Carlo simulation to incorporate uncertainty and variability into the analysis. The Monte Carlo simulations randomly sampled input values from the probability distributions and household samples. The model calculated the LCC and PBP for products at each efficiency level for 10,000 housing units per simulation run.

Table IV.23 summarizes the approach and data DOE used to derive inputs to the LCC and PBP calculations. The table provides the data and approach DOE used for the December 2009 NOPR TSD, as well as the changes made for today's final rule. The following subsections discuss the main inputs and the changes DOE made to them.

TABLE IV.23—SUMMARY OF INPUTS AND KEY ASSUMPTIONS IN THE LCC AND PBP ANALYSES *

Inputs	NOPR	Changes for the final rule
	Installed Costs	
Product Price	Derived by multiplying manufacturer cost by manufacturer, retailer, and distributor markups and sales tax, as appropriate.	Updated manufacturer product costs (*see* section IV.C.3.a).
Installation Cost	Water Heaters: Based on data from *RS Means* and other sources.	Applied additional cost for space constraints and other installation situations.
	DHE: Based on data from *RS Means* and DOE's furnace installation model.	No change.
	Pool Heaters: Based on data from *RS Means*	Modified fraction of installations with pilot light.
	Operating Costs	
Annual Energy Use	Water Heaters: Used hot water draw model to calculate hot water use for each household in the sample from RECS 2005. Calculated energy use using the water heater analysis model (WHAM).	No change.
	DHE: Based on sample and data from RECS 2005	No change.
	Pool Heaters: Based on sample and data from RECS 1993 to 2005.	Based on sample and data from RECS 2001 and 2005. Included spa heaters.
Energy Prices	Electricity: Based on EIA's 2007 Form 861 data Natural Gas: Based on EIA's 2007 *Natural Gas Navigator*. Variability: Regional energy prices determined for 13 geographic areas **.	Electricity: Updated using data from EIA's 2008 Form 861 data and EIA's Form 826. Natural Gas: Updated using EIA's 2008 *Natural Gas Navigator.* Variability: No change.
Energy Price Trends	Forecasted using EIA's *AEO2009*	Forecasts updated using EIA's *AEO2010* (Early Release).
Repair and Maintenance Costs.	Water Heaters: Based on *RS Means* and other sources	No change.
	DHE: Based on *RS Means* and other sources	No change.
	Pool Heaters: Based on *RS Means* and other sources	No change.
	Present Value of Operating Cost Savings	
Product Lifetime	Water Heaters: Based on data from RECS, AHS, and shipments. Variability and uncertainty: Characterized using Weibull probability distributions.	No change.
	Set lifetime of oil-fired storage water heater equal to that of gas-fired storage water heater.	No change.
	DHE: Based on range of lifetimes from various sources	No change.
	Variability and uncertainty: Characterized using Weibull probability distributions.	
	Pool Heaters: Based on range of lifetimes from various sources. Variability and uncertainty: characterized using Weibull probability distributions..	Average lifetime increased from 8 years to 10 years.
Discount Rates	Approach based on the cost to finance an appliance purchase. Primary data source was the Federal Reserve Board's SCF *** for 1989, 1992, 1995, 1998, 2001, 2004, and 2007.	No change in approach; added data for asset classes.
Standard Compliance Date	Water heaters: 2015 DHE and Pool Heaters: 2013.	No change.

* References for the data sources mentioned in this table are provided in the sections following the table or in chapter 8 of the December 2009 NOPR TSD.

** Consisting of the nine U.S. Census Divisions, with four large States (New York, Florida, Texas, and California) treated separately.

*** Survey of Consumer Finances.

1. Product Price

To calculate consumer product prices, DOE multiplied the manufacturer selling prices developed in the engineering analysis by the supply-chain markups described above (along with sales taxes where appropriate). DOE used different markups for baseline products and higher-efficiency products, because the markups estimated for incremental costs differ from those estimated for baseline models. The estimated product prices at the considered efficiency levels are included in Chapter 8 in the TSD.

2. Installation Cost

Installation costs include labor, overhead, and any miscellaneous materials and parts. The following sections discuss DOE's treatment of installation costs for each of the three heating products for the December 2009 NOPR, describe and address significant comments received, and discuss changes that DOE made for today's final rule.

a. Water Heaters

In its preliminary analysis, DOE included several installation costs to address the space constraints that water heaters having thicker insulation may face. DOE assumed that major modifications for replacement installations of electric storage water heaters would occur 40 percent of the time for water heater designs with 3 inches or greater insulation. To estimate the fraction of households that would require various modifications, DOE used the water heater location determined for each sample household. DOE determined the location using information from the 2005 RECS, which reports whether the house has a basement, whether the basement is heated or unheated, and the presence or absence of a garage, crawlspace, or attic.

Generally, DOE maintained the above approach for the December 2009 NOPR. However, in response to comments on the space constraints for water heaters with increased insulation thickness, for the NOPR analysis, DOE investigated the issue of space constraints for electric and gas-fired storage water heaters with an insulation thickness of 2 inches or more. Based upon the results of this inquiry, DOE expanded the percentage of installations that may have space constraints to also include water heaters with 2–3 inches of insulation. DOE assumed that major modifications for replacement installations of electric and gas storage water heaters would occur 20 percent of the time for water heater designs with 2–3 inches of insulation. DOE also added for all water heaters a cost for extra labor needed to install water heaters in attics, and for installing larger water heaters.

Commenting on the December 2009 NOPR analysis, Rheem and Southern stated that DOE has not adequately considered the space constraints faced by manufactured housing, although no data were provided relevant to this issue. (Rheem, No. 89 at pp. 11–12; Southern, No. 90 at pp. 3–4) In response, DOE reviewed its assumptions regarding space constraints faced by manufactured housing, and based on its assessment of likely water heater locations from 2005 RECS, it approximately doubled the fraction of installations deemed to have space constraints. These installations would incur costs as described above to address the space constraints faced by water heater designs with more insulation.

Regarding installation of gas-fired storage water heaters, A.O. Smith stated that the need (and cost) to add electrical power and condensate disposal to existing installations appears to be understated in the December 2009 NOPR. (A.O. Smith, No. 76 at p. 4) DOE notes that the commenter did not provide any data to support its position. DOE reviewed the available sources, which are based on *RS Means* and consultant reports, concluded that they provide a reasonable basis for its estimates, and therefore it has maintained the NOPR estimates for the final rule.

AHRI stated that replacing larger gas-fired storage water heaters with condensing water heaters would require the added cost of new venting system, electrical connection, and a condensate disposal system, and sometimes an electric supply circuit. (AHRI, No. 91 at p. 7) Rheem stated that external power would be required to operate max-tech gas-fired storage water heaters, that venting would typically change to a positive pressure system with plastic venting, and that condensate lines, pumps, and proper disposal methods would be required. (Rheem, No. 89 at pp. 3–4) For the final rule analysis, DOE included a range of installation costs for the condensing water heater design that include all of the items cited by AHRI and Rheem.

In its preliminary analysis, DOE applied a distribution of costs for heat pump water heater installations in indoor locations, including situations where modifications would be required. In response to comments on the assumed costs, for the December 2009 NOPR analysis, DOE made a number of changes, which are discussed below. Additional comments on these issues at the NOPR stage and DOE's response are likewise presented below.

In 20 percent of replacement installations, DOE assumed that a household facing space constraints would install a smaller water heater and use tempering valves. BWC stated that adjusting the thermostat higher on a smaller-volume heat pump water heater and using a tempering valve cannot be done. It noted that the viable refrigerants available limit the water heater to lower temperatures (typically ~130 °F maximum), and to achieve temperatures above this level, an electric resistance element must be used, which decreases the efficiency of the water heater. (BWC, No. 61 at p. 2) Rheem raised similar concerns. (Rheem, No. 89 at p. 8) DOE finds some merit in the above comments. Therefore, it reduced the fraction of installations that would use a tempering valve to include only those cases where the water heater setpoint would not need to exceed 140 °F, as recommended in manufacturer product literature. DOE assumed that those households for which the tempering valve strategy is not viable would incur significant costs to modify the space to accommodate the heat pump water heater.

For the December 2009 NOPR, DOE assumed that some households that would experience significant indoor cooling due to operation of the heat pump water heater in the heating months would have a venting system installed to exhaust and supply air. DOE estimated that 40 percent of households facing a significant cooling effect would incur this cost, which averages $460. A.O. Smith stated that heat pump water heaters will not be vented due to the exorbitant costs of such a venting system and the fact that the venting will not fit within the existing studs and will need to be installed outside the current wall structure, where it will either be exposed, or have to be covered with additional material. (A.O. Smith, No. 76 at p. 3) DOE agrees that the costs of a venting system could be high in some cases, but its analysis assumes that venting will occur in some cases, and the associated costs are included in its LCC analysis. DOE also agrees that in some cases it would be necessary to install the venting system outside the wall structure, where the exposed vents would likely be covered. Therefore, for the final rule analysis, DOE has assumed that one-fourth of the venting system installations would incur an additional cost (on average $581) for covering the exposed vents.

For half of indoor replacement installations, DOE added a cost for

installing a fully-louvered closet door to permit adequate air flow for the operation of the unit. A.O. Smith stated that putting a louvered door on a closet will not provide adequate air volume for a heat pump water heater to function correctly. (A.O. Smith, No. 76 at p. 3) Southern raised similar concerns about closet installations. (Southern, No. 90 at pp. 3–4) AHRI also commented that heat pump water heaters installed in replacement situations may require costly alterations so that the heat pump water heater can perform efficiently. (AHRI, No. 91 at p. 6) DOE agrees that there are legitimate concerns about the extent to which installing a louvered door will provide adequate air flow for closet installations of heat pump water heaters. For the final rule analysis, DOE decreased the fraction of indoor replacement installations that add a louvered door. DOE now assumes that all indoor replacement installations where the household would face a significant cooling effect would use a venting system (costing on average $469), which would provide adequate air flow and also alleviate excessive cooling of the indoor space near the water heater.

GE stated that DOE overstated the installation costs for heat pump water heaters, and claimed that their heat pump water heater has not required more labor, larger drain pans, tempering valves, or closet door redesigns. (GE, No. 84 at p. 1) DOE's estimates of installation costs for heat pump water heaters seek to account for the full range of installation situations that might be faced in all replacements of conventional electric storage water heaters. DOE agrees that in many installations, particularly those not located indoors, the additional costs associated with heat pump water heater installation may be small, and DOE's analysis accounts for those installations as well as those where higher costs may be incurred. Chapter 8 of the final rule TSD provides further details about DOE's analysis of installation costs for heat pump water heaters.

For the December 2009 NOPR, DOE's design for gas-fired storage water heaters at efficiency level 2 (0.63 EF for the representative 40-gallon unit) assumed natural draft (atmospheric venting) operation. DOE's analysis assumed that installations with water heaters with recovery efficiency (RE) of 80 percent or higher (which accounted for a small fraction of models at 0.63 EF) would use stainless steel vent connectors. Without such vent connectors, there is a potential for corrosion of the vent due to condensation of flue gases, which can lead to safety concerns.

AGA expressed concerns about the safety of atmospheric venting at efficiency level 2. AGA referred to analysis by the Gas Technology Institute of vent temperatures from water heaters with high recovery efficiency, and voiced concern for recovery efficiencies of 78 percent and higher regarding condensation and the resulting corrosive environment in vent connectors during water heater cycling. AGA insisted that, for venting integrity and occupant safety, 100 percent of installations of units with recovery efficiency of 78 percent and higher should include the cost of a stainless steel vent connector. It added that the combined concerns of vent connector corrosion and venting system buoyancy suggest that the proper vent connector should be stainless steel Type B. (AGA, No. 78 at p. 9) A.O. Smith also expressed concerns that efficiency level 2 could potentially lead to increased vent corrosion and raise issues that may require revisiting the venting table in the National Fuel Gas Code.[5] (A.O. Smith, No. 76 at p. 1)

In response, DOE appreciates the information provided by AGA regarding the safety of atmospheric venting at efficiency level 2. Although there are several 40-gallon gas-fired water heater models currently available to consumers at 0.63 EF that utilize atmospheric venting and do not have any instructions directing installers to use special venting for these products, DOE believes that the prudent course is to assume that a stainless steel vent connector would be required for all models with RE of 78 percent and higher. Applying this assumption resulted in DOE using a cost for a stainless steel vent connector for 57 percent of installations at efficiency level 2, for 53 percent of installations at efficiency level 1, and for 24 percent of installations at the baseline level. DOE agrees that there remain issues that may require revisiting the venting table in the National Fuel Gas Code, and discusses these issues in section VI.D.2 below.

b. Direct Heating Equipment

DOE used the approach in the 1993 TSD[6] to calculate installation costs for baseline direct heating equipment for its December 2009 NOPR analysis, as it believed that the factors affecting DHE installation are largely unchanged, and more recent data are not available. For gas wall gravity, floor, and room direct heating equipment, DOE included installation costs for designs that require electricity (the average cost is $181). DOE made this adjustment for the replacement market only, because wiring is considered part of the general electrical work in new construction.

LTS commented that the proposed standards for the gravity wall furnace category (71-percent AFUE for furnaces in the input capacity range over 27,000 and up to 46,000 Btu/h) would not allow the product to keep the same characteristics, particularly cabinet size and combustion chamber sizes. The commenter claims that with a bigger cabinet and heat exchanger dimensions, installation would require more carpenter work, possible drywall work, and, in some cases, changing or replacing the vent. According to LTS, these changes would be in addition to providing an electrical port. (LTS, No. 56.7 at pp. 1–2)

In response, DOE found that gravity wall furnaces that have dimensions to fit in replacement applications are currently available on the market with efficiencies ranging from 64-percent to 69-percent AFUE in the representative capacity range. There are currently no 71-percent or 72-percent AFUE models within the representative capacity range offered by any of the manufacturers. DOE agrees that models at 71-percent or 72-percent AFUE are likely to have larger dimensions and/or include electronic ignition, either of which would require an additional installation cost. As discussed in section IV.C.2.b, for the final rule, DOE decided to remove the 71-percent and 72-percent AFUE levels from its analysis. DOE introduced the 70-percent AFUE level, which it believes has the necessary dimensions to fit in replacement applications. This level includes electronic ignition, and DOE included a cost for installation of electrical wiring.

Regarding gas wall fan type DHE, AHRI commented that adding to the heat exchanger to increase efficiency would make the upright models bigger, such that they may not be able to fit in the same space as the unit they are replacing. The result could be added installation costs. For the max-tech level for gas wall fan type DHE (80-percent AFUE), DOE added carpentry cost for cutting and repairing the wall to increase the dimensions of the wall opening for a fraction of installations. That fraction also takes into account

[5] National Fire Protection Association, National Fuel Gas Code—2009 Edition. Available at: *http://www.nfpa.org/AboutTheCodes/AboutTheCodes.asp?DocNum=54.*

[6] U.S. Department of Energy—Office of Codes and Standards, Technical Support Document: Energy Efficiency Standards for Consumer Products: Room Air Conditioners, Water Heaters, Direct Heating Equipment, Mobile Home Furnaces, Kitchen Ranges and Ovens, Pool Heaters, Fluorescent Lamp Ballasts & Television Sets, 1993. Washington, DC. Vol. 1 of 3. Report No. DOE/EE–0009.

that some installations are "console units" and do not have this issue, and that some upright installations are not installed inside the wall and, therefore, do not have this issue.

c. Pool Heaters

DOE developed installation cost data for the baseline pool heater in its December 2009 NOPR analysis using *RS Means* and information in a consultant's report. DOE incorporated additional installation costs for designs involving electronic ignition and/or condensing technology.

In the December 2009 NOPR analysis, DOE included a cost for adding electricity at efficiencies above 82 percent (which use electronic ignition only) for installations where the unit currently uses a pilot light. For the December 2009 NOPR, DOE estimated that 26.5 percent of installations would incur this cost. Raypak stated that 8 percent of pool heaters are millivolt pool heaters (*i.e.,* use a pilot light), and the cost of adding electricity is not insignificant. (Raypak, No. 67 at p. 2) For the final rule, DOE has adopted the 8-percent value provided by Raypak to estimate the fraction of installations that would require addition of electricity at efficiencies above 82 percent. For further details on DOE's derivation of installation costs for pool heaters, *see* chapter 8 of the TSD.

3. Annual Energy Use

DOE determined the annual energy use in the field for the three types of heating products as described above in section IV.E.

4. Energy Prices

For the December 2009 NOPR analysis, DOE derived average energy prices for 13 geographic areas consisting of the nine U.S. Census Divisions, with four large States (New York, Florida, Texas, and California) treated separately. For Census Divisions containing one of these large States, DOE calculated the regional average excluding the data for the large State.

DOE estimated residential electricity prices for each of the geographic areas based on data from EIA Form 861, "Annual Electric Power Industry Database," and EIA Form 826, "Monthly Electric Utility Sales and Revenue Data." DOE calculated average annual regional residential electricity prices as well as average monthly regional electricity prices. For the December 2009 NOPR, DOE used data from 2007. For the final rule analysis, DOE used more recent 2008 data from the same sources.

DOE estimated average annual residential natural gas prices in each of the 13 geographic areas based on data from EIA's *Natural Gas Navigator*.[7] For the December 2009 NOPR, DOE used EIA data from 2007. For today's final rule, DOE used more recent 2008 data from the same source.

DOE estimated average residential prices for liquefied petroleum gas (LPG) in each of the 13 geographic areas based on data from EIA's State Energy Consumption, Price, and Expenditures Estimates.[8] For the December 2009 NOPR, DOE used data from 2006. For today's final rule, DOE used the more recent 2007 data from the same source.

DOE estimated average residential prices for oil in each of the 13 geographic areas based on data from EIA's *Petroleum Navigator*.[9] For the December 2009 NOPR, DOE used data from 2007. For today's final rule, DOE used more recent 2008 data from the same source.

5. Energy Price Trend

To estimate the trends in electricity prices for the December 2009 NOPR, DOE used the regional price forecasts in the 2009 *Annual Energy Outlook (AEO 2009)* April Release.[10] To arrive at prices in future years, DOE multiplied the average prices described above by the forecast of annual average price changes in each region. Because the *AEO 2009* forecasts prices only to 2030, DOE followed past guidelines provided to the Federal Energy Management Program by EIA and used the average rate of change during 2020–2030 to estimate the price trends beyond 2030. For today's final rule, DOE updated its analysis to use the price forecasts in the *AEO 2010* Early Release, which includes price forecasts until 2035. DOE used the average rate of change from 2025 to 2035 to estimate price trends beyond 2035.

The spreadsheet tools used to conduct the LCC and PBP analysis allow users to select either the *AEO's* high-price case or low-price case price forecasts to estimate the sensitivity of the LCC and PBP to different energy price forecasts. The *AEO 2009* April Release and *AEO 2010* Early Release only provide forecasts for the Reference Case. Therefore, for the December 2009 NOPR, DOE used the *AEO 2009* March Release high-price or low-price forecasts directly to estimate high-price and low-price trends. For today's final rule, DOE updated the low-price and high-price forecasts to be based on the ratio between the *AEO 2009* March Release low- or high-price forecasts and the *AEO 2009* March Release reference case. DOE then applied these ratios to the *AEO 2010* Early Release reference case to construct its high-price and low-price forecasts. DOE did not receive any substantive comments on its forecast of energy price trends. Thus, DOE retained the same approach for the final rule.

6. Repair and Maintenance Costs

Repair costs are associated with repairing or replacing components that have failed in the appliance, whereas maintenance costs are associated with maintaining the operation of the equipment. Determining the repair cost involves determining the cost and the service life of the components that are likely to fail. Addressing water heaters, A.O. Smith commented that the repair and maintenance costs presented in the December 2009 NOPR are reasonably accurate. (A.O. Smith, No. 76 at p. 4) For more information on DOE's development of repair and maintenance cost estimates, *see* chapter 8 of the TSD.

For the December 2009 NOPR analysis, DOE assumed that there would be some instances where professional maintenance would be needed for heat pump water heaters. For some locations where the heat pump water heater might be more exposed to the outdoor environment, such as garages and crawlspaces, DOE applied a 5-year preventative maintenance cost based on experience with heat pump water heater outdoor installations in Australia, which has roughly comparable conditions to much of the United States.

Commenting on the December 2009 NOPR, BWC stated that heat pump water heaters are installed with an optional component and that the repair and maintenance costs of the optional components were not taken into account, although the commenter provided no specific information regarding the nature or prevalence of such optional components. (BWC, No. 61 at p. 3) Daikin stated that heat pump water heaters generally do not require maintenance for the first 10 years of operation. (Daikin, No. 82 at p. 2) GE stated that the maintenance cost for heat pump water heaters is overstated. (GE, No. 84 at p. 1) In response, DOE acknowledges that many heat pump water heaters may require little or no maintenance. However, DOE believes that because the field experience with

[7] *See* Energy Information Administration, *Natural Gas Navigator* (2009). Available at: *http://tonto.eia.doe.gov/dnav/ng/ng_pri_sum_dcu_nus_m.htm.*

[8] *See* Energy Information Administration, *2007 State Energy Consumption, Price, and Expenditure Estimates (SEDS).* Available at: *http://www.eia.doe.gov/emeu/states/_seds.html.*

[9] *See* Energy Information Administration, *Petroleum Navigator, December (2009). Available at: http://tonto.eia.doe.gov/dnav/pet/pet_cons_821dsta_a_EPD0_VAR_Mgal_a.htm.*

[10] All *AEO* publications are available online at: *http://www.eia.doe.gov/oiaf/aeo/.*

heat pump water heaters is limited, it is reasonable to apply a maintenance cost for some installations. DOE assumed that optional components, which are an addition to the water heater, are not uniformly applicable, and thus, it did not include them in its analysis.

Therefore, for the reasons above, DOE has retained the approach to repair and maintenance costs used for the December 2009 NOPR for the final rule. The approach also accounts for repair or replacement of common components such as heating elements, fans, and compressors.

7. Product Lifetime

DOE used a variety of sources to establish minimum, average, and maximum values for the lifetime of each of the three types of heating products. For each water heater product class and for DHE and pool heaters, DOE characterized the product lifetime using a Weibull probability distribution that ranged from minimum to maximum lifetime estimates. *See* chapter 8 of the December 2009 NOPR TSD for further details on the sources DOE used to develop product lifetimes.

a. Water Heaters

For the December 2009 NOPR analysis, DOE used an average lifetime of 13 years for gas-fired, electric, and oil-fired storage water heaters. DOE did not receive any comments on this value, and it continued to use it for the final rule.

For the December 2009 NOPR analysis, DOE used an average lifetime of 20 years for gas-fired instantaneous water heaters. A.O. Smith stated that a 20 year lifetime for gas-fired instantaneous water heaters is too long, and is largely based on manufacturers' literature or advertising claims. It referred to its experience with commercial water heating equipment that uses a similar copper-tube type heat exchanger as gas-fired instantaneous water heaters and similar input combustion systems of around 200,000 Btu/h, and the commenter concluded that the same service life (*i.e.,* 13 years) as a tank-type heater should be used for gas-fired instantaneous water heaters. (A.O. Smith, No. 76 at pp. 4–5)

DOE acknowledges that, given that long-term field experience with gas-fired instantaneous water heaters is relatively limited, there is uncertainty regarding the lifetime of these products. Furthermore, the lifetime is influenced by maintenance practices. The 20-year mean lifetime used by DOE is primarily based on the value reported in the National Association of Home Builders/Bank of America Home Equity Study of Life Expectancy of Home Components, which is 20+ years.[11] Regarding the analogy between gas-fired instantaneous water heaters and commercial water heating equipment mentioned by A.O. Smith, DOE notes that the usage patterns in residential applications are different (*e.g.,* less hot water use), and these patterns have a significant impact on the lifetime. Given the available data, DOE decided to retain the mean lifetime of 20 years for the final rule analysis.

b. Direct Heating Equipment

For the December 2009 NOPR analysis, DOE used an average lifetime of 15 years for DHE. DOE did not receive any comments on this value, and it continued to use it for the final rule.

c. Pool Heaters

For the December 2009 NOPR analysis, DOE used an average lifetime of 8 years for pool heaters. In the public meeting, Lochinvar stated that pool heaters live longer than 6–8 years. (Lochinvar, Public Meeting Transcript, No. 57.4 at p. 224) For the final rule, DOE subsequently reviewed information provided by an expert consultant and based upon this information, decided to use a mean lifetime of 10 years for pool heaters, with the same distribution as in the December 2009 NOPR analysis (3 to 20 years).

8. Discount Rates

For the December 2009 NOPR, DOE developed separate distributions of discount rates for new construction and replacement applications. Because the cost of heating products installed in new homes is part of the home selling price, DOE estimated discount rates for appliance purchases in new housing using the effective real mortgage rate for homebuyers, which accounts for deducting mortgage interest for income tax purposes. DOE developed a distribution of mortgage interest rates using data from the Federal Reserve Board's "Survey of Consumer Finances" (SCF) for 1989, 1992, 1995, 1998, 2001, 2004, and 2007.[12] Because the mortgage rates carried by households in these years were established over a range of time, DOE believes they are representative of rates that may apply when amended standards take effect. The effective real interest rates on mortgages across the seven surveys averaged 3.0 percent.

DOE's approach for deriving discount rates for replacement purchases involved identifying all possible debt or asset classes that might be used to purchase replacement products, including household assets that might be affected indirectly. DOE used data from the surveys mentioned above to estimate the average percentages of the various debt and equity classes in the average U.S. household portfolios. DOE used SCF data and other sources to develop distributions of interest or return rates associated with each type of equity and debt. For the final rule, it added 2009 values for interest or return rates to the distributions for some of the asset classes. The resulting average rate across all types of household debt and equity, weighted by the shares of each class, is 5.1 percent.

DOE did not receive any comments on the discount rates it used in the LCC analysis, and it continued to apply the approach used in the December 2009 NOPR, with the updates discussed above, for the final rule.

9. Compliance Date

In the context of EPCA, the compliance date is the future date when parties subject to the requirements of a new standard must begin to comply. As described in DOE's semi-annual Implementation Report for Energy Conservation Standards Activities submitted to Congress pursuant to section 141 of the Energy Policy Act of 2005 and section 305 of the Energy Independence and Security Act of 2007,[13] a final rule for the three types of heating products that are the subject of this rulemaking is scheduled to be completed by March 2010. Compliance with amended energy efficiency standards for direct heating equipment and pool heaters is required three years after the final rule is published in the **Federal Register** (in 2013); compliance with amended standards for water heaters is required five years after the final rule is published (in 2015). Comments on the compliance date for the three types of heating products are presented and responded to in section V.B of this final rule. DOE calculated the LCC for the three types of heating products as if consumers would purchase new products in the year compliance with the standard is required.

[11] National Association of Home Builders (NAHB), "Study of Life Expectancy of Home Components" (Feb. 2007). Available at: *http://www.nahb.org/fileUpload_details.aspx?contentID=99359.*

[12] The Federal Reserve Board, Survey of Consumer Finances 1989, 1992, 1995, 1998, 2001, 2004, 2007. Available at: *http://www.federalreserve.gov/pubs/oss/oss2/scfindex.html.*

[13] Available at: *http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/2010_feb_report_to_congress.pdf.*

10. Product Energy Efficiency in the Base Case

To accurately estimate the percentage of consumers who would be affected by a particular standard level, DOE's analysis considered the projected distribution of product efficiencies that consumers purchase under the base case (*i.e.,* the case without new energy efficiency standards). DOE refers to this distribution as a base-case efficiency distribution. Using the projected distribution of product efficiencies for each heating product, DOE randomly assigned a specific product efficiency to each sample household. If a household was assigned a product efficiency greater than or equal to the efficiency of the standard level under consideration, the LCC calculation shows that this household is not affected by that standard level.

To estimate the base-case market shares of various energy efficiency levels for water heaters in the compliance year, DOE began with data on shipments for 2002–2006 from AHRI, supplemented with data on the number of water heater models at different energy efficiency levels reported in AHRI Directories. (*See* chapter 8 of the TSD for citations for these data sources.) For the final rule, DOE updated its estimates using the February 2010 AHRI Directory. To estimate the base-case market shares of gas-fired and electric storage water heaters, DOE considered the market penetration goals set by the ENERGY STAR program, in combination with its assessment of constraints on such penetration. The projected base-case energy efficiency market shares for water heaters that DOE used for the final rule, shown in Table IV.24, are half of the ENERGY STAR goal for heat pump water heaters (EF of 2.0 and 2.2), and one-fifth of the ENERGY STAR goal for gas-fired condensing water heaters (EF of 0.77). These market shares represent the products that households would purchase in 2015 in the absence of revised energy conservation standards.

TABLE IV.24—WATER HEATERS: BASE-CASE ENERGY EFFICIENCY MARKET SHARES*

Gas storage		Electric storage		Oil storage		Gas-fired instantaneous	
EF	Market share (%)	EF	Market share (%)	EF	Market share (%)	EF	Market share (%)
0.59	63.9	0.90	29.8	0.53	0.0	0.62	1.0
0.62	23.4	0.91	16.8	0.54	20.0	0.69	2.9
0.63	1.6	0.92	11.2	0.56	0.0	0.78	1.0
0.64	4.8	0.93	26.1	0.58	0.0	0.80	4.9
0.65	0.0	0.94	7.5	0.60	10.0	0.82	52.4
0.67	5.3	0.95	3.7	0.62	20.0	0.84	1.9
0.77	1.0	2.0	4.0	0.66	25.0	0.85	3.9
		2.2	1.0	0.68	25.0	0.92	20.4
						0.95	11.7
	100%		100%		100%		100%

* The base-case market shares of each product class are estimated in the shipment analysis, as described in chapter 9 of the final rule TSD.

For DHE, DOE estimated the market shares of different energy efficiency levels within each product class in the base case using data in the AHRI Directory. For the final rule, DOE updated its estimates using the February 2010 AHRI Directory, and for hearth products, DOE also consulted manufacturers' Web sites in addition to the 2010 AHRI Directory (*see* chapter 8 of the TSD for the citation and detailed information). For pool heaters, DOE estimated the market shares of different energy efficiency levels in the base-case by using 2008 data from the Federal Trade Commission (FTC) on the number of gas-fired pool heater models at different energy efficiency levels as a proxy for shipments. For the final rule, DOE updated its estimates using 2009 FTC data.

DOE did not receive any comments on its estimation of base-case energy efficiency market shares for the three types of heating products. For further information on DOE's estimation of base-case market shares, *see* chapter 8 of the TSD.

11. Inputs to Payback Period Analysis

The payback period is the amount of time it takes the consumer to recover the additional installed cost of more-efficient products, compared to baseline products, through energy cost savings. For these calculations, DOE uses a simple payback period, which does not account for changes in operating expense over time or the time value of money. Payback periods are expressed in years. Payback periods that exceed the life of the product mean that the increased total installed cost is not recovered in reduced operating expenses.

The inputs to the PBP calculation are the total installed cost of the equipment to the customer for each efficiency level and the annual (first-year) operating expenditures for each efficiency level. The PBP calculation uses the same inputs as the LCC analysis, except that energy price trends and discount rates are not needed. DOE did not receive any comments on its methodology for the payback period analysis.

As noted above, EPCA, as amended, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy (and, as applicable, water) savings during the first year that the consumer will receive as a result of the standard, as calculated under the test procedure in place for that standard. (42 U.S.C. 6295(o)(2)(B)(iii)) For each TSL, DOE determined the value of the first year's energy savings by calculating the quantity of those savings in accordance with the applicable DOE test procedure, and multiplying that amount by the average energy price forecast for the year in which compliance with the amended standard would be required.

Results of DOE's payback period analysis, including both the rebuttable presumption analysis and the payback period analysis considering all of the relevant statutory factors, are discussed in section VI.

G. National Impact Analysis—National Energy Savings and Net Present Value Analysis

1. General

DOE's National Impact Analysis (NIA) assesses the national energy savings (NES) and the national net present value (NPV) of total consumer costs and savings expected to result from standards at specific efficiency levels. DOE applied the NIA spreadsheet to calculate NES and NPV, using the annual energy consumption and total installed cost data from the LCC analysis. DOE forecasted the energy savings, energy cost savings, equipment costs, and NPV for each product class from 2013 through 2043 for DHE and pool heaters, and from 2015 through 2045 for water heaters. The forecasts provide annual and cumulative values for all four parameters. In addition, DOE incorporated into its NIA spreadsheet the capability to analyze the sensitivity of the results to forecasted energy prices and equipment efficiency trends. Table IV.25 summarizes the approach and data DOE used to derive the inputs to the NES and NPV analyses for the December 2009 NOPR, and also summarizes the changes DOE made for today's final rule. These changes are described in the following sections, and more details are available in chapter 10 of the final rule TSD. Comments on the NIA, as presented in the December 2009 NOPR, and DOE's response are presented in the sections that follow.

TABLE IV.25—APPROACH AND DATA USED FOR THE NATIONAL IMPACTS ANALYSIS

Inputs	NOPR	Changes for the final rule
Shipments	Annual shipments from shipments model	See table IV.4.
Compliance Date of Standard	Water Heaters: 2015 DHE and Pool Heaters: 2013.	No change.
Base-Case Forecasted Efficiencies	Efficiency market shares estimated for compliance year. Sales-weighted energy factor (SWEF) remains constant except for gas and electric water heaters, for which SWEF increases slightly over forecast period.	No change in approach; updated efficiency market shares for water heaters and DHE estimated for compliance year.
Standards-Case Forecasted Efficiencies	"Roll-up" scenario used for determining SWEF in 2013 (or 2015) for each standards case. SWEF remains constant except for gas and electric water heaters, for which SWEF increases slightly over forecast period.	No change in approach.
Annual Energy Consumption per Unit	Annual weighted-average values as a function of SWEF.	No change.
Rebound Effect	Water heaters: 10% DHE: 15%. Pool Heaters: 10%.	No change.
Total Installed Cost per Unit	Annual weighted-average values as a function of SWEF.	No change.
Energy Cost per Unit	Annual weighted-average values a function of the annual energy consumption per unit and energy (and water) prices.	No change.
Repair Cost and Maintenance Cost per Unit.	Annual values are a function of efficiency level	No change.
Escalation of Energy Prices	*AEO2009* forecasts (to 2030) and extrapolation to 2043 (and 2045).	Updated using *AEO2010* (Early Release) forecasts.
Energy Site-to-Source Conversion Factor	Varies yearly and is generated by DOE/EIA's NEMS.	No change.
Discount Rate	Three and seven percent real	No change.
Present Year	Future expenses are discounted to 2010, when the final rule will be published.	No change.

2. Shipments

The shipments portion of the NIA spreadsheet is a model that uses historical data as a basis for projecting future shipments of the appliance products that are the subject of this rulemaking. In projecting shipments for water heaters and pool heaters, DOE accounted for two market segments: (1) New construction and (2) replacement of failed equipment. Data were unavailable to develop separate forecasts of direct heating equipment shipments for replacement and new home installations, so the forecast was based on the time series of historical total shipments developed for each product class.

Table IV.26 summarizes the approach and data DOE used to derive the inputs to the shipments analysis for the December 2009 NOPR analysis, and the changes DOE made for today's final rule, based on public comments. A discussion of these inputs and changes follows. For details on the shipments analysis, *see* chapter 9 of the TSD.

TABLE IV.26—APPROACH AND DATA USED FOR THE SHIPMENTS ANALYSIS

Inputs	NOPR analysis	Changes for the final rule
Historical Shipments	Water Heaters: Data provided by AHRI	Water Heaters: Used new data for GIWH for 2008 and 2009.
	DHE: Data provided by AHRI and DOE estimates, and data from manufacturers and the trade association for hearth products.	DHE: Derived new data based on manufacturer input.

TABLE IV.26—APPROACH AND DATA USED FOR THE SHIPMENTS ANALYSIS—Continued

Inputs	NOPR analysis	Changes for the final rule
New Construction Shipments	Pool Heaters: Data from 1993 TSD, inputs from manufacturers, and DOE estimates. For water heaters and pool heaters, determined by multiplying housing forecasts by forecasted saturation of products in new housing. Housing forecasts based on *AEO2009* projections. New housing product saturations based on American Housing Survey for water heaters, consultant data for pool heaters.	Pool Heaters: Used data provided by manufacturers trade association. No change in approach. New housing forecast updated with *AEO2010* projections.
Replacements	For water heaters and pool heaters, determined by tracking total product stock by vintage and establishing the failure of the stock using retirement functions from the LCC and PBP analysis. For pool heaters, included estimated non-replacement of some pool heaters.	No change.

To determine new construction shipments, DOE used forecasts of housing starts coupled with estimates of product market saturation in new housing. For the preliminary analysis, DOE used actual data for 2008 for new housing completions and mobile home placements and adopted the projections from *AEO2009* for 2009 to 2030. DOE updated its new housing projections for today's final rule using *AEO2010* Early Release, which provides projections from 2010 to 2035. DOE kept completions constant after 2035. DOE estimated replacements using historical shipments data and product retirement functions that it developed from product lifetimes. Table IV.27 provides a summary of total shipments in 2009 for residential water heaters, direct heating equipment, and pool heaters.

TABLE IV.27—RESIDENTIAL WATER HEATERS, DIRECT HEATING EQUIPMENT AND POOL HEATERS SHIPMENTS (2009)

	Total shipments (million)
Residential Water Heaters	
Gas-fired Storage	3.76
Electric Storage	3.75
Oil-fired Storage	* 0.031
Gas-fired Instantaneous	* 0.384
Direct Heating Equipment	
Gas Wall Fan	* 0.030
Gas Wall Gravity	* 0.103
Gas Floor	* 0.003
Gas Room	* 0.020
Gas Hearth	* 0.286
Pool Heaters	
Gas-fired	0.118

* Estimated.

a. Water Heaters

For the December 2009 NOPR analysis, DOE used information on choice of water heater products in recently-built housing to estimate shipments of each product class to the new construction market. DOE calculated the average market shares of water heaters using a particular fuel in new homes during 2000 to 2008, and assumed that these shares would hold throughout the forecast period. AGA stated that DOE should not fix market shares, and should realize that increasing disparity between gas and electric installed cost will exacerbate a trend away from gas-fired units. (AGA, No. 78 at pp. 7–8) In response, DOE notes that its data on water heater choice in new homes does not show a clear trend away from gas-fired units during the period from 2000 to 2008 (as documented in chapter 9 of the TSD), nor did AGA provide any data to substantiate such a trend. DOE recognizes that future market dynamics may result in changes from the average pattern seen in 2000 to 2008, but DOE does not have sufficient information to forecast the various factors that affect water heater choice in new homes. Therefore, DOE has retained the approach used in the December 2009 NOPR analysis for the final rule.

The shipments model assumes that when a unit using a particular fuel is retired, it generally is replaced with a unit that uses the same fuel. Section IV.G.2.d discusses the potential effects of energy conservation standards on choice of water heater product in the new construction and replacement markets.

For its shipments forecast for gas-fired storage water heaters and electric storage water heaters, DOE assumed that the current market shares of small-volume products (20 to 55 gallons rated storage volume) and large-volume products (over 55 gallons rated storage volume) would remain the same throughout the forecast period. The shipments market shares for large-volume products are 4 percent for gas-fired storage water heaters and 9 percent for electric storage water heaters.

Within the category of gas-fired water heaters, DOE disaggregated the shares of gas storage water heaters and gas-fired instantaneous water heaters based on projections of total shipments of gas-fired instantaneous water heaters. Because there is much uncertainty about the future growth of gas-fired instantaneous water heaters, DOE modeled scenarios of their market penetration based on experience with gas-fired instantaneous water heaters in Australia, where the proportion of instantaneous water heaters in total gas-fired storage water heater shipments has grown considerably in the past decade. (*See* chapter 9 of the TSD for information on the past and projected market penetration in Australia.)

Commenting on the December 2009 NOPR approach, AHRI stated that the experience of gas-fired instantaneous water heaters in Australia is too dissimilar to the U.S. market to be used to predict future U.S. shipments. (AHRI, No. 91 at p. 3) Rheem stated that the Australian market was primarily based on outdoor installations, and was influenced by local government programs. (Rheem, No. 89 at p. 13) A.O. Smith stated that in 2009, gas-fired instantaneous water heater shipments will be about 9.4 percent of the total gas market, not 20 percent as the DOE forecast suggests. A.O. Smith estimated a more moderate growth curve for gas-fired instantaneous water heaters, growing to 13–15 percent of the gas market, consistent with DOE's low-

penetration scenario. Moreover, A.O. Smith stated that this level will not be reached for 5–7 years, unlike the DOE forecast of 1–2 years. (A.O. Smith, No. 76 at p. 5)

In response, DOE acknowledges the uncertainty associated with basing its forecasted market penetration of gas-fired instantaneous water heaters on the Australian experience, but it believes that there is no other market that could provide an approximate model for forecasting U.S. market penetration. In making use of the Australian experience, DOE's December 2009 NOPR analysis took into account some of the differences between the two markets that would tend to cause shipments growth to be lower in the U.S. In response to the comments from A.O. Smith, however, DOE made modifications to its approach for the final rule. First, it incorporated A.O. Smith's estimated market share for 2009 (as well as data it provided on the actual share in 2008). Second, based on the new data on shipments, DOE significantly moderated the growth curve for gas-fired instantaneous water heater market penetration such that the rise is less steep than had been assumed for the December 2009 NOPR. Because of broad similarities between the U.S. and Australian water heating markets, DOE continued to use scenarios of market penetration that are partly based on the Australian experience for the final rule. Differences in retail prices and installation costs for instantaneous water heaters, as well as in government incentives, suggest that the growth in the U.S. market will be less strong than in Australia. However, DOE believes that the rapid growth seen in the U.S. before 2008, together with the reputation of instantaneous gas-fired water heaters as an energy-efficient water heating option suggest that the ultimate market penetration may be higher than 13 to 15 percent of the gas water heating market. Therefore, DOE estimated that the U.S. market share (*i.e.,* 28 percent) approaches a level equal to half of the Australian level (*i.e.,* 56 percent) by around 2025. Chapter 9 of the TSD presents more details on DOE's projection.

b. Direct Heating Equipment

To estimate historical shipments of direct heating equipment for the December 2009 NOPR analysis, DOE used two sets of data from AHRI and information from the 1993 TSD. As noted above, data were unavailable to develop separate forecasts of direct heating equipment shipments for replacement and new home installations, so DOE based the forecast on the time series of historical total shipments developed for each product class, along with assumptions regarding future trends. For gas hearth DHE shipments, the forecast used for the December 2009 NOPR related shipments to projected new housing completions.

AHRI stated that the December 2009 NOPR assumption that future shipments of traditional DHE (*i.e.,* all of the product classes except gas hearth DHE) will be flat is unrealistically optimistic and contrary to the last 30 years of shipment history. The commenter stated that this is a declining market not only because these products are sold primarily as replacements, but also because in some cases, the failing unit is replaced not with a similar model but rather with a vented fireplace heater. AHRI recommended that, at a minimum, the shipment forecast for traditional DHE use a 30-percent decrease over the next 30 years. (AHRI, No. 91 at p. 11) In response, for the final rule analysis, DOE modified its forecast such that total shipments of traditional DHE decrease by 30 percent between 2005 and 2042. The modification of the shipments forecast for each of the four traditional DHE product classes is described in chapter 9 of the TSD.

c. Pool Heaters

To forecast pool heater shipments for new construction for the December 2009 NOPR analysis, DOE multiplied the annual housing starts forecasted for single-family and multi-family housing by the estimated saturation of gas-fired pool heaters in recently built new housing. For replacement pool heaters, DOE used a survival function based on its distribution of product lifetimes to determine when a unit fails. In addition, DOE assumed that some households would not replace their pool heater when it fails due to cost considerations. DOE also introduced a market segment representing purchases by existing households that had not owned a pool heater. These first-time owners include existing households that have a pool and those that install one.

The Association of Pool and Spa Professionals (APSP) stated that DOE's data on pool heater shipments are overstated, and they submitted shipments data for 2003–2009. (APSP, No. 64 at p. 1) AHRI made similar comments. (AHRI, No. 91 at p. 8) DOE appreciates the information provided by APSP. For the final rule, it used the data for 2003–2009 as a basis for its shipments forecast.

Raypak stated that the pool heater forecasts are overstated, and that DOE's projection of a huge recovery in first-time pool owners is inaccurate, because of the significant reduction in property values and more difficult access to credit. (Raypak, Public Meeting Transcript, No. 57.4 at pp. 258–259) AHRI stated that DOE did not recognize the increasing sales of electric heat pump pool heaters, which will reduce the shipments of gas-fired pool heaters. (AHRI, No. 91 at p. 9) In response, DOE notes that incorporating the new data for 2003–2009 reduces the forecast of future shipments. DOE agrees with Raypak regarding first-time pool owners and reduced the number of such installations in the early years of its forecast. DOE was not able to consider the impact of heat pump pool heaters as well as electric resistance pool heaters on the market because shipments data were not available. Furthermore, DOE did not include electric pool heaters in the current rulemaking for reasons explained in the NOPR. 74 FR 65852, 65866 (Dec. 11, 2009). Finally, DOE notes that the longer pool heater lifetime used for the final rule (as described in section IV.F.7.c) results in fewer replacement shipments.

d. Impact of Standards on Shipments

i. Water Heaters

To the extent that energy conservation standards result in an increase in the price of a specific type of water heater compared to a competing product, some consumers (or home builders in the case of shipments for new construction) may purchase the competing product. The consumer or builder decision is not solely based on economic factors, as the availability of a natural gas supply plays a key role. Evaluation of this decision requires an assessment of the specific factors that influence it in the context of the two main markets for water heaters, replacements and new homes.

In the December 2009 NOPR analysis, DOE determined that the greatest potential for product switching would exist in the case of a standard that effectively required an electric heat pump water heater. This type of product often has a substantially higher installed cost than a typical electric resistance storage water heater and is relatively new to consumers and builders. Because the product choice decision partially depends on the relative costs of competing products, DOE considered three potential combinations that could result from standards: (1) Electric heat pump water heater and a gas-fired storage water heater using natural draft; (2) electric heat pump water heater and a gas-fired storage water heater using power vent; and (3) electric heat pump water heater and a gas-fired storage water heater using condensing

technology. DOE used data from the 2005 RECS to estimate the percentage of households expected to purchase an electric water heater in the base case that could switch to gas-fired water heater because they had the necessary infrastructure. To estimate how many of these households would switch to gas-fired water heaters, DOE considered the difference in installed cost between the gas-fired storage water heater and an electric heat pump water heater in each of the combinations listed above. The estimated fraction of households using an electric storage water heater estimated to switch to a gas-fired storage water heater instead of installing a heat pump water heater ranges from zero with a standard level for gas-fired storage water heaters that require condensing technology, to 9 percent with a standard level for gas-fired storage water heaters that require power vent technology.

DOE did not quantify the potential for switching to gas water heating in the case of a standard that requires 0.95 EF for some or all electric water heaters, as the installed cost is only moderately higher than the baseline electric water heater (0.90 EF). DOE judged that this increase would not be sufficient to prompt consumers to consider switching to gas water heating, given the higher cost of a gas water heater and the fact that such switching would usually require installation of a venting system, which adds significant cost.

Commenting on DOE's December 2009 NOPR analysis, A.O. Smith stated that there will not be appreciable fuel switching in retrofits. (A.O. Smith, No. 76 at p. 4) GE stated that fuel switching is impractical for most consumers. (GE, No. 84 at p. 2) The American Public Power Association (APPA) stated that TSL 3 and TSL 4 would not likely induce fuel switching, but higher TSLs would. (APPA, No. 92 at p. 4) Rheem stated that TSL 6 (*i.e.,* requiring heat pump water heaters) would encourage a shift to instantaneous electric water heaters. In response, DOE believes that the high equipment and installation cost of instantaneous electric water heaters, which may involve upgrading the electrical wiring, along with the high operating cost, will limit the prevalence of a shift to these products. Given that the remaining comments are generally supportive of the estimates in the December 2009 NOPR, DOE retained its December 2009 NOPR analysis of fuel switching for the final rule. However, DOE expanded its analysis to consider the potential for product switching within the same fuel type, as discussed below.

In the December 2009 NOPR analysis, for TSL 5, DOE combined an efficiency level requiring heat pump technology for large-volume electric storage water heaters with an efficiency level requiring condensing technology for large-volume gas storage water heaters. Because these technologies have roughly comparable estimated installed costs and there are constraints in switching from gas to electric or from electric to gas water heaters, DOE did not project that fuel switching would occur under TSL 5.

DOE received a number of comments on potential reaction of consumers to TSL 5. Rheem stated that TSL 5 would provide a strong value incentive for the replacement consumer to replace one large electric resistance unit with two smaller electric storage water heaters to avoid the higher first cost impact associated with a heat pump water heater. It also pointed to other approaches consumers might choose, and noted that TSL 5 could encourage installation of large commercial tank type models in residential applications, where such products often lack an equitable certification status for safe operation. (Rheem, No. 89 at p. 6) A.O. Smith stated that the added cost of a heat pump water heater would induce consumers to install two smaller-storage-capacity, lower-cost heaters in the place of one larger-capacity unit. (A.O. Smith, No. 76 at p. 4) AHRI stated that the market may react to TSL 5 by replacing a large electric storage water heater with either a 50-gallon model with a tempering valve, a 50-gallon model with higher input heating elements, two smaller storage water heaters, or multiple instantaneous water heaters. (AHRI, No. 91 at p. 7) NPCC stated that in emergency replacements of electric water heaters, switching to two smaller water heaters is unlikely because it would require a new 30 amp circuit, which would require a contractor. (NPCC, Public Meeting Transcript, No. 57.4 at pp. 106–107) Regarding TSL 5's requirement of condensing gas-fired storage water heaters for large-volume water heaters, Southern stated that consumers could instead install a non-condensing unit with a 75,000 Btu burner and 55-gallon tank. (Southern, No. 90 at pp. 6–7) In contrast to these comments, NRDC opined that it is unlikely that TSL 5 would cause product switching. (NRDC, No. 85 at p. 6)

In response, DOE agrees that the December 2009 NOPR TSL 5 would present consumers of large water heaters with a total installed cost that could lead some of them to consider alternatives to purchasing a new large water heater. To estimate the likely incidence of switching away from large-volume units under TSL 5 and TSL 6 in today's final rule (*see* section VI.A for description of TSLs), DOE considered several alternatives to purchasing a new large water heater, as well as constraints that would likely limit their adoption.

First, DOE considered factors that would cause some households to choose not to install an alternative to a new large-volume unit. Most important is the need for emergency replacement, which, according to comments from Bradford White (BWC, No. 62 at p. 4), accounts for 95 percent of water heater replacements. This may preclude consideration of switching in some cases. In addition, based on shipments data from AHRI [14] and equipment stock information from AEO 2010 [15], DOE determined that at least 15 percent of furnace shipments go to households that are switching from non-condensing to condensing gas furnace and also have a gas water heater. Some of these households may want to also install a condensing gas water heater to avoid complex venting system modifications. The details are described in chapter 9 of the TSD. DOE judged that the above factors would reduce the fraction of installations estimated to adopt an alternative to purchasing a large-volume water heater by 25 percent.

One alternative applicable to both gas-fired storage water heaters and electric storage water heaters involves installing a small-volume water heater, increasing the setpoint, and applying a tempering valve. DOE believes that this strategy would only be viable for a fraction of 66-gallon units.[16] This strategy results in the household having roughly the same amount of hot water with a small-volume water heater as they would have with a large-volume unit; higher-temperature water is stored in a smaller tank, and then mixed with cold water using the valve. For units larger than 66 gallons, meeting the household's hot water demand would require increasing the setpoint above the 140 °F limit, which could result in deposits on the internal surface of the tank. To assess the viability of this approach for each of the sample households with 66-gallon

[14] AHRI furnace shipment data. Available at *http://www.ahrinet.org/Content/Furnaces_609.aspx.*

[15] AEO 2010 (Early Release): Table 31. Residential Sector Equipment Stock and Efficiency. Available at: *http://www.eia.doe.gov/oiaf/aeo/supplement/supref.html.*

[16] DOE notes that production of large gas-fired water heaters tends to be clustered around models with a rated storage volume of 66 gallons or 75 gallons. DOE assumed that the strategies discussed here are likewise relevant to water heaters with a rated capacity from 56 gallons to 66 gallons.

water heaters, DOE calculated whether the first-hour rating of a small-volume water heater with a tempering valve would meet the first-hour rating of the existing 66-gallon water heater without exceeding a 140 °F setpoint. (The first hour rating is the amount of hot water in gallons the heater can supply per hour, starting with a tank full of hot water). If so, DOE assumed the household would choose this option.

For gas-fired storage water heaters, DOE considered the approach of switching to a small-volume unit with high input capacity (larger burner). DOE understands that designs for units below 56-gallon rated volume that have very high rated input (*e.g.,* 75 kBtu/h) are not common. There are some 50-gallon models with an input of 65 kBtu/h; these designs usually incorporate a 5-inch internal flue tube (instead of 4-inch), and the tank is usually taller to accommodate the same water storage volume. These units are likely to require venting modifications (upgrade to 4-inch vent). In addition, for many installations the input rate for the existing 66-gallon or larger unit is already 55 kBtu/h or higher, and a 50-gallon unit with a high-capacity burner may not satisfy the household hot water requirements. DOE accounted for the above constraints to estimate the fraction of installations that would switch to a small-volume with high input capacity. DOE also evaluated a similar strategy for electric storage water heaters that involves switching to a small-volume unit with high input heating elements.

To consider the alternative of installing two small-volume units, for each sample household with a large-volume water heater that, according to DOE's estimation, would not adopt either of the above two strategies, DOE first considered space constraints that would limit this approach, depending on the water heater location. For those households judged not to have such constraints, DOE compared the total installed cost of either a heat pump water heater or a gas-fired condensing water heater with the alternative of installing two small-volume units. For the cost of this alternative, DOE used information from a consultant report. Because installing two small-volume units is more complicated and takes longer, DOE assumed that households would choose to install two small-volume units only if the total installed cost was at least 10 percent less than the cost for a heat pump water heater or a gas-fired condensing water heater.

The results of DOE's analysis indicate that switching away from a large-volume water heater would occur in 37 percent of large-volume electric storage water heater installations and in 22 percent of large-volume gas-fired storage water heater installations. The details of DOE's approach and the estimated degree of switching using each of the alternatives described above are provided in chapter 9 of the TSD.

ii. Direct Heating Equipment and Pool Heaters

For DHE and pool heaters, in the December 2009 NOPR analysis, DOE did not find any data it could use to estimate the extent of switching away from the products subject to this rulemaking if energy conservation standards were to result in a significant increase in installed costs. Raypak stated that as pool heaters become more expensive, more may be repaired instead of being replaced, so the fraction of non-replacements should be higher. (Raypak, Public Meeting Transcript, No. 57.4 at p. 249) It also stated that the proposed standard for pool heaters would induce product switching to solar or heat pump pool heaters. (Raypak, No. 67 at p. 3) In response, DOE believes that the standard adopted for pool heaters in this final rule (82-percent thermal efficiency) does not increase the installed cost enough to induce most consumers to not replace the product or to switch to a different product.

3. Base-Case and Standards-Case Efficiency Distributions

A key input to DOE's estimates of NES and NPV is the energy efficiencies that DOE forecasts over time for the base case (without new standards) and each of the standards cases. The forecasted efficiencies represent the annual shipment-weighted energy efficiency of the products under consideration over the forecast period.

For the December 2009 NOPR analysis, DOE used the shipment-weighted average energy efficiencies for 2013 (for DHE and pool heaters) or 2015 (for water heaters) as a starting point to forecast the base-case energy efficiency distribution for each product class. To represent the distribution of product energy efficiencies in those years, DOE used the same market shares as in the base case for the LCC analysis. For gas-fired storage water heaters and electric storage water heaters, DOE estimated the distribution of product energy efficiencies in 2015 by accounting for the estimated market impact of the recently-established ENERGY STAR efficiency levels for water heaters (*see* section IV.F.10). The projected trend to 2015 represents an average annual increase in energy efficiency of 0.27 percent for gas-fired storage water heaters and 0.55 percent for electric storage water heaters. DOE applied the above values to estimate the increase in average energy efficiency until the end of the forecast period.

DOE found no quantifiable indications of change in energy efficiencies over time for oil-fired and gas-fired instantaneous water heaters, direct heating equipment, or pool heaters, and it did not receive any comments on this topic. Therefore, for these products, DOE estimated that energy efficiencies remain constant at the 2015 or 2013 level until the end of the forecast period.

For its determination of standards-case forecasted efficiencies, DOE used a "roll-up" scenario in the preliminary analysis and the December 2009 NOPR to establish the SWEF for the year that compliance with the standards would be required and subsequent years. In this approach, product energy efficiencies in the base case that do not meet the standards level under consideration would roll up to meet the new standard level. The market share of energy efficiencies that exceed the standard level under consideration would be the same in the standards case as in the base case. Changes over the forecast period match those in the base case. DOE did not receive any comments on its forecasts of energy efficiency distributions, so for today's final rule, DOE maintained the approach described above.

4. National Energy Savings

DOE calculates NES for each year as the difference between energy consumption of the product stock using the average unit energy consumption (UEC) of the stock in the base case (without new standards) or in a case given new standards. In addition to annual shipments, key inputs for determining NES are annual UEC and the site-to-source conversion factor.

a. Annual Unit Energy Consumption

For each year in the forecast period, DOE used the shipments-weighted energy efficiencies for the base case and standards cases, along with the data on annual energy use by efficiency level, to estimate the shipments-weighted average annual per-unit energy consumption for each product class under the base case and standards cases. When calculating energy consumption at each considered efficiency level above the baseline, DOE applied a rebound effect of 10 percent for water heaters, 15 percent for DHE, and 10 percent for pool heaters. A rebound effect refers to increased energy

consumption resulting from actions that increase energy efficiency and reduce consumer costs. (For example, if energy efficiency improvements were to reduce the energy consumption of a room air conditioner (thereby decreasing its electricity costs), a consumer may choose to run the unit more often, thereby increasing comfort but returning a portion of the savings arising from DOE's standards.) When the rebound effect is incorporated, calculated energy savings are lower than if no rebound effect were considered.

DOE's calculation of UEC accounts for the product switching that DOE anticipates will occur under specific TSLs. That is, DOE accounted for the energy use of the products to which some fraction of households are assumed to switch. For example, in the case of switching from a large-volume water heater to two small-volume units, DOE calculated and incorporated the energy use of the two small-volume units.

b. Site-to-Source Energy Conversion

To estimate the national energy savings expected from appliance standards, DOE uses a multiplicative factor to convert site energy consumption (at the home or commercial building) into primary or source energy consumption (the energy required to deliver the site energy). These conversion factors account for the energy used at power plants to generate electricity and losses in transmission and distribution, as well as for natural gas losses from pipeline leakage and energy used for pumping. For electricity, the conversion factors vary over time due to projected changes in generation sources (*i.e.,* the power plant types projected to provide electricity to the country). The factors that DOE developed are marginal values, which represent the response of the system to an incremental decrease in consumption associated with appliance standards.

In the December 2009 NOPR analysis, DOE used annual site-to-source conversion factors based on the version of NEMS that corresponds to *AEO2009.* For today's final rule, DOE updated its conversion factors based on *AEO2010* Early Release. The *AEO* does not provide energy forecasts beyond 2035; DOE used conversion factors that remain constant at the 2035 values throughout the remainder of the forecast period.

In response to a request from the DOE's Office of Energy Efficiency and Renewable Energy (EERE), the National Research Council (NRC) appointed a committee on "Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards" to conduct a study called for in section 1802 of EPACT 2005. The fundamental task before the committee was to evaluate the methodology used for setting energy efficiency standards and to comment on whether site (point-of-use) or source (full-fuel-cycle) measures of energy efficiency better support rulemaking to achieve energy conservation goals. The NRC committee defined "site (point-of-use) energy consumption" as reflecting the use of electricity, natural gas, propane, and/or fuel oil by an appliance at the site where the appliance is operated. "Full-fuel-cycle energy consumption" was defined as including, in addition to site energy use, the following: Energy consumed in the extraction, processing, and transport of primary fuels such as coal, oil, and natural gas; energy losses in thermal combustion in power generation plants; and energy losses in transmission and distribution to homes and commercial buildings.[17]

In evaluating the merits of using point-of-use and full-fuel-cycle measures, the NRC committee noted that DOE uses what the committee referred to as "extended site" energy consumption to assess the impact of energy use on the economy, energy security, and environmental quality. The extended site measure of energy consumption includes the generation, transmission, and distribution but, unlike the full-fuel-cycle measure, does not include the energy consumed in extracting, processing, and transporting primary fuels. A majority of members on the NRC committee concluded that extended site energy consumption understates the total energy consumed to make an appliance operational at the site. As a result, the NRC committee's primary general recommendation is for DOE to consider moving over time to use of a full-fuel-cycle measure of energy consumption for assessment of national and environmental impacts, especially levels of greenhouse gas emissions, and to providing more comprehensive information to the public through labels and other means, such as an enhanced Web site. For those appliances that use multiple fuels (*e.g.,* water heaters), the NRC committee believes that measuring full-fuel-cycle energy consumption would provide a more complete picture of energy used, thereby allowing comparison across many different appliances as well as an improved assessment of impacts. The NRC committee also acknowledged the complexities inherent in developing a full-fuel-cycle measure of energy use and stated that a majority of the committee recommended a gradual transition to that expanded measure and eventual replacement of the currently used extended site measure.

DOE acknowledges that its site-to-source conversion factors do not capture all of the energy consumed in extracting, processing, and transporting primary fuels. DOE also agrees with the NRC committee's conclusion that developing site-to-source conversion factors that capture the energy associated with the extraction, processing, and transportation of primary fuels is inherently complex and difficult. However, DOE has performed some preliminary evaluation of a full-fuel-cycle measure of energy use.

Based on two studies completed by the National Renewable Energy Laboratory (NREL) in 1999 and 2000, DOE estimated the ratio of the energy used upstream to the energy content of the coal or natural gas delivered to power plants. For coal, the NREL analysis considered typical mining practices and mine-to-plant transportation distances, and used data for the State of Illinois. Based on data in this report, the estimated multiplicative factor for coal is 1.08 (*i.e.,* it takes approximately 1.08 units of coal energy equivalent to provide 1 unit of coal to a power plant). A similar analysis of the energy consumed in upstream processes needed to produce and deliver natural gas to a power plant yielded a multiplicative factor of 1.19.[18]

While the above factors are indicative of the magnitude of the impacts of using full-fuel-cycle measures of energy use, there are two aspects of the problem that warrant further study. The first is the refinement of the estimates of the multiplicative factors, particularly to incorporate regional variation. The second is development of forecasts of the multiplicative factors over the timeframes used in the rulemaking analyses, typically ten to fifty years. The second issue, of forecasting how the efficiency factors for various fuels may change over time, has the potential to be quite significant. The existing NEMS forecast of power plant electricity

[17] *See* The National Academies, Board on Energy and Environmental Systems, Letter to Dr. John Mizroch, Acting Assistant Secretary, U.S. DOE, Office of EERE, from James W. Dally, Chair, Committee on Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards (May 15, 2009).

[18] For further information on the NREL studies, please see: Spath, Pamela L., Margaret K. Mann, and Dawn Kerr, "Life Cycle Assessment of Coal-fired Power Production, " NREL/TP–570–25119 (June 1999); and Spath, Pamela L. and Margaret K. Mann, "Life Cycle Assessment of a Natural Gas Combined-Cycle Power Generation System," NREL/TP–570–27715 (Sept. 2000).

generation by fuel type can be used to estimate the impact of a changing mix of fuels. However, NEMS currently provides no information on potential changes to the relative ease with which the different fuels can be extracted and processed.

AGA stated that the December 2009 NOPR's energy consumption estimates for specific design options do not reflect a full-fuel-cycle analysis of the energy consumed. Referring to the NRC committee's report, AGA recommended that DOE use "extended site energy" analysis in the near term.[19] (AGA, No. 78 at pp. 2–3) In response, DOE refers to the preceding discussion of why it has not yet adopted a full-fuel-cycle measure of energy use. DOE's calculation of national energy savings does in fact use the extended site measure of energy consumption, which includes generation, transmission, and distribution but, unlike the full-fuel-cycle measure, does not include the energy consumed in extracting, processing, and transporting primary fuels. The calculation of energy consumption that DOE uses in the LCC analysis does not use an extended site energy measure, because the purpose of the calculation is to estimate the operating costs that consumers will face with alternative appliance efficiency levels. The site energy calculated in the LCC analysis is converted to extended site energy (*i.e.,* source or primary energy) in the NIA. DOE intends to further evaluate the viability of using full-fuel-cycle measures of energy consumption for assessment of national and environmental impacts of appliance standards.

5. Consumer Net Present Value

The consumer NPV is the net value in the present of the costs and savings experienced by consumers of the considered products. DOE calculates the NPV using the value of increased total installed costs, the value of operating cost savings (including energy, repair, and maintenance costs) in each year in which such savings occur, and a discount rate.

a. Increased Total Installed Costs and Operating Cost Savings

The increase in total annual installed cost is equal to the annual change in the per-unit total installed cost (difference between base case and standards cases) multiplied by the shipments forecasted for the standards case. Similarly, the total annual savings in operating costs are equal to the change in annual operating costs (difference between base case and standards case) per unit multiplied by the shipments forecasted for the standards case.

DOE's calculation of total annual installed cost and total annual savings in operating costs accounts for the fuel and product switching that was estimated to occur under specific TSLs (*see* section IV.G.2.d). The accounting of the energy use of the products to which a fraction of households are assumed to switch was described above in section IV.G.4.a. DOE also accounted for the installed cost of those products. For example, in the case of switching from a large-volume water heater to two small-volume units, DOE calculated and incorporated the installed cost of the two units.

b. Discount Rates

DOE multiplies monetary values in future years by the discount factor to determine the present value. For the December 2009 NOPR analysis and today's final rule, DOE estimated the NPV of appliance consumer benefits using both a 3-percent and a 7-percent real discount rate. DOE uses these discount rates in accordance with guidance provided by the Office of Management and Budget (OMB) to Federal agencies on the development of regulatory analysis (OMB Circular A–4 (Sept. 17, 2003), section E, "Identifying and Measuring Benefits and Costs"). DOE did not receive any comments on the discount rates used to calculate the NPV of appliance consumer benefits, and consequently, DOE has retained those discount rates in this final rule.

H. Consumer Subgroup Analysis

In analyzing the potential impact of new or amended energy conservation standards on individual and commercial consumers, DOE evaluates the impact on identifiable subgroups of consumers that may be disproportionately affected by a national standard level. For the December 2009 NOPR and today's final rule, DOE used 2005 RECS data to analyze the potential effect of energy conservation standards on the considered consumer subgroups for selected heating products. For gas-fired and electric storage water heaters, and gas wall fan and gas wall gravity DHE, DOE estimated consumer subgroup impacts for low-income households and senior-only households. In addition, for gas-fired and electric storage water heaters, DOE estimated consumer subgroup impacts for households in multi-family housing and households in manufactured homes as well.

DOE did not evaluate consumer subgroup impacts for gas-fired instantaneous water heaters and oil-fired storage water heaters. Gas-fired instantaneous water heaters were excluded from the consumer subgroup analysis due to insufficient data, and oil-fired storage water heaters were excluded due to low product shipments. For direct heating equipment, gas floor DHE and gas room DHE were excluded due to the low and decreasing levels of product shipments. For gas hearth DHE, DOE examined the senior-only subgroup, but did not evaluate the low-income subgroup because the saturation of this product is very small among low-income households due to the high product cost. DOE did not evaluate consumer subgroup impacts for pool heaters because the sample size of the subgroups is too small for meaningful analysis.

DOE did not receive any comments on its approach for the consumer subgroup analysis, and for today's final rule, DOE has made no change to its method for estimating consumer subgroup impacts. Details on the consumer subgroup analysis and results can be found in chapter 11 of the TSD.

I. Manufacturer Impact Analysis

DOE conducted the MIA to estimate the financial impact of amended energy conservation standards on water heater, DHE, and pool heater manufacturers and to calculate the impact of such standards on gross domestic manufacturing employment and capacity. The MIA has both quantitative and qualitative aspects. The quantitative part of the MIA primarily relies on the GRIM—an industry-cash-flow model customized for the three products covered by this rulemaking. The GRIM inputs are data characterizing the industry cost structure, investments, shipments, and markups. The key MIA output is the INPV. Different sets of assumptions (scenarios) produce different results. DOE presents the industry impacts by the major product types. DOE estimated the industry impacts for gas-fired and electric storage water heaters together because these product groupings represent a market that is served by the same manufacturers and these products are typically produced in the same factories. Similarly, DOE presents the other MIA results separately for oil-fired storage water heaters, gas-fired instantaneous water heaters, the traditional DHE product categories, gas hearth DHE, and gas-fired pool heaters.

The qualitative part of the MIA addresses factors such as product characteristics, market and product

[19] AGA cited the "Report" issued by the National Academy of Sciences, but it is evident that AGA was referring to the report by the NRC committee cited in footnote 12.

trends, as well as an assessment of the impacts of standards on subgroups of manufacturers. DOE outlined its methodology for the MIA in the December 2009 NOPR. 74 FR 65852, 65915–22 (December 11, 2009). The complete MIA for the December 2009 NOPR is presented in chapter 12 of the NOPR TSD.

In overview, for the final rule, DOE updated the MIA to reflect changes in the outputs of two other key DOE analyses that feed into the GRIM. Product costs are key inputs to the GRIM. For today's final rule, DOE incorporated the changes made to the engineering analysis, including updates to the MPCs (*see* section IV.C). In the MIA, DOE updated its shipment forecasts and efficiency distributions. In turn, DOE updated the GRIM to incorporate these revised costs and shipments.

For consistency in nominal dollars, for the final rule, DOE inflated the NOPR capital and product conversion costs to 2009$ from 2008$ using producer price index (PPI) information for the relevant industries. See *http://data.bls.gov:8080/PDQ/outside.jsp?survey=pc.* The PPI industry information is related to the North American Industry Classification System (NAICS) code. For gas-fired storage, oil-fired storage, and gas-fired instantaneous water heaters, DOE updated the conversion costs using PPI information under series id PCU3352283352283—"Household water heaters, except electric." DOE updated the conversion costs for electric storage water heaters using series id PCU3352283352281—"Household water heaters, electric, for permanent installation." DOE updated the DHE conversion costs using series id PCU3334143334147—"Floor and wall furnaces, unit heaters, infrared heaters, and mechanical stokers." Finally, DOE updated the conversion costs for pool heaters using series id PCU3334143334149—"Other heating equipment, except electric." For the final rule, DOE also updated its traditional DHE product line analysis used to calculate industry-wide conversion costs to account for new products that have come on to the market and to account for changes to the traditional DHE efficiency levels and TSLs, as reflected in the most current information in the AHRI certification database (*see http://www.ahridirectory.org/ahridirectory/pages/home.aspx*.).

DOE used the GRIM to revise the MIA results from the December 2009 NOPR to reflect the updated MPCs, shipments, and conversion costs. For direct employment calculations, DOE revised the GRIM to include the latest U.S. Census information available from the 2007 Economic Census.[20]

The following sections discuss interested parties' comments on the December 2009 NOPR MIA methodology. In general, DOE provides background on an issue that was raised by interested parties, summarizes the interested parties' comment, and discusses DOE's response to the comments.

1. Water Heater Conversion Costs

For the MIA, DOE classified one-time conversion costs into two major categories: (1) Product conversion costs and (2) capital conversion costs. Product conversion costs are one-time investments in research, development, testing, marketing, and other costs focused on making product designs comply with the amended energy conservation standard. Capital conversion costs are one-time investments in property, plant, and equipment to adapt or change existing production facilities so that new product designs can be fabricated and assembled.

In response to the December 2009 NOPR, AHRI stated that TSL 4 would require more than 75 percent of gas 40-gallon water heater models and more than 90 percent of electric 50-gallon water heater models from the AHRI Directory to be either redesigned or dropped from production. AHRI added that the severity of this change is even greater than this example suggests because shipments are more skewed towards current Federal minimum efficiency standards than the proportion of models suggests. (AHRI, No. 91 at pp. 1–2)

DOE acknowledges that a significant effort may be necessary for manufacturers to reach the efficiencies required by TSL 4. In the December 2009 NOPR, DOE noted that over 80 percent of the gas-fired water heaters currently sold do not meet the efficiency requirements at TSL 2 through TSL 4 and that only a small portion of the electric storage water heaters currently on the market meet the required efficiencies at TSL 4. This current product distribution drives the estimate of capital conversion costs at TSL 4 and, consequently, contributes to the overall results. These conversion costs reflect the need for manufacturers to add foaming stations and additional production lines to maintain current production levels with water heaters that require much thicker insulation. 74 FR 65852, 65936–37 (Dec. 11, 2009).

BWC commented that the significant increase in insulation thickness necessary to achieve the proposed level for water heaters would require additional assembly time to manufacture the same production quantity. In order to achieve the same manufacturing capacity, BWC stated that it would require a combination of more labor, a reconfiguration of production lines, more foaming equipment on production lines, and/or additional production lines. BWC stated that any of these options result in expensive capital conversion costs, which BWC does not believe were fully taken into consideration. (BWC, No. 61 at pp. 1–2)

DOE's initial estimates for the capital conversion costs for water heaters at each TSL can be found in the December 2009 NOPR. 74 FR 65852, 65936–41 (Dec. 11, 2009). During interviews with manufacturers prior to the publication of the December 2009 NOPR, DOE solicited confidential information about the required capital conversion costs at each efficiency level. In the December 2009 NOPR, DOE stated that it based its capital conversion costs for gas-fired and electric storage water heaters on information learned during these interviews. 74 FR 65852, 65917–18 (Dec. 11, 2009). DOE verified its industry-wide estimates for the gas-fired and electric storage water heaters by comparing the NOPR estimates to a separate bottoms-up estimate of the sub-assembly lines, assembly lines, and tooling changes required by each manufacturer and the level of investments that would be required to maintain a historic value for net plant, property, and equipment as a ratio of total revenue. For oil-fired storage and gas-fired instantaneous water heaters, DOE estimated its capital conversion costs using a bottoms-up approach to estimate the cost of additional production equipment and changes to existing production lines that the industry would require at each TSL. DOE used feedback from manufacturer interviews about the tooling requirements at each efficiency level and product catalogs to estimate the total capital conversion costs for both oil-fired storage and gas-fired instantaneous water heaters at each TSL. *Id.* Pages 12–35 to 12–39 of the December 2009 NOPR TSD also contained DOE's estimated capital conversion costs as well as additional information about the assumptions

[20] Annual Economic Census: 2007, *American FactFinder,* Bureau of the Census (Available at: *http://www.census.gov/econ/census07/*) (Last accessed Feb. 2010).

behind the required changes at each efficiency level.

For the gas-fired and electric storage water heater capital conversion costs at TSL 4 and TSL 5 in the December 2009 NOPR, DOE noted and agrees with BWC's comment that the increased insulation thickness would require manufacturers to lengthen existing assembly lines or add additional assembly lines because the much thicker insulation requirements lower the throughput of existing assembly lines. However, DOE continues to believe it has adequately addressed BWC's concerns about the capital conversion cost estimates for two reasons. First, DOE's capital conversion cost estimates are drawn from industry-wide aggregated data gathered during manufacturer interviews. Second, DOE's assumptions regarding the required plant changes at the proposed TSL in the December 2009 NOPR are consistent with the plant changes noted in BWC's comment. Finally, BWC did not provide any additional data supporting its comment that DOE's capital conversion cost estimates did not fully capture the potential costs.

For today's final rule, DOE continues to use the same methodology to calculate the water heater conversion costs. Additional details of DOE's estimates can be found in chapter 12 of the TSD.

DOE also received several comments from manufacturers regarding issues that would arise under a potential amended standard for electric storage water heaters that would effectively require heat pump water heaters (*i.e.,* TSL 5 through TSL 8). Broadly, the comments addressed three issues: (1) Potential changes to current facilities; (2) the cost to manufacture heat pump water heaters; and (3) the unique challenges presented by the December 2009 NOPR TSL 5.

At the public meeting, A.O. Smith stated that it is in the final stages of implementing production for heat pump water heaters on a small scale relative to what would be required if the entire market moved to heat pump water heaters. (A.O. Smith, Public Meeting Transcript, No. 57.4 at pp. 91–92) In written comments, A.O. Smith extrapolated the cost of setting up this limited production line to estimate the cost of shifting the entirety of its electric storage market share to heat pump water heaters. A.O. Smith stated that a new facility capable of producing two million heat pump water heaters annually would cost $90 million to build—before accounting for investment in land and other fees—and would take 2–3 years to complete. A.O. Smith stated that it would likely build a new facility because line speed and assembly operations would not allow for the product to be integrated into current production lines at high shipment volumes. A.O. Smith also stated that it would probably be cheaper to set up a new line than to rework the production lines in existing facilities. (A.O. Smith, Public Meeting Transcript, No. 57.4 at p. 92)

AHRI stated that an amended standard effectively requiring heat pump water heaters would force all manufacturers to continue to provide electric storage water heaters utilizing resistance technologies until the compliance date of the amended standard due to competitive pressures. A competitor that did not have to continue manufacturing resistance water heaters until the compliance date (because, presumably, it did not serve this market in the base case) could have an advantage. (AHRI, Public Meeting Transcript, No. 57.4 at pp. 100–103) BWC added that a standard that required heat pump water heaters would disrupt its manufacturing facility since existing manufacturing lines are optimized for specific products. Heat pump water heaters would require production lines to be redesigned to handle all new components and their assembly. Finally, a combination of additional production lines and/or a new manufacturing facility would be required to manufacture heat pump water heaters without interrupting current production. (BWC, No. 61 at pp. 2–3)

DOE agrees that modifying existing production facilities to exclusively heat pump water heaters could be very disruptive to ongoing operations there. During on-site manufacturing impact interviews, most manufacturers were still developing their heat pump water heaters. At that time, manufacturers responded to questions about how they would approach the manufacture of heat pump water heaters by describing the necessary changes to existing facilities. For example, manufacturers anticipated that they would purchase the heat pump modules from outside vendors if heat pump water heaters were required for all electric storage water heaters for three reasons: (1) They lacked experience manufacturing high-volume sealed refrigeration systems; (2) they had limited refrigeration engineering expertise; and (3) they lacked space in their facilities to produce heat pump module subassemblies. DOE incorporated these comments into its NOPR capital cost conversion analysis in the following manner: (1) Manufacturers would initially source the heat pump modules; (2) electric storage water heater assembly and subassembly lines would have to be modified to accommodate the assembly of heat pump water heaters; (3) assembly lines would need to be lengthened to merge new tank assemblies with the heat pump modules; and (4) heat pump water heater integration would require manufacturers to install advanced testing equipment to verify performance, operation, etc. In sum, DOE estimated in the NOPR that manufacturers would incur almost $70 million in capital conversion costs to modify their production facilities to exclusively manufacture heat pump electric storage water heaters. DOE estimated these investments take place between 2010, the announcement date of the standard, and 2015, the year manufacturers must comply with the standard. However, the capital conversion cost estimates did not include the cost of building manufacturing capacity to produce the heat pump modules in house because DOE believed manufacturers would likely purchase these as subassemblies. 74 FR 65852, 65921, 65938 (Dec. 11, 2009).

Manufacturers can choose among multiple design paths and production options for heat pump water heaters, so capital, manufacturing, and product development expenses will vary accordingly. DOE agrees with A.O. Smith that one possible reaction by manufacturers at the NOPR TSL 6 or TSL 7 (equivalently, TSL 7 and TSL 8 in the final rule) could be to build a new facility to exclusively manufacture heat pump water heaters. In the December 2009 NOPR, DOE stated that manufacturers could consider moving all or part of their existing production capacity abroad if NOPR TSL 6 were selected, as the benefit to the manufacturer of a new facility abroad could be greater than modifying an existing facility. In the NOPR, DOE noted that building a new facility could entail less business disruption risk than attempting to completely redesign and upgrade existing facilities. Combined with lower labor rates overseas, this prospect could compel manufacturers to move their production facilities outside of the U.S. 74 FR 65852, 65938, 65952 (Dec. 11, 2009).

While acknowledging there are multiple strategic paths to manufacturer heat pump water heaters, DOE believes it has used a consistent approach to characterize the costs facing the industry. DOE also believes its approach captures manufacturers' concerns about the technology changes required at the

NOPR TSL 6 and TSL 7. While DOE did not include the conversion costs to manufacture the heat pump module or to build new facilities, DOE did include the substantial costs to modify all existing production lines. Furthermore, DOE believes that existing facilities could be modified to produce heat pump water heaters at the final rule TSL 7 and TSL 8, although at a substantial capital conversion cost. Supporting this notion, DOE notes that most existing heat pump water heater designs from major manufacturers incorporate parts of standard electric resistance water heaters. For example, the tank portion of existing heat pump water heater designs are very similar to electric resistance water heater designs, thereby limiting most changes to the assembly line area of a plant. The designs of heat pump water heaters at TSL 7 or TSL 8 would likely be similar to recently-released heat pump water heaters and would maintain these similarities with electric resistance water heaters.

Current manufacturing operations are highly optimized to manufacture water heaters that utilize resistive elements and relatively few additional components (*e.g.,* thermostats), whereas heat pump water heater modules require additional assembly steps even if they are purchased as completed sub-assemblies. While a new manufacturing facility would make the integration of heat pump modules simpler, the $90 million estimate for such a facility projected by A.O. Smith indicates that this approach could also be more costly. Alternatively, manufacturers could choose to build an annex for assembling heat pump water heater modules and then deliver them to the final assembly area in a manner similar to completed tank assemblies. When queried in manufacturer impact interviews, no manufacturer of electric water heater with traditional resistive elements had yet decided on a specific path towards high-volume heat pump water heater production. However, DOE believes that the capital conversion costs that assume manufacturers modify existing facilities to accommodate integrating a sourced heat pump module would be the most likely scenario on account of lower capital expenditures than a "green field" facility, established supplier bases, trained work force, etc. Hence, DOE believes that this scenario captures the significant impacts on electric storage water heater manufacturers.

Finally, both the preservation of return on invested capital scenario and the preservation of operating profit scenario incorporate the financial burdens to substantially modify facilities to manufacture heat pump water heaters and the significant expenses that would be required to carry inventory that is many times more expensive than in the base case (because the MPCs of heat pump water heaters are multiple times the MPCs of resistance water heaters). In addition, the preservation of operating profit scenario models the impacts on manufacturers that would occur after the compliance date of the standard if they cannot fully markup the substantial cost of a sourced heat pump module. Therefore, the costs and market disruption to manufacture heat pump water heaters are modeled in the MIA scenarios.

In response to DOE's request for comment at the public meeting on the required conversion costs for all considered NOPR TSLs, Rheem did not comment specifically because it deemed conversion costs confidential and proprietary. However, Rheem wished to advise DOE that this information was submitted confidentially to DOE's contractor during MIA interviews. (Rheem, No. 89 at p. 9) During the public meeting, Rheem did state that converting all of its electric water heater models to heat pump water heaters (as the December 2009 NOPR TSL 6 or TSL 7 would require) would be a very significant undertaking requiring capital and new manufacturing capabilities. As evidence to that point, Rheem noted that it has to date released only one heat pump water heater model. (Rheem, Public Meeting Transcript No. 57.4 at p. 93–94)

DOE agrees that migrating electric storage production entirely to heat pump water heater production would require a significant investment in time and resources. DOE asked each participant during manufacturer interviews to quantify the costs to manufacture exclusively heat pump water heaters. DOE's own analysis of these conversion costs proved consistent with the estimates submitted by the industry at large. Therefore, DOE believes that its capital conversion costs for the industry are reasonable and that it has adequately modeled the impacts of the significant plant changes that would be required to exclusively manufacture heat pump water heaters in the electric storage water heaters product class. The significant product and capital conversion costs associated with the technology and the required production changes contribute to large, negative impacts on INPV at the December 2009 NOPR TSL 6 and TSL 7.

As discussed earlier, the December 2009 NOPR TSL 5 would effectively require heat pump water heaters for tanks with rated storage volumes greater than 55 gallons. BWC commented that this proposed level would likely result in a smaller percentage of the market above the 55-gallon breakpoint, which would make it more difficult to finance the high conversion costs for moving large tank production to heat pump water heaters. BWC also stated it would have to cut down on its product offerings due to the high development and capital conversion costs. (BWC, No. 61 at p. 2) A.O. Smith stated it has two dedicated factories that build commercial condensing products, and the commenter stated, after studying the production volumes at the December 2009 NOPR TSL 5, that it would likely have to add production lines. Water heater manufacturers would have to invest a significant amount to learn how to manufacture a device with a refrigerant circuit for a small number of units per year. (A.O. Smith, Public Meeting Transcript, 122–123, 126) In its written comments, Rheem added that the December 2009 NOPR TSL 5 introduces added burden and risk because it requires manufacturers to continue to produce conventional storage products in large quantities while incrementally preparing for production of maximum technology products which could involve additional production lines and new facilities. (Rheem, No. 89 at p. 10) AHRI stated that separate minimum efficiency levels for larger size water heaters would require separate production lines for these models. Given the significant differences in the process of manufacturing either heat pump water heaters or condensing gas-fired water heaters, these models could not be interspersed into the high-speed production lines currently operating in water heater manufacturing plants. (AHRI, No. 91 at p. 6) Finally, BWC, A.O. Smith, and Rheem all commented that the lower volume of water heaters above 55-gallons made the business case for the investments in the advanced technology harder to justify. (BWC, No. 61 at p. 2; A.O. Smith, Public Meeting Transcript, No. 57.4 at pp. 98–99; Rheem, Public Meeting Transcript No. 57.4 at pp. 99–100)

DOE agrees with BWC, A.O. Smith, Rheem, and AHRI that the December 2009 NOPR TSL 5 (*i.e.,* TSL 6 for this final rule) would likely require additional production lines for manufacturers to produce heat pump water heaters and condensing products for high-volume products. While DOE believes that existing facilities could be modified to manufacture exclusively heat pump water heaters, DOE does not believe individual manufacturers could

integrate heat pump water heaters or condensing gas-fired water heaters above 55-gallons into existing production lines. Rather, DOE calculated the cost for each manufacturer to build a separate production line as an annex to an existing facility to maintain their current market share of the gas-fired and electric storage water heater markets above 55-gallons. DOE also assumed that the capital conversion costs for rated storage volumes less than 55-gallons at the NOPR TSL 5 would not decline if the efficiency requirements were higher for rated storage volumes greater than 55-gallons (*see* pages 12–36 to 12–37 of the December 2009 NOPR TSD). 74 FR 65852, 65918 (Dec. 11, 2009). In addition, DOE calculated the product conversion costs for large rated storage volumes at the December 2009 NOPR TSL 5 by multiplying its estimate for the industry to offer heat pump products at TSL 6 and condensing gas-fired products at TSL 7 for all rated storage volumes by the percentage of total electric storage and gas-fired storage water heater models that exceed a 55-gallon rated volume. 74 FR 65852, 65917 (Dec. 11, 2009). DOE did not modify its approach to calculate the conversion costs at TSL 5 and TSL 6 for the final rule because its approach is consistent with manufacturers' comments. Finally, DOE notes that there are a disproportionately large number of models above 55-gallons relative to the shipment volumes of those products. Thus, the economic impacts to convert those products to a new technology are proportionately more burdensome for those manufacturers. Therefore, DOE agrees that the business case is harder to justify for the larger storage volumes and that this is captured by the MIA, but notes that the impacts are still less severe than requiring manufacturers to exclusively offer either advanced technology.

DOE also received a number of comments about the impacts of the oil-fired storage water heater conversion costs on manufacturers. BWC stated that the business case to make the investments at the December 2009 NOPR TSL 4 is difficult because the industry is small and declining and could lead them to exit the oil-fired market. (BWC, No. 61 at p. 2; Public Meeting Transcript, No. 57.4 at p. 289) AHRI stated that the cost to redesign, develop, and retool production for oil-fired models is high at the proposed December 2009 NOPR TSL 4 compared to the very small market, which offers limited opportunity for a return. AHRI added that this TSL is not currently met by all current 50-gallon residential oil-fired water heaters and all 30-gallon and 32-gallon models except those offered by one manufacturer. Consequently, some manufacturers could drop out of the oil water heater market. (AHRI, No. 91 at p. 2)

DOE agrees that there are no existing 50-gallon oil-fired water heaters on the market that meet the efficiencies required at the December 2009 NOPR TSL 4. However, DOE notes that there are three existing 30-gallon products from two manufacturers that meet these efficiencies using conventional technology. Therefore, DOE continues to believe that models that do not meet the required efficiencies could be made to do so by manufacturers using insulation changes. While not insignificant, the conversion costs to make insulation changes to existing products would not be as substantial as a higher efficiency requirement, which could require manufacturers to use significantly different technology. DOE noted in the December 2009 NOPR that if any manufacturer had to meet the standard using a more complex technology, these costs could force them to exit the oil-fired storage water heater market. 74 FR 65852, 65940 (Dec. 11, 2009). Whether a given manufacturer chooses to exit the market will depend on a variety of internal and external factors, but based upon the available information, DOE believes it has appropriately captured the magnitude of investments that the various TSLs require.

2. Manufacturer Markups and Markup Scenarios

The MPCs from the engineering analysis are key inputs to the GRIMs used in this rule. For water heaters, the MSP is comprised of production costs (the direct manufacturing costs or MPCs), non-production costs (indirect costs like selling, general, and administrative expenses (SG&A)), and profit. For gas-fired, electric, and oil-fired storage water heaters in the MIA, MSP is calculated by multiplying the MPC by the manufacturer markup and adding the shipping cost. For all other products, MSP is calculated by multiplying the MPC by the appropriate manufacturer markup. DOE used several standards-case markup scenarios to bound the range of uncertainty about the potential impacts on prices and profitability following the implementation of amended energy conservation standards.

In both its written submission and comments at the public meeting, BWC stated that profit margins for water heater manufacturers are falling due to the decline of new construction and the industry having excess capacity. BWC argued that because the profitability estimates in DOE's analysis are incorrect, it would be difficult to sustain the costs associated with the December 2009 NOPR TSL 4. Detailed profit data were supplied by BWC in previous communication with DOE's contractor. (BWC, No. 61 at p. 2; Public Meeting Transcript, No. 57.4 at p. 40)

As background, DOE used publicly-available information to calculate its initial markup estimates. Because not all manufacturers in the industry are public and because those that are public often compete in different businesses, DOE calibrated its initial estimates based on information received during manufacturer interviews. During the NOPR phase, DOE refined the manufacturer markup based on feedback from manufacturers to better reflect the residential heating products market. 74 FR 65852, 65892 (Dec. 11, 2009). Given this process, DOE believes the manufacturer markups used in the engineering analysis and manufacturer impact analysis are representative of the industry as a whole. In addition, DOE used estimated market shares to weigh feedback it received on the financial parameters (including the industry capital structure) to determine an aggregate number representative of the entire industry. While individual manufacturers have different gross margins depending on a variety of factors, DOE's use of weighted average financial parameters yields cash flow from operations that are consistent with the overall industry. For example, in the base case, earnings before interest and taxes (EBIT) for gas-fired and electric storage water heating manufacturing is approximately 5 percent. Finally, with respect to BWC's concern that margins have compressed due to the housing downturn, DOE acknowledges that the current economic environment, particularly in new construction, has adversely impacted the industry. DOE notes that the two markup scenarios it models are used to bound the potential impacts on manufacturers due to amended energy conservation standards, in light of the inherent uncertainty in how pricing will adjust in the marketplace. The preservation of operating profit scenario models a case in which margins and profitability decline in response to amended energy conservation standards. DOE believes that the impacts captured by the preservation of operating profit scenario would be a better indicator of the likely impacts on manufacturers than specifically attempting to model a short-term effect that also impacts margins in

the base case. A short-term effect that would be impacted in the base case and standards case would not model long-term financial impacts caused by standards and would not consider the impacts on INPV over the entire analysis period. Consequently, DOE has decided to continue to use the markup scenarios modeled in the December 2009 NOPR.

DOE also received comments from traditional DHE manufacturers about the markup scenarios in the MIA. As opposed to the preservation of return on invested capital scenario, LTS stated that it expects profitability to decrease, possibly to zero or below in the event of standards. LTS argued this outcome is likely because manufacturers will either have to abandon some product categories or face lower consumer demand following standards because features the consumer wants would no longer be available, such as the ability to retrofit replacement products and operate without line power. (LTS, No. 56.7 at p. 2; Public Meeting Transcript, No. 57.4 at p. 21) LTS further argued that the preservation of operating profit scenario is too optimistic in the event product offerings are reduced. (LTS, No. 56.7 at p. 2) Finally, LTS stated that the large negative impacts on industry net present values suggest that manufacturers would be substantially harmed if profitability were impacted. (LTS, Public Meeting Transcript, No. 57.4 at pp. 21–22)

In response, DOE created two markup scenarios to bound the potential impacts on DHE manufacturers, as discussed in TSD chapter 12. DOE believes the less optimistic scenario—in which manufacturers do not earn any additional profit from any of the changes required by standards despite increased investment—captures LTS's concerns. DOE agrees with LTS that profitability could decrease if consumer demand was lower or product lines were dropped. At the same time, if manufacturers dropped selected product lines, they would not incur the capital investments included in DOE's estimates because DOE assumes manufacturers convert all product lines. While DOE acknowledges that manufacturers could choose to eliminate certain product lines, DOE believes that its markup scenarios would still reflect the negative impact on industry value. DOE also agrees that lower consumer demand would impact profitability. All of the concerns raised by manufacturers indicate that the range of impacts would be towards the higher end calculated by DOE. While DOE's results changed slightly from the NOPR to account for the latest available data on the industry's product lines, as discussed in chapter 12 of the TSD, DOE believes that the analytical tools correctly capture the impacts on traditional DHE manufacturers. DOE is not adopting the same TSL for traditional DHE as was proposed in the NOPR, in part because of these impacts. DOE further discusses how it weighs the benefits and burden of the amended energy conservation standards, including the impact on traditional DHE manufacturers, in section VI.D.3.

3. Pool Heater Conversion Costs

Raypak agreed with DOE's statement that TSL 5 and TSL 6 would require manufacturers to incur significant product and capital conversion costs. Raypak commented that this statement is also true for TSL 3 and TSL 4. While most manufacturers have some products at these efficiency levels, Raypak argued that manufacturing all products at the levels proposed in the December 2009 NOPR would require substantial tooling and product conversion costs. (Raypak, No. 67 at p. 2; Public Meeting Transcript, No. 57.4 at p. 308) In addition, Zodiac stated that even small efficiency improvements often require significant efforts and burden manufacturers. (Zodiac, No. 68 at p. 1)

DOE agrees that the conversion costs at TSL 3 and TSL 4 are also significant. However, DOE notes that the plant changes at TSL 5 and TSL 6 increase substantially over those necessary at TSL 4, because manufacturers would have to make changes to both component parts (including heating exchanger fabrication) and their main assembly lines. DOE calculated the conversion costs for manufacturers to convert all existing products that did not meet the standard. Therefore, the conversion costs for each manufacturer would vary depending on their experience with high-efficiency products and the range of their current product offerings. DOE believes it has adequately captured the impacts of the conversion costs in the MIA.

4. Employment

Bock stated that the employment impacts discussion in the December 2009 NOPR for oil-fired water heaters did not take into consideration manufacturers shutting down or moving production outside of the United States. (Bock, No. 101 at p. 2)

In the December 2009 NOPR, DOE calculated the potential impacts of amended energy conservation standards on direct employment by bounding the range of potential impacts. 74 FR 65852, 65947–49 (Dec. 11, 2009). For the upper end of the range, the direct employment analysis estimated the number of U.S. production workers who are impacted by this rulemaking, assuming that manufacturers continue to produce the same scope of covered products after the compliance date and that the existing domestic production is not shifted to other countries. In this best case scenario, the direct employment impact analysis shows approximately no change in the number of U.S. production workers in the residential oil-fired storage water heater market. To calculate the lower bound of the range of potential impacts, DOE calculated the total number of domestic production workers that would lose their jobs if all production were no longer made domestically. *Id.* In this scenario, manufacturers respond to the higher labor requirements by shifting production to lower-labor-cost countries or exit the oil-fired market. Since a major US manufacturer has oil-fired storage water heaters that exceed the standard proposed in the December 2009 NOPR, a complete exit from the market or a complete shift to lower-labor-cost countries by industry is unlikely. In the December 2009 NOPR, DOE did not expect substantial changes to U.S. production workers in the residential oil-fired market if manufacturers were able to implement the insulation design options presented in the engineering analysis. 74 FR 65852, 65949 (Dec. 11, 2009).

A.O. Smith stated that the December 2009 NOPR TSL 6 or TSL 7 would require manufacturers to keep their electric resistance water heater lines running while implementing new heat pump water heater production lines. This assumption implies manufacturers would be building new factories or production lines, which could be outside of the United States. (A.O. Smith, Public Meeting Transcript, No. 57.4 at pp. 316–317) A.O. Smith also noted that it would expect to utilize low-cost-labor countries to produce the heat pump portion of the assembly, similar to the trend in the room air conditioning industry. (A.O. Smith, No. 76 at p. 4) BWC added that a disruptive heat pump water heater standard could cause a new manufacturing facility to be located abroad to not disrupt manufacturing in their existing U.S. facility. (BWC, No. 61 at pp. 2–3)

As stated in section IV.I.1, DOE believes that an electric storage water heater standard that effectively mandated heat pump water heaters would not require manufacturers to build new production facilities, because those products would mimic current heat pump water heater designs that simplify manufacturing by maintaining

similarities with electric resistance water heaters. However, DOE does recognize that heat pump water heaters have higher labor content than water heaters that only use a resistance element, which could put additional pressure on U.S. manufacturing employment. DOE also believes that these pressures exist at a standard level that would only effectively require heat pump water heaters for products with rated storage volumes greater than 55-gallons. In particular, DOE believes TSL 5 or TSL 6 could cause a change in direct employment if manufacturers with multiple facilities in the U.S. build a dedicated heat pump water heater line at a factory abroad or relocate domestic production for large rated storage volumes.

Also in response to the December 2009 NOPR, ACEEE stated that focusing on manufacturing jobs within the heating products industry is too narrow, because energy savings creates more jobs, including direct employment impacts as noted by DOE's statement that significant technology changes (such as heat pump water heaters) could increase other manufacturing employment. Finally, ACEEE expressed its belief that compared to the total number of jobs in the US economy and given the uncertainties of projections five years into the future, the small employment numbers estimated are not significant and should not be a determining factor in DOE's decision. (ACEEE, No. 79 at pp. 3–4)

DOE agrees with ACEEE that the energy savings from more-efficient standards would likely result in increased net employment. DOE analyzes how consumer savings increase employment in other sectors of the economy in the indirect employment analysis (*see* section IV.J). Furthermore, DOE agrees that more-efficient technologies such as heat pump water heaters could increase direct employment in the United States. DOE noted that even at the December 2009 NOPR TSL 5, if manufacturers build a dedicated heat pump water heater line in the United States, additional labor would be required. DOE also noted that even sourcing heat pump modules could increase U.S. employment because existing assembly lines would need to be lengthened and the manufacturing process would take additional time to assemble and test. 74 FR 65852, 65948–49 (Dec. 11, 2009). However, DOE continues to believe that the higher labor content for assembling heat pump water heaters could also put additional pressure on manufacturers to relocate existing manufacturing facilities in lower-labor-cost countries. Therefore, in light of the multiple strategic options manufacturers could pursue, DOE believes that presentation and consideration of the range of direct employment impacts is appropriate, in that it represents these possibilities. Lastly, while not the only determining factor, a potential reduction in industry employment is a consideration in terms of the impacts on manufacturers for the MIA.

DOE received a number of comments about the direct employment impacts for traditional DHE at the standard levels proposed in the December 2009 NOPR. Specifically, LTS expressed its agreement with DOE's statement that TSL 3 would likely lead to the discontinuation of product lines and could cause small businesses to exit the market completely. LTS believes that both of these outcomes could be possible and that either would have a significant impact on future employment in their industry. (LTS, No. 56.7 at p. 2; Public Meeting Transcript, No. 57.4 at p. 22) LTS also stated that reduced demand, if product features like retrofitability were eliminated, would also harm employment. (LTS, Public Meeting Transcript, No. 57.4 at p. 317) Empire stated that jobs would be lost due to poor prospects for a sufficient return on investment needed in the traditional DHE categories. (Empire, No. 100 at p. 1; Public Meeting Transcript, No. 57.4 at p. 299) Finally, Williams added that increased efficiency standards would force them to eliminate jobs as a result of current products not meeting the new standards. (Williams, No. 96 at p. 1)

In response, DOE notes that it calculated the potential impacts of amended energy conservation standards on domestic production employment for traditional DHE by bounding the range of potential impacts. The upper end of the range assumes that domestic production is not shifted to lower-labor-cost countries and that production volume does not decrease. In this best-case scenario, where shipments do not decrease and higher-efficiency products require more labor, the direct employment impact analysis shows a net increase in the number of domestic jobs for traditional direct heating equipment. To calculate the upper end of the range of direct employment impacts, DOE believes it is reasonable to assume that production volume could be sustained by selectively upgrading certain product lines and increasing shipments of products that meet the amended energy conservation standard. Under this set of assumptions, customers would likely continue to demand these products for the replacement market, and manufacturers would likely selectively upgrade their most popular products to maintain as many sales as possible with their limited resources.

However, at some standard levels, including the December 2009 NOPR TSL 3, the capital conversion and product development costs could be prohibitive for the small domestic manufacturers of traditional DHE. Because DOE agrees that the December 2009 NOPR TSL 3 could lead to the risk of manufacturers exiting the market or reducing the scope of their product lines, the lower end of the range illustrates the industry dynamic in which not all product lines continue to be produced in the U.S. In this scenario, small domestic manufacturers could exit the market rather than invest in new designs, which would result in a loss of domestic employment at these firms. In summary, DOE agrees that all the possibilities raised by manufacturers could result in a loss of direct employment in the traditional DHE market. DOE acknowledged this possibility in the December 2009 NOPR. 74 FR 65852, 65949–50 (Dec. 11, 2009). However, DOE believes it has appropriately bounded the range of employment impacts. DOE continues to believe that amended energy conservation standards could impact DHE direct employment, but believes it has taken the potential into consideration in examining the economic impact on manufacturers in the industry. DOE also notes that it has reviewed its analysis on the potential impacts on small business manufacturers in light of the changes made since the December 2009 NOPR publication and believes it has taken the necessary steps to limit the possibility of manufacturers exiting the market.

AHRI stated that the negative direct employment impacts for traditional direct heating equipment could be larger than the indirect employment gains. (AHRI, Public Meeting Transcript, No. 57.4 at pp. 324–325)

In response, DOE notes that direct and indirect employment impacts are assessed in different analyses for this rulemaking. The MIA assesses the direct employment impacts on manufacturers that make the covered products. The indirect employment impacts are jobs that are created from the consumer savings on energy as a result of the amended energy conservation standards. In light of the results of these analyses, DOE agrees with AHRI that the positive, indirect employment impacts due to the traditional DHE energy conservation standards could be offset by possible direct industry employment

losses. Specifically, DOE calculated that the indirect net employment benefits would be fewer than 250 jobs gained in any year, whereas DOE calculated that there are approximately 300 production workers currently in the traditional DHE market. *See* chapter 14 of the TSD for a more complete discussion of the indirect employment impacts related to the traditional DHE industry.

BWC stated that while it does not meet the SBA definition of a small business, BWC is a small company, especially compared to its closest competitors. BWC stated that the December 2009 NOPR TSL 4, and the large cost increases and capital investments it would entail, could threaten the company's survival, because it would place a disproportionate burden on their small company. (BWC, No. 61 at p. 1)

While BWC is not a small business, DOE recognizes that the impacts on all manufacturers are not uniform. However, DOE believes that as a full-line competitor in the residential water heater market, BWC's concerns about the capital investments are most appropriately captured in the industry-wide impacts which are considered when determining what TSL is economically justifiable. DOE also notes that DOJ was primarily concerned about the potential impacts on competition in the traditional DHE market which is discussed in section VI.C.5.

5. Access to Capital

BWC stated that financing the costs associated with the December 2009 NOPR TSL 4 for water heaters would be difficult, because banks are more hesitant to lend in the current economic environment. (BWC, No. 61 at p. 2)

In response, DOE acknowledges that it may be difficult for a given manufacturer to access the capital necessary to finance the investments required by this final rule, particularly given the recent state of capital markets. In response to a similar comment in the December 2009 NOPR, DOE noted that the compliance date for the residential water heater standard is 2015. In the GRIM, DOE assumes the product conversion and capital conversion costs are allocated in between the announcement of the final rule adopting amended energy conservation standards (estimated to be March 2010) and the compliance date of the standard, with more of conversion costs occurring closer to the compliance date than the announcement date. Because most of the product conversion and capital conversion costs are allocated several years in the future, the economic conditions at that time will likely be different than they are currently. 74 FR 65852, 65919 (Dec. 11, 2009). With that said, DOE's current analytical tools do not have the capability to model the state of financial markets in future years, nor how those changes will impact the industry's financing capabilities. DOE acknowledges that the impacts on individual manufacturers are not uniform, particularly in terms of access to capital. However, during the course of manufacturer interviews, DOE received feedback from manufacturers on their capital structure, and DOE adjusted the discount rate for each of the water heater product types to be reflective of the manufacturers in the industry. While it could be difficult to obtain the necessary funding for TSL 4 and higher TSLs, DOE believes it has accurately captured the requisite level of expenditures to meet the amended energy conservation standards.

LTS stated it does not have the required capital estimated by DOE to make the necessary conversions at TSL 3 and, with the current credit markets, LTS does not think it can borrow it. (LTS, No. 56.7 at pp. 2–3; Public Meeting Transcript, No. 57.4 at p. 23)

Again, DOE acknowledges that it may be difficult for a given manufacturer to access the capital necessary to finance the investments required by this final rule, particularly given the recent state of capital markets. This is particularly true for small business manufacturers who cannot rely on a parent company's other operations to help finance the necessary investments. At the same time, DOE believes it would be inappropriate to extrapolate the health of the financial markets at any one particular time to future periods of time. As discussed above, there is a real possibility that small manufacturers may choose not to improve all product lines, whether due to limited access to capital or insufficient expected return on capital. To that point, DOE believes it has captured the level of expenditures necessary to meet the amended energy conservation standards and included the cost for manufacturers to convert all existing product lines to model the impacts these changes would have on the industry. These considerations are included in the assessment of the economic justification of the standard. Finally, DOE notes that the impact of amended energy conservation standards specifically considered the potential impacts on small business manufacturers.

J. Employment Impact Analysis

DOE considers employment impacts in the domestic economy as one factor in selecting an energy conservation standard. Employment impacts include direct and indirect impacts. Direct employment impacts are changes in the number of employees for manufacturers of equipment subject to standards, their suppliers, and related service firms. The MIA addresses these impacts.

Indirect employment impacts from standards consist of the net jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, due to: (1) Reduced spending by end users on energy (electricity, gas (including liquefied petroleum gas), and oil); (2) reduced spending on new energy supply by the utility industry; (3) increased spending on the purchase price of new equipment; and (4) the effects of those three factors throughout the economy. DOE expects the net monetary savings from standards to be redirected to other forms of economic activity. DOE also expects these shifts in spending and economic activity to affect the demand for labor in the short term, as explained below.

One method for assessing the possible effects on the demand for labor of such shifts in economic activity is to compare employment statistics in different economic sectors, which are compiled and published by the Bureau of Labor Statistics (BLS). The BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy. There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital-intensive and less labor-intensive than other sectors.[21] Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.,* the utility sector) to more labor-intensive sectors (*e.g.,* the retail and manufacturing sectors). Thus, based on the BLS data alone, DOE believes net national employment will increase due

[21] *See* U.S. Department of Commerce, Bureau of Economic Analysis, "Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II)" (1992).

to shifts in economic activity resulting from standards.

In developing the December 2009 NOPR, DOE estimated indirect national employment impacts using an input/output model of the U.S. economy called Impact of Sector Energy Technologies (ImSET).[22] ImSET is a special-purpose version of the "U.S. Benchmark National Input-Output" (I–O) model designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer-based I–O model with structural coefficients to characterize economic flows among 188 sectors most relevant to industrial, commercial, and residential building energy use.

DOE did not receive any comments on its employment impacts analysis, and DOE has made no change to its method for estimating employment impacts for today's final rule. For further details, *see* chapter 14 of the final rule TSD.

K. Utility Impact Analysis

The utility impact analysis estimates the change in the forecasted power generation capacity for the Nation that would be expected to result from adoption of new energy conservation standards. For the December 2009 NOPR and today's final rule, DOE calculated this change using the NEMS–BT computer model. NEMS–BT models certain policy scenarios such as the effect of reduced energy consumption by fuel type. The output of the analysis provides a forecast for the needed generation capacities at each TSL. While DOE was able to use the forecasts from the *AEO 2010* Early Release for the national impacts analysis, the NEMS–BT model corresponding to this case was not yet available. Thus, for the utility impact analysis, the estimated net benefit of the standards in today's final rule is the difference between the forecasted generation capacities by NEMS–BT and the *AEO 2009* April Release Reference Case. DOE expects that the results would be only minimally different if it had been able to use the NEMS–BT model corresponding to the *AEO 2010* Early Release. DOE obtained the energy savings inputs associated with efficiency improvements to considered products from the NIA. These inputs reflect the effects of both fuel (natural gas) and electricity consumption savings. Chapter 13 of the final rule TSD presents more information on the utility impact analysis.

[22] More information regarding ImSET is available online at: *http://www.pnl.gov/main/publications/external/technical_reports/PNNL-15273.pdf.*

1. Effects of Standards on Energy Prices and Associated Benefits

To evaluate potentially important indirect effects of energy conservation standards on energy users in general, in its December 2009 NOPR analysis, DOE analyzed the potential impact on natural gas prices resulting from amended standards on water heaters and the associated benefits for all natural gas users in all sectors of the economy. 74 FR 65852, 65914–15 (Dec. 11, 2009). (DOE did not include natural gas savings from amended standards on DHE and pool heaters in its analysis because they are not large enough to have a noticeable impact.) DOE used NEMS–BT to model the impact of the natural gas savings associated with possible standards on natural gas prices. Like other widely-used energy-economic models, NEMS incorporates parameters to estimate the changes in energy prices that would result from an increase or decrease in energy demand. The response of price observed in the NEMS output changes over the forecast period based on the model's dynamics of natural gas supply and demand. For each year, DOE calculated the nominal savings in total natural gas expenditures by multiplying the estimated annual change in the average end-user natural gas price by the annual total U.S. natural gas consumption, adjusted for the estimated natural gas savings associated with each TSL. DOE then calculated the NPV of the savings in natural gas expenditures for 2015 to 2045 using 3- and 7-percent discount rates for each scenario. However, because there is uncertainty about the extent to which the calculated impacts from reduced natural gas prices are a benefits transfer, DOE tentatively concluded that it should not give a heavy weight to this factor in its consideration of the economic justification of standards on heating products.

NRDC stated that DOE should give full weight to the aggregate benefit of reduced natural gas prices that result from the standards. NRDC stated that this consumer benefit needs to be quantified and included in the national impact analysis. NRDC disagreed with DOE that this factor not be given heavy weight because lower natural gas prices may be a benefits transfer from producers to consumers, and stated that there is no logical or statutory basis for failing to give the reduction in natural gas prices from efficiency standards their full weight (NRDC, No. 85 at p. 4) In response, DOE notes that the benefits to all consumers associated with reductions in energy prices resulting from standards is not listed among the seven factors that EPCA directs DOE to evaluate in determining whether an energy conservation standard for covered products is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII)) Indeed, EPCA specifically directs DOE to consider the economic impact of the standard on manufacturers and consumers of the products subject to the standard. While it is true that EPCA directs DOE to consider other factors the Secretary of Energy considers relevant, in so doing, DOE takes under advisement the guidance provided by OMB on the development of regulatory analysis. Specifically, at page 38, Circular A–4 states, "You should not include transfers in the estimates of the benefits and costs of a regulation."

As discussed in the December 2009 NOPR, when gas prices drop in response to lower demand and a lower output of existing natural gas production capacity, consumers benefit but producers suffer. In economic terms, the situation represents a benefits transfer to consumers (whose expenditures fall) from producers (whose revenue falls equally). When prices decrease because extraction costs decline, however, consumers and producers both benefit, and the change in natural gas prices represents a net gain to society. Consumers benefit from the lower prices, and producers, whose revenues and costs both fall, are no worse off. DOE is continuing to investigate the extent to which a change in natural gas prices projected to result from standards represents a net gain to society. At this time, however, DOE retains the position that it should not give a heavy weight to this factor in its consideration of the economic justification of standards on heating products.

In its December 2009 NOPR analysis, DOE also considered the possibility of estimating the impact of specific standard levels on electricity prices. Investigation conducted for the rulemaking for general service fluorescent lamps and incandescent reflector lamps [23] found that whereas natural gas markets exhibit a fairly simple chain of agents from producers to consumers, the electric power industry is a complex mix of fuel suppliers, producers, and distributors. While the distribution of electricity is regulated everywhere, its institutional structure varies, and upstream actors are

[23] *See* U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, "Energy Conservation Standards for General Service Fluorescent Lamps and Incandescent Reflector Lamps; Proposed Rule," 74 FR 16920, 16978–79 (April 13, 2009).

more diverse. For these and other reasons, DOE decided not to estimate the value of potentially reduced electricity costs for all consumers associated with amended standards for heating products.

NPCC stated that DOE should estimate the economic benefits of the reduced need for new electric power plants and infrastructure and include such estimation in the utility impacts analysis. It stated that since a primary goal of the Federal appliance standards program is to avoid construction and operation of unnecessary generating facilities and their associated environmental impacts, failure to quantify the economic value of doing so appears to be a fundamental oversight. (NPPC, No. 87 at p. 6) In a similar vein, NRDC criticized DOE for not analyzing the benefits associated with reduced electricity prices resulting from standards. NDRC stated that the use of NEMS–BT should be explored as a way to quantify the benefit of avoided generation and the corresponding rate impact, and that DOE should give full weight to the aggregate benefit of reduced electricity prices that result from the standards. (NRDC, No. 85 at p. 4–5)

In response to the above comments, DOE used NEMS–BT to assess the impacts of the reduced need for new electric power plants and infrastructure projected to result from standards. In NEMS–BT, changes in power generation infrastructure affect utility revenue requirements, which in turn affect electricity prices. As described in chapter 13 of the TSD, DOE found that the impact on electricity prices from a change in electricity demand is smaller than the impact seen for natural gas prices. Although the aggregate benefits for all electricity users are potentially large, DOE believes that there is uncertainty about the extent to which the calculated impacts from reduced electricity prices are a benefits transfer from the actors involved in electricity supply. Because of the aforementioned complexity and diversity of the electric power sector in the U.S., DOE has concluded that, at present, it should not give a heavy weight to this factor in its consideration of the economic justification of standards on heating products. DOE is continuing to investigate the extent to which change in electricity prices projected to result from standards represents a net gain to society.

L. Environmental Assessment

Pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) 42 U.S.C. 6295(o)(2)(B)(i)(VI), DOE prepared a draft environmental assessment (EA) of the potential impacts of the standards for heating products in today's final rule, which it has included as chapter 16 of the TSD. DOE found that the environmental effects associated with the standards for heating products were not significant. Therefore, DOE is issuing a Finding of No Significant Impact (FONSI), pursuant to NEPA, the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and DOE's regulations for compliance with NEPA (10 CFR part 1021). The FONSI is available in the docket for this rulemaking.

In the EA, DOE estimated the reduction in power sector emissions of CO_2, NO_X, and Hg using the NEMS–BT computer model. In the EA, NEMS–BT is run similarly to the *AEO* NEMS, except that energy use of the heating products is reduced by the amount of energy saved (by fuel type) due to the TSLs. The inputs of national energy savings come from the NIA analysis; the output is the forecasted physical emissions. The estimated net benefit of the standards in today's final rule is the difference between the forecasted emissions by NEMS–BT at each TSL and the *AEO 2009* April Early Release Reference Case. NEMS–BT tracks CO_2 emissions using a detailed module that provides results with broad coverage of all sectors and inclusion of interactive effects. Because the on-site operation of non-electric heating products requires use of fossil fuels and results in emissions of CO_2, NO_X, and sulfur dioxide (SO_2), DOE also accounted for the reduction in these emissions due to standards at the sites where these appliances are used.

DOE has determined that SO_2 emissions from affected Electric Generating Units (EGUs) are subject to nationwide and regional emissions cap and trading programs that create uncertainty about the impact of energy conservation standards on SO_2 emissions. Because of the cap, energy reductions due to energy conservation standards result in no reduction in SO_2 emissions, although the costs of meeting such emission cap requirements are reflected in the electricity prices and forecasts used in DOE's analysis of the standards. Title IV of the Clean Air Act sets an annual emissions cap on SO_2 for all affected EGUs. SO_2 emissions from 28 eastern States and the District of Columbia (D.C.) are also limited under the Clean Air Interstate Rule (CAIR, published in the **Federal Register** on May 12, 2005; 70 FR 25162 (May 12, 2005), which creates an allowance-based trading program that will gradually replace the Title IV program in those States and DC. (The recent legal history surrounding CAIR is discussed below.) The attainment of the emissions caps is flexible among EGUs and is enforced through the use of emissions allowances and tradable permits. Under existing EPA regulations, any excess SO_2 emission allowances resulting from the lower electricity demand caused by the imposition of an efficiency standard could be used to permit offsetting increases in SO_2 emissions by any regulated EGU. However, if the standard resulted in a permanent increase in the quantity of unused emission allowances, there would be an overall reduction in SO_2 emissions from the standards. While there remains some uncertainty about the ultimate effects of efficiency standards on SO_2 emissions covered by the existing cap-and-trade system, the NEMS–BT modeling system that DOE uses to forecast emissions reductions currently indicates that no physical reductions in power sector emissions would occur for SO_2.

Much like SO_2 emissions, NO_X emissions from 28 eastern States and D.C. are limited under the CAIR. Although CAIR has been remanded to EPA by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), it will remain in effect until it is replaced by a rule consistent with the Court's July 11, 2008, opinion in *North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008); *see* also *North Carolina* v. *EPA,* 550 F.3d 1176 (D.C. Cir. 2008). These court positions were taken into account in the analysis conducted for the December 2009 NOPR and in today's final rule. Because all States covered by CAIR opted to reduce NO_X emissions through participation in cap-and-trade programs for electric generating units, emissions from these sources are capped across the CAIR region.

In the 28 eastern States and D.C. where CAIR is in effect, DOE's forecasts indicate that no NO_X emissions reductions will occur due to energy conservation standards because of the permanent cap. Energy conservation standards have the potential to produce an economic impact in the form of lower prices for NO_X emissions allowances, if their impact on electricity demand is large enough. However, DOE has concluded that the standards in today's final rule will not have such an effect because the estimated reduction in electricity demand in States covered by the CAIR cap would be too small to affect allowance prices for NO_X under the CAIR.

New or amended energy conservation standards would reduce NO_X emissions

in those 22 States that are not affected by the CAIR. DOE used the NEMS–BT to forecast emission reductions from the standards in today's final rule.

Similar to emissions of SO_2 and NO_X, future emissions of Hg would have been subject to emissions caps. The Clean Air Mercury Rule (CAMR) would have permanently capped emissions of mercury from new and existing coal-fired plants in all States beginning in 2010 (70 FR 28606). However, the CAMR was vacated by the D.C. Circuit in its decision in *New Jersey* v. *Environmental Protection Agency,* 517 F 3d 574 (D.C. Cir. 2008). Thus, DOE was able to use the NEMS–BT model, which reflects CAMR being vacated and does not incorporate CAMR emission caps, to estimate the changes in Hg emissions resulting from today's final rule. However, DOE continues to review the impact of rules that reduce energy consumption on Hg emissions, and may revise its assessment of Hg emission reductions in future rulemakings.

The operation of non-electric heating products requires use of fossil fuels and results in emissions of CO_2, NO_X and SO_2 at the sites where these appliances are used. NEMS–BT provides no means for estimating such emissions. DOE calculated the effect of the standards in today's final rule on the above site emissions based on emissions factors derived from the literature. *See* Chapter 16 of the final rule TSD for additional details.

EEI stated that if DOE examines changes in power plant emissions, then it should also examine changes in the emissions associated with oil extraction (domestic and overseas), crude oil transportation (sea-based and land-based), natural gas flaring, oil refining, refined oil delivery, natural gas production, natural gas delivery, natural gas delivery system methane leaks, propane production and delivery, and emissions associated with the extraction and importation of liquefied natural gas. (EEI, No. 95 at p. 5)

As noted in chapter 16 of the TSD, DOE developed only qualitative estimates of effects on upstream fuel-cycle emissions because NEMS–BT does a thorough accounting only of emissions at the power plant due to downstream energy consumption. In other words, NEMS–BT does not account for upstream emissions. Therefore, the environmental assessment for today's final rule reports only power plant emissions.

EEI stated that DOE should consider the production process in the EA, especially if higher efficiency standards result in more water heaters being manufactured in other countries. (EEI, No. 95 at p. 5) In response, DOE believes that the standards in today's final rule are unlikely to result in significant change in the location of water heater manufacturing. The dimensions and weight of water heaters, and the resulting shipping expense, mitigate against overseas production of the entire unit.

M. Monetizing Carbon Dioxide and Other Emissions Impacts

As part of the development of this final rule, DOE considered the estimated monetary benefits likely to result from the reduced emissions of CO_2 and other pollutants that are expected to result from each of the TSLs considered. This section summarizes the basis for the estimated monetary values used for each of these emissions and presents the benefits estimates considered.

For today's final rule, DOE is relying on a new set of values for the social cost of carbon (SCC) that were recently developed by an interagency process. A summary of the basis for these new values is provided below, and a more detailed description of the methodologies used is provided as an Annex to Chapter 16 of the TSD.

1. Social Cost of Carbon

Under Executive Order 12866, agencies are required, to the extent permitted by law, "to assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." The purpose of the SCC estimates presented here is to allow agencies to incorporate the social benefits of reducing CO_2 emissions into cost-benefit analyses of regulatory actions that have small, or "marginal," impacts on cumulative global emissions. The estimates are presented with an acknowledgement of the many uncertainties involved and with a clear understanding that they should be updated over time to reflect increasing knowledge of the science and economics of climate impacts.

The SCC is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year. It is intended to include (but is not limited to) changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services due to climate change.

As part of the interagency process that developed these SCC estimates, technical experts from numerous agencies met on a regular basis to consider public comments, explore the technical literature in relevant fields, and discuss key model inputs and assumptions. The main objective of this process was to develop a range of SCC values using a defensible set of input assumptions grounded in the existing scientific and economic literatures. In this way, key uncertainties and model differences transparently and consistently inform the range of SCC estimates used in the rulemaking process.

The interagency group selected four SCC values for use in regulatory analyses. Three values are based on the average SCC from three integrated assessment models, at discount rates of 2.5, 3, and 5 percent. The fourth value, which represents the 95th percentile SCC estimate across all three models at a 3-percent discount rate, is included to represent higher-than-expected impacts from temperature change further out in the tails of the SCC distribution.

TABLE IV.28—SOCIAL COST OF CO_2, 2010–2050 (IN 2007 DOLLARS)

Discount year	5% Avg	3% Avg	2.5% Avg	3% 95th
2010	4.7	21.4	35.1	64.9
2015	5.7	23.8	38.4	72.8
2020	6.8	26.3	41.7	80.7
2025	8.2	29.6	45.9	90.4
2030	9.7	32.8	50.0	100.0
2035	11.2	36.0	54.2	109.7
2040	12.7	39.2	58.4	119.3
2045	14.2	42.1	61.7	127.8
2050	15.7	44.9	65.0	136.2

a. Monetizing Carbon Dioxide Emissions

The "social cost of carbon" (SCC) is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year. It is intended to include (but is not limited to) changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services. Estimates of the social cost of carbon are provided in dollars per metric ton of carbon dioxide. [24]

When attempting to assess the incremental economic impacts of carbon dioxide emissions, the analyst faces a number of serious challenges. A recent report from the National Academies of Science (*Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use.* National Academies Press. 2009) points out that any assessment will suffer from uncertainty, speculation, and lack of information about: (1) Future emissions of greenhouse gases, (2) the effects of past and future emissions on the climate system, (3) the impact of changes in climate on the physical and biological environment, and (4) the translation of these environmental impacts into economic damages. As a result, any effort to quantify and monetize the harms associated with climate change will raise serious questions of science, economics, and ethics and should be viewed as provisional.

Despite the serious limits of both quantification and monetization, SCC estimates can be useful in estimating the social benefits of reducing carbon dioxide emissions. Under Executive Order 12866, agencies are required, to the extent permitted by law, "to assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." The purpose of the SCC estimates presented here is to make it possible for agencies to incorporate the social benefits from reducing carbon dioxide emissions into cost-benefit analyses of regulatory actions that have small, or "marginal," impacts on cumulative global emissions. Most Federal regulatory actions can be expected to have marginal impacts on global emissions.

For such policies, the benefits from reduced (or costs from increased) emissions in any future year can be estimated by multiplying the change in emissions in that year by the SCC value appropriate for that year. The net present value of the benefits can then be calculated by multiplying each of these future benefits by an appropriate discount factor and summing across all affected years. This approach assumes that the marginal damages from increased emissions are constant for small departures from the baseline emissions path, an approximation that is reasonable for policies that have effects on emissions that are small relative to cumulative global carbon dioxide emissions. For policies that have a large (non-marginal) impact on global cumulative emissions, there is a separate question of whether the SCC is an appropriate tool for calculating the benefits of reduced emissions; we do not attempt to answer that question here.

An interagency group convened on a regular basis to consider public comments, explore the technical literature in relevant fields, and discuss key inputs and assumptions in order to generate SCC estimates. Agencies that actively participated in the interagency process include the Environmental Protection Agency, and the Departments of Agriculture, Commerce, Energy, Transportation, and Treasury. This process was convened by the Council of Economic Advisers and the Office of Management and Budget, with active participation and regular input from the Council on Environmental Quality, National Economic Council, Office of Energy and Climate Change, and Office of Science and Technology Policy. The main objective of this process was to develop a range of SCC values using a defensible set of input assumptions that are grounded in the existing literature. In this way, key uncertainties and model differences can more transparently and consistently inform the range of SCC estimates used in the rulemaking process.

The interagency group selected four SCC estimates for use in regulatory analyses. For 2010, these estimates are $4.7, $21.4, $35.1, and $64.9 (in 2007 dollars). The first three estimates are based on the average SCC across models and socio-economic and emissions scenarios at the 5, 3, and 2.5-percent discount rates, respectively. The fourth value is included to represent the higher-than-expected impacts from temperature change further out in the tails of the SCC distribution. For this purpose, we use the SCC value for the 95th percentile at a 3-percent discount rate. The central value is the average SCC across models at the 3-percent discount rate. For purposes of capturing the uncertainties involved in regulatory impact analysis, we emphasize the importance and value of considering the full range. These SCC estimates also grow over time. For instance, the central value increases to $24 per ton of CO_2 in 2015 and $26 per ton of CO_2 in 2020. *See* Appendix A of the Annex to Chapter 16 of the TSD for the full range of annual SCC estimates from 2010 to 2050.

It is important to emphasize that the interagency process is committed to updating these estimates as the science and economic understanding of climate change and its impacts on society improves over time. Specifically, the interagency group set a preliminary goal of revisiting the SCC values within two years or at such time as substantially updated models become available, and to continue to support research in this area. In the meantime, we will continue to explore the issues raised by this analysis and consider public comments as part of the ongoing interagency process.

b. Social Cost of Carbon Values Used in Past Regulatory Analyses

To date, economic analyses for Federal regulations have used a wide range of values to estimate the benefits associated with reducing carbon dioxide emissions. In the final model year 2011 CAFE rule, the Department of Transportation (DOT) used both a "domestic" SCC value of $2 per ton of CO_2 and a "global" SCC value of $33 per ton of CO_2 for 2007 emission reductions (in 2007 dollars), increasing both values at 2.4 percent per year. It also included a sensitivity analysis at $80 per ton of CO_2. A domestic SCC value is meant to reflect the value of damages in the United States resulting from a unit change in carbon dioxide emissions, while a global SCC value is meant to reflect the value of damages worldwide.

A 2008 regulation proposed by DOT assumed a domestic SCC value of $7 per ton CO_2 (in 2006 dollars) for 2011 emission reductions (with a range of $0-$14 for sensitivity analysis), also increasing at 2.4 percent per year. A regulation finalized by DOE in October of 2008 used a domestic SCC range of $0 to $20 per ton CO_2 for 2007 emission reductions (in 2007 dollars). In addition, EPA's 2008 Advance Notice of Proposed Rulemaking for Greenhouse Gases identified what it described as "very preliminary" SCC estimates subject to revision. EPA's global mean values were

[24] In this document, DOE presents all values of the SCC as the cost per metric ton of CO_2 emissions. Alternatively, one could report the SCC as the cost per metric ton of carbon emissions. The multiplier for translating between mass of CO_2 and the mass of carbon is 3.67 (the molecular weight of CO_2 divided by the molecular weight of carbon = 44/12 = 3.67).

$68 and $40 per ton CO_2 for discount rates of approximately 2 percent and 3 percent, respectively (in 2006 dollars for 2007 emissions).

In 2009, an interagency process was initiated to offer a preliminary assessment of how best to quantify the benefits from reducing carbon dioxide emissions. To ensure consistency in how benefits are evaluated across agencies, the Administration sought to develop a transparent and defensible method, specifically designed for the rulemaking process, to quantify avoided climate change damages from reduced CO_2 emissions. The interagency group did not undertake any original analysis. Instead, it combined SCC estimates from the existing literature to use as interim values until a more comprehensive analysis could be conducted.

The outcome of the preliminary assessment by the interagency group was a set of five interim values: Global SCC estimates for 2007 (in 2006 dollars) of $55, $33, $19, $10, and $5 per ton of CO_2. The $33 and $5 values represented model-weighted means of the published estimates produced from the most recently available versions of three integrated assessment models—DICE, PAGE, and FUND—at approximately 3 and 5 percent discount rates. The $55 and $10 values were derived by adjusting the published estimates for uncertainty in the discount rate (using factors developed by Newell and Pizer (2003)) at 3 and 5 percent discount rates, respectively. The $19 value was chosen as a central value between the $5 and $33 per ton estimates. All of these values were assumed to increase at 3 percent annually to represent growth in incremental damages over time as the magnitude of climate change increases.

These interim values represent the first sustained interagency effort within the U.S. Government to develop an SCC for use in regulatory analysis. The results of this preliminary effort were presented in several proposed and final rules and were offered for public comment in connection with proposed rules, including the joint EPA–DOT fuel economy and CO_2 tailpipe emission proposed rules.

c. Approach and Key Assumptions

Since the release of the interim values, interagency group reconvened on a regular basis to generate improved SCC estimates considered for this final rule. Specifically, the group considered public comments and further explored the technical literature in relevant fields.

It is important to recognize that a number of key uncertainties remain, and that current SCC estimates should be treated as provisional and revisable since they will evolve with improved scientific and economic understanding. The interagency group also recognizes that the existing models are imperfect and incomplete. The National Academy of Science (2009) points out that there is tension between the goal of producing quantified estimates of the economic damages from an incremental ton of carbon and the limits of existing efforts to model these effects. There are a number of concerns and problems that should be addressed by the research community, including research programs housed in many of the agencies participating in the interagency process to estimate the SCC.

The U.S. Government will periodically review and reconsider estimates of the SCC used for cost-benefit analyses to reflect increasing knowledge of the science and economics of climate impacts, as well as improvements in modeling. In this context, statements recognizing the limitations of the analysis and calling for further research take on exceptional significance. The interagency group offers the new SCC values with all due humility about the uncertainties embedded in them and with a sincere promise to continue work to improve them.

In summary, in considering the potential global benefits resulting from reduced CO_2 emissions, DOE used the most recent values identified by the interagency process, adjusted to 2009$ using the standard GDP deflator values for 2008 and 2009. For each of the four cases specified, the values for emissions in 2010 used were approximately $5, $22, $36, and $67 per metric ton avoided (values expressed in 2009$). To monetize the CO_2 emissions reductions expected to result from amended standards for residential water heaters in 2015–2045 and for direct heating equipment and pool heaters in 2013–2043, DOE used the values identified in Table A1 of the "Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866," which is reprinted as an Annex to Chapter 16 of the TSD, appropriately escalated to 2009$. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the discount rates that had been used to obtain the SCC values in each case.

NRDC stated that the economic impacts of avoided CO_2 emissions should be aggregated into the NIA. (NRDC, No. 85 at p. 3) As discussed in section IV.G.1, the NIA assesses the national energy savings and the national net present value of total consumer costs and savings expected to result from standards at specific efficiency levels. The NPV is not intended as a measure of all national economic benefits associated with standards. Although DOE does not aggregate the estimated economic benefits of avoided CO_2 emissions (and other emissions) into the NIA, it does believe that the NPV of the monetized benefits associated with emissions reductions can be viewed as a complement to the NPV of the consumer savings calculated for each TSL considered in this rulemaking. Therefore, in section VI of this final rule, DOE presents the NPV values that would result if DOE were to add the estimates of the potential economic benefits resulting from reduced CO_2 and NO_X emissions in each of four valuation scenarios to the NPV of consumer savings calculated for each TSL considered in this rulemaking.

2. Monetary Values of Non-Carbon Emissions

As previously stated, DOE's analysis assumed the presence of nationwide emission caps on SO_2 and caps on NO_X emissions in the 28 States covered by CAIR. In the presence of these caps, the NEMS–BT modeling system that DOE used to forecast emissions reduction indicated that no physical reductions in power sector emissions would occur (although there remains uncertainty about whether physical reduction of SO_2 will occur), but that the standards could put slight downward pressure on the prices of emissions allowances in cap-and-trade markets. Estimating this effect is very difficult because of factors such as credit banking that can change the trajectory of prices. From its modeling to date, DOE is unable to estimate a benefit from energy conservation standards on the prices of emissions allowances at this time. *See* the environmental assessment in the final rule TSD for further details.

DOE also investigated the potential monetary benefit of reduced NO_X emissions from the TSLs it considered. As noted above, new or amended energy conservation standards would reduce NO_X emissions in those 22 States that are not affected by CAIR, in addition to the reduction in site NO_X emissions nationwide. DOE estimated the monetized value of NO_X emissions reductions resulting from each of the TSLs considered for today's final rule based on environmental damage estimates from the literature. Available estimates suggest a very wide range of monetary values for NO_X emissions, ranging from $370 per ton to $3,800 per ton of NO_X from stationary sources, measured in 2001$ (equivalent to a

range of $447 to $4,591 per ton in 2009$).[25]

EEI stated that the costs of remediating emissions are included in the electricity rates that consumers pay, and care should be taken not to double count the benefits of reduced emissions. (EEI, No. 95 at p. 5) DOE understands the comment as referring to actions power plant operators take to meet environmental regulations, the costs of which are reflected in electricity rates. With regulations currently in place, revised standards for heating products would result in a reduction in CO_2 and NO_X emissions by avoiding electricity generation. Because these emissions impose societal costs, their reduction has an economic value that can be estimated.

DOE is not including monetization estimates of Hg in today's final rule. DOE is aware of multiple agency efforts to determine the appropriate range of values used in evaluating the potential economic benefits of reduced Hg emissions. DOE has decided to await further guidance regarding consistent valuation and reporting of Hg emissions before further monetizing Hg in its rulemakings. As explained earlier, DOE was able to use the NEMS–BT model to estimate the changes in Hg emissions resulting from today's final rule, and it has considered these physical emissions reductions as part of the standard-setting process. DOE notes that the amounts of Hg under consideration in today's final rule are not large, so the monetized results would be unlikely to be significant as compared to the total costs and benefits of the rule.

V. Discussion of Other Comments

A. Trial Standard Levels and Proposed Standards

Since DOE opened the docket for this rulemaking, it has received more than one hundred unique written comments, with hundreds of signatories, from a diverse set of parties, including manufacturers and their representatives, State Attorneys General, members of Congress, energy conservation advocates, consumer advocacy groups, electric and gas utilities, and private citizens. DOE also received more than 17,000 form letter submissions recommending that DOE strengthen the proposed energy conservation standards. All substantive comments on the analytical methodologies DOE used are discussed above. DOE also received many comments related to the relative merits of various TSLs. Generally, these comments either stated that a certain TSL was economically justified, technologically feasible, and maximized energy, or they argued how DOE should weigh the various factors that go into making that determination. *See* section VI.D for a discussion of DOE's analytical results and how it weighed those factors in establishing today's final rule.

For today's final rule, DOE has revised the NOPR TSLs for water heaters and direct heating equipment and continued to analyze the same TSLs for pool heaters. A detailed description of these TSL revisions for water heaters and direct heating equipment is provided in section VI.A. A brief summary is provided in the sections that follow.

1. Water Heaters

In the NOPR, DOE proposed TSL 4 for water heaters. 74 FR 65852, 65854 (Dec. 11, 2009). As discussed in that document, DOE strongly considered NOPR TSL 5, which would provide additional energy and carbon savings, while mitigating some of the issues associated with a national heat pump water heater standard, but it identified a number of potential issues for which DOE did not have adequate information to address before the publication of the NOPR. (See 74 FR 65852, 65965–67 (Dec. 11, 2009)). DOE is adding a new TSL 5 for the final rule, which is a slight modification of the NOPR TSL 5. The NOPR TSL 5 is now referred to as TSL 6 for the final rule. DOE tentatively concluded that at NOPR TSL 5 (now final rule TSL 6), the benefits would be outweighed by several burdens, but it stated that it will revisit this decision and strongly consider adoption of TSL 6 in the final rule in light of any comments and data submitted by interested parties. Many of those comments were discussed in section IV. Below DOE presents further comments on NOPR TSL 5 (now final rule TSL 6), as well as on the proposed NOPR TSL 4.

Support for setting a standard at NOPR TSL 5 (TSL 6 for this final rule) was expressed by several interested parties. As noted above, DOE received over 17,000 form letters from private citizens advocating stronger standards for water heaters. (Private Citizens, No. 63 and 74) The Joint Advocacy comment (submitted by ASAP) stated that its signatories are very pleased with the DOE's proposed new efficiency standards for most storage-type residential water heaters but urged DOE to adopt stronger efficiency levels (NOPR TSL 5) for the largest units, which would help assure a market for these new emerging products where they are most cost-effective. It stated that NOPR TSL 5 offers a middle ground that increases savings relative to NOPR TSL 4 while also fostering the development of precisely the knowledge base and market infrastructure needed for a longer term, market-wide transition to high-efficiency technologies. It strongly urged DOE to choose NOPR TSL 5 (now TSL 6), for the final rule. (ASAP, No. 102 at p. 2) NRDC stated that NOPR TSL 5 should be adopted for water heaters as it is technically feasible, economically justified, and provides significant additional energy, economic, and environmental savings. (NRDC, No. 85 at p. 2) A comment provided by eight utilities stated support for NOPR TSL 5 because stronger standards for the biggest units would boost total energy and economic savings by more than 40 percent compared to the proposed rule, and DOE would be helping advanced technologies become mainstream products, thereby speeding transition to next-generation water heaters. (Eight utilities, No. 72 at p. 1) ASE stated that at NOPR TSL 5 the advanced technology requirements are limited to a modest share of total water heater shipments, which is a sensible means of addressing the issue of manufacturers being able to scale up the production of these products to meet the needs of the market. (ASE, No. 77 at p. 2) Other parties expressing support for choosing NOPR TSL 5 included Alabama Consumer Advocate, Avista, Energy Consumers Alliance of New England, KCP&L, Energy Trust of Oregon, Alliance to Save Energy, and NEEA. (ACA, No. 60 at p. 1; Avista, No. 66 at pp.1–2; Energy Consumers Alliance of New England, No. 59 at p. 1; KCP&L, No. 97 at p. 1; Energy Trust of Oregon, No. 69 at p. 1; Alliance to Save Energy, No. 56.4 at p.1; NEEA, No. 88 at p. 1)

Opposition to setting a standard at NOPR TSL 5 (now TSL 6 for the final rule) was also expressed by several interested parties. AHRI stated that NOPR TSL 5 would cause installation issues for large-volume, advanced-technology models and that consumers may opt for less-efficient alternative options. It stated that DOE's analysis has undervalued these factors, and as a result, AHRI expects that the actual energy savings will fall well short of the savings projected in the TSD. (AHRI, No. 91 at p. 6) A.O. Smith stated that it does not support NOPR TSL 5. It believes that the energy savings are overstated because many consumers,

[25] Refer to the OMB, Office of Information and Regulatory Affairs, "2006 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," Washington, DC, for additional information.

when faced with the increased cost of large-storage-capacity water heaters that are required to use either condensing gas or electric heat pump technology, would elect to install two smaller-storage-capacity water heaters instead of one larger capacity unit. (A.O. Smith, No. 76 at p. 4) Rheem commented that the energy savings from TSL 6 are significantly overstated, and it pointed to several options for consumers to work around the standards on large-volume units. (Rheem, No. 89 at pp. 6–7) BWC stated that the efficiency levels under consideration for larger-capacity water heaters would be difficult and expensive to obtain. (BWC, No. 61 at p. 1) Referring to NOPR TSL 5 and NOPR TSL 6, APPA stated that they do not support a standard that eliminates high efficiency electric resistance water heaters as a consumer option. It believes that these TSLs would cause an adverse economic impact for consumers and lessen the utility of the product. (APPA, No. 92 at p. 2) Southern Company stated that it does not agree with NOPR TSL 6 because performance of heat pump water heaters depends on climate and installation location. (Southern, No. 90 at pp. 3–4)

Support for NOPR TSL 4 (unchanged in the final rule), was expressed by APPA and A.O. Smith. (APPA, No. 92 at p. 2; A.O. Smith, No. 76 at p. 1) AHRI recommended that DOE should adopt minimum efficiency requirements for gas-fired and electric storage water heaters that have their basis in TSL 4 but have been modified to address issues related to the needs of the replacement market and unique attributes of some models. For electric storage water heaters 65 gallons and larger, AHRI recommended that DOE select TSL 3 (also unchanged for the final rule), as TSL 4 for this size presents a disproportionately large increase in efficiency. For oil-fired storage water heaters it recommended that DOE adopt TSL 3. For gas-fired instantaneous water heaters, AHRI recommended that the standard be changed to a minimum EF of 0.80 for models using an external electric supply and a minimum EF of 0.78 for models that do not use an external electric supply. (AHRI, No. 91 at p. 1) Rheem also supported a 0.80 EF level for gas-fired instantaneous water heaters and noted that the 0.82 EF level has a high payback period. (Rheem, No. 89 at p. 13) Bock supported TSL 3 because all storage water heater manufacturers are capable of meeting the standard, and it would allow consumers to have abundant hot water at a reasonable cost. (Bock, No. 101 at p. 3)

DOE acknowledges the positions expressed regarding adoption of either the proposed standards (TSL 4) or NOPR TSL 5 for water heaters. It addresses the arguments raised by the commenters, as well as other factors, in its discussion of the merits of the various considered TSLs in section VI.D.

2. Direct Heating Equipment

In the NOPR, DOE proposed TSL 3 for direct heating equipment. 74 FR 65852, 65854 (Dec. 11, 2009). The only modifications made to the TSLs analyzed for the final rule compared to those analyzed for the NOPR were to the efficiency levels in TSLs 3, 4, 5, and 6 for gas wall gravity DHE. DOE revised the efficiency levels analyzed for gas wall gravity DHE in the final rule to more accurately reflect the current market for products within the representative rated capacity. A detailed description of these changes is provided in section IV.C.2.b.

AHRI stated that no amended energy conservation standards should be set for traditional DHE because of the significant impact on manufacturers and the small energy savings. (AHRI, No. 91 at p. 10) AGA stated that standards should not be set for DHE because the low and declining shipments represent a minimal opportunity for energy savings, and the increased installed cost of DHE may lead to greater use of central heating, thereby increasing overall energy consumption (AGA, No. 78 at p. 11) Williams recommended that DOE not adopt standards for DHE because of the significant impact on manufacturers, the unique utility of DHE to heat homes without ductwork, design constraints, and safety concerns. Williams stated that manufacturers, as well as consumers, would be negatively impacted by the proposed rule. (Williams, No. 96 at pp. 1–2)

AHRI stated its belief that the proposed standards for traditional DHE (NOPR TSL 3) are too high and that the impact on manufacturers needs to be reconsidered. According to the commenter, the proposed levels would have very significant and costly effects on manufacturers. The DHE results show negative impact on the profitability of the manufacturers, all of which are small manufacturers, and there is a real concern about whether they could stay in business and make a profit at these levels. (AHRI, Public Meeting Transcript, No. 57.4 at pp. 28–29) AHRI reiterated DOE's estimates for the INPV decreasing between 6 and 33.5 percent at the proposed level, industry cash flow dropping from $1.4 million to −$0.9 million (a 162-percent decrease), and the conversion costs reaching $2.31 million per manufacturer (about 350 percent of estimated earnings before interest and taxation). AHRI also stated that the number of product lines per manufacturer would drop from 5 to 3 and that all of AHRI's members indicated a loss of employment would result. Finally, AHRI stated all these negative impacts would be compounded by a decline in sales. Because of all these negative impacts and insignificant energy savings, AHRI stated that DOE should not consider TSL 3 for the final rule (AHRI, No. 91 at p. 13)

LTS stated that DOE estimated that the conversion costs for a typical small DHE manufacturer at the proposed level would be $2.3 million or 347 percent of each company's earnings before interest and taxes. LTS questioned having to spend three or four years' profit to meet a standard they are certain will make them less profitable overall. (LTS, No. 56.7 at pp. 2–3; Public Meeting Transcript, No. 57.4 at p. 23) LTS reiterated the NOPR's estimate that industry cash flow could decrease up to 161.8 percent. Finally, LTS reiterated DOE's statement that the large estimated impact on INPV suggests that manufacturers would be substantially harmed if profitability were impacted. (LTS, No. 56.7 at p. 2)

Congressman Costello and Congressman Shimkus urged DOE to consider Empire's testimony and related concerns. Congressman Costello and Congressman Shimkus stated that Empire strongly believes the technology necessary to meet these proposed efficiency standards is not in place and that the cost of retrofitting these product lines does not justify the small energy savings for the small traditional DHE market. (Costello, No. 62 at p. 1)

DOE acknowledges the positions expressed regarding adoption of the proposed standards (TSL 3) for direct heating equipment. It addresses the arguments raised by the commenters, as well as other factors, in its discussion of the merits of the various considered TSLs in section VI.D.

3. Pool Heaters

In the NOPR, DOE proposed NOPR TSL 3 for pool heaters. 74 FR 65852, 65854 (Dec. 11, 2009). The TSLs analyzed in the final rule are identical to those analyzed in the NOPR. AHRI stated that the proposed standard for pool heaters is not economically justified because its payback period well exceeds product lifetime. It recommended the proposed standard for pool heaters be lowered to 81 percent. (AHRI, No. 91 at p. 9) Raypak stated that the proposed standard for pool heaters

has a very high payback period which is outside the lifetime of the appliance, so the commenter argued that such level should not be considered economically justified. Raypak supported adoption of amended energy conservation standards at TSL 1 for pool heaters because it would raise the efficiency level by 3 percentage points, while preventing the elimination of the millivolt design option. (Raypak, No. 67 at pp. 3–4) APSP stated that the proposed level could result in a significantly negative impact on the pool heater industry in these already turbulent economic times. (APSP, No. 64 at p. 1)

DOE acknowledges the positions expressed regarding adoption of the proposed standards (TSL 3) for pool heaters. It addresses the arguments raised by the commenters, as well as other factors, in its discussion of the merits of the various considered TSLs in section VI.D.

B. Compliance Date of Amended Standards

As discussed in section IV.F.9, compliance with amended energy conservation standards for direct heating equipment and pool heaters is required three years after the final rule is published in the **Federal Register** (*i.e.,* in 2013); compliance with amended energy conservation standards for water heaters is required five years after the final rule is published (*i.e.,* in 2015).

Raypak stated that the date of when the standard goes into effect should be changed to five years for pool heaters. (Raypak, No. 67 at p. 3) In response, DOE notes that the language in 42 U.S.C. 6295(e)(4) specifies compliance dates for amended standards (if any) for the heating products that are the subject of this rulemaking. These statutory dates were set such that they were to apply to products manufactured on or after the 36-month period beginning on the date such final rule was to be published for the first iteration of rulemaking and on or after the 60-month period beginning on the date such final rule was to be published for the second iteration of rulemaking. (42 U.S.C. 6295(e)(4)(A)–(B)) The language of 42 U.S.C. 6295(e)(4)(B) anticipates that a standard will be in place for covered pool heaters that are manufactured precisely three years after publication of the final rule and prospectively thereafter. Although DOE did not meet the rulemaking dates set by the statute, DOE continues to believe that the time differential, as specified in EPCA, between the publication of the final rule and the compliance deadline reflects Congress's judgment as to what constitutes adequate lead time. Consequently, for the final rule, DOE has maintained a compliance date corresponding to three years after final rule publication in the **Federal Register** for direct heating equipment and pool heaters, and five years after the date of publication in the **Federal Register** for water heaters.

VI. Analytical Results and Conclusions

A. Trial Standard Levels

DOE analyzed the benefits and burdens of a number of TSLs for each of the three types of heating products separately. For a given product consisting of several product classes, DOE developed some of the TSLs so that each TSL is comprised of energy efficiency levels from each product class that exhibit similar characteristics. For example, in the case of water heaters, one of the TSLs consists of the max-tech efficiency levels from each product class being considered for this rulemaking. DOE attempted to limit the number of TSLs considered for the December 2009 NOPR by eliminating efficiency levels that do not exhibit significantly different economic and/or engineering characteristics from the efficiency levels already selected as a TSL. For the December 2009 NOPR, DOE analyzed seven TSLs for water heaters, six TSLs for direct heating equipment, and six TSLs for pool heaters. 74 FR 65852, 65929–32 (Dec. 11, 2009).

For today's final rule, DOE has revised the TSLs for water heaters and direct heating equipment and continued to analyze the same TSLs for pool heaters. A description of each TSL DOE analyzed for each of the three types of heating products is provided below. While DOE only presents the results for those efficiency levels used in TSL combinations in today's final rule, DOE presents the results for all efficiency levels analyzed in the final rule TSD.

1. Water Heaters

Table VI.1 shows the eight TSLs DOE analyzed for water heaters for the final rule. Since amended water heater standards would apply to the full range of storage volumes, DOE is presenting the TSLs for water heaters in terms of the energy efficiency equations, rather than only showing the required efficiency level at the representative capacities. As further discussed in the December 2009 NOPR (74 FR 65852, 65929 (Dec. 11, 2009)), DOE is grouping the energy efficiency equations for each of the four water heater product classes to show the benefits and burdens of amended energy conservation standards.

For TSLs 1, 2, 3, and 4, DOE is using the rated storage volume divisions developed in the engineering analysis and the energy efficiency equations as shown in section IV.C.6, which specify a two-slope approach. TSLs 1, 2, 3, and 4 are identical to those presented in the December 2009 NOPR. TSL 1 consists of the efficiency levels for each product class that are approximately equal to the current shipment-weighted average efficiency. TSL 2 and TSL 3 consist of efficiency levels with slightly higher efficiencies compared to TSL 1 for most of the product classes. TSL 4 represents the maximum electric resistance water heater efficiency across the entire range of storage volumes that DOE analyzed for electric storage water heaters, and the maximum atmospherically-vented efficiency across the entire range of storage volumes that DOE analyzed for gas-fired storage water heaters.

DOE is adding a new TSL 5 for the final rule, which is a slight modification of the December 2009 NOPR TSL 5 (currently referred to as TSL 6 for the final rule). For both TSL 5 and TSL 6, DOE considered a pairing of efficiency levels that would promote the penetration of advanced technologies into the electric and gas-fired storage water heater markets and potentially save additional energy by using a two-slope approach with different requirements for each category. Consequently, DOE pairs an efficiency level effectively requiring heat pump technology for large-volume electric storage water heaters with an efficiency level achievable using electric resistance technology for small-volume electric storage water heaters. In addition, DOE pairs an efficiency level effectively requiring condensing technology for large-volume gas storage water heaters with an efficiency level that can be achieved in atmospherically-vented gas-fired storage water heaters with increased insulation thickness for small storage volumes. The only difference between TSL 5 and TSL 6 for the final rule is the requirements for gas-fired storage water heaters. DOE reanalyzed these levels due to potential safety concerns, which were discussed above and are further discussed below. For gas-fired water heaters at TSL 5, DOE analyzed energy efficiency level 1 for small volumes paired with efficiency level 6 for large volumes. For gas-fired water heaters at TSL 6, DOE analyzed energy efficiency level 2 for small volumes paired with efficiency level 6 for large volumes.

Although it paired different technologies for small-volume and large-volume products for TSL 5 and TSL 6, DOE maintained the same

division point between small-volume and large-volume gas-fired and electric storage water heaters just as was done in the December 2009 NOPR. As further explained in the December 2009 NOPR, DOE is concerned that increased standards for large-volume water heaters may drive production and sales of water heaters at volumes just below the division points. 74 FR 65852, 65929 (Dec. 11, 2009). As a result, in analyzing TSL 5 and 6 for the final rule, DOE is using the same division points as it used for the December 2009 NOPR TSL 5, which is 55 gallons for gas-fired and electric storage water heaters, to attempt to mitigate the potential migration to small-volume units described above. TSL 5 and 6 include efficiency levels that effectively require heat pump technology for electric storage water heater with rated storage volumes above 55 gallons, and efficiency levels that effectively require condensing technology for gas-fired storage water heaters with rated storage volumes above 55 gallons. Using DOE's shipments model and market assessment, DOE estimated approximately 4 percent of gas-fired storage water heater shipments and 11 percent of models would be subject to the large-volume water heater requirements using the TSL 5 and TSL 6 division. Similarly, DOE estimated approximately 9 percent of electric storage water heater shipments and 27 percent of models would be subject to the large-volume water heater requirements using the TSL 5 and TSL 6 division.

TSL 7 uses the same divisions as TSLs 1, 2, 3, and 4 for gas-fired water heaters (*i.e.,* does not include the distinction at TSL 5 and TSL 6 for units above and below a 55-gallon storage capacity). TSL 7 is identical to TSL 4 except DOE is considering what is effectively a heat pump water heater level for electric storage water heaters across the entire range of storage volumes that is compatible with ENERGY STAR criteria for electric storage water heaters at the representative rated storage volume.

TSL 8 consists of the max-tech efficiency levels for each of the water heater product classes at the time the analysis was developed. The max-tech efficiency levels were revised for the final rule as described in the engineering analysis. TSL 7 and 8 both set efficiency levels that effectively require use of heat pump technology for electric storage water heaters. TSL 8, however, requires a higher efficiency level than TSL 7, which corresponds to the max-tech efficiency level for the representative rated storage capacity (*i.e.,* 2.35 EF at 50 gallons). TSL 8 also sets efficiency levels that effectively require use of condensing technology for gas-fired storage and instantaneous water heaters.

Table VI.1 presents the energy efficiency equations and associated two-slope divisions for TSL 1 through TSL 8.

TABLE VI.1—TRIAL STANDARD LEVELS FOR RESIDENTIAL WATER HEATERS (ENERGY FACTOR)

Trial standard level	Energy efficiency equation	
TSL 1	For GSWHs with a Rated Storage Volume at or below 60 gallons: EF = 0.675 − (0.0015 × Rated Storage Volume in gallons).	For GSWHs with a Rated Storage Volume above 60 gallons: EF = 0.699 − (0.0019 × Rated Storage Volume in gallons).
	For ESWHs with a Rated Storage Volume at or below 80 gallons: EF = 0.967 − (0.00095 × Rated Storage Volume in gallons).	For ESWHs with a Rated Storage Volume above 80 gallons: EF = 1.013 − (0.00153 × Rated Storage Volume in gallons).
	For OSWHs (over the Entire Rated Storage Volume range): EF = 0.64 − (0.0019 × Rated Storage Volume in gallons).	
	For GIWHs (over the Entire Rated Storage Volume range): EF = 0.82 − (0.0019 × Rated Storage Volume in gallons).	
TSL 2	For GSWHs with a Rated Storage Volume at or below 60 gallons: EF = 0.675 − (0.0012 × Rated Storage Volume in gallons).	For GSWHs with a Rated Storage Volume above 60 gallons: EF = 0.717 − (0.0019 × Rated Storage Volume in gallons).
	For ESWHs with a Rated Storage Volume at or below 80 gallons: EF = 0.966 − (0.0008 × Rated Storage Volume in gallons).	For ESWHs with a Rated Storage Volume above 80 gallons: EF = 1.026 − (0.00155 × Rated Storage Volume in gallons).
	For OSWHs (over the Entire Rated Storage Volume range): EF = 0.66 − (0.0019 × Rated Storage Volume in gallons).	
	For GIWHs (over the Entire Rated Storage Volume range): EF = 0.82 − (0.0019 × Rated Storage Volume in gallons).	
TSL 3	For GSWHs with a Rated Storage Volume at or below 60 gallons: EF = 0.675 − (0.0012 × Rated Storage Volume in gallons).	For GSWHs with a Rated Storage Volume above 60 gallons: EF = 0.717 − (0.0019 × Rated Storage Volume in gallons).
	For ESWHs with a Rated Storage Volume at or below 80 gallons: EF = 0.965 − (0.0006 × Rated Storage Volume in gallons).	For ESWHs with a Rated Storage Volume above 80 gallons: EF = 1.051 − (0.00168 × Rated Storage Volume in gallons).
	For OSWHs (over the Entire Rated Storage Volume range):	

TABLE VI.1—TRIAL STANDARD LEVELS FOR RESIDENTIAL WATER HEATERS (ENERGY FACTOR)—Continued

	EF = 0.68 − (0.0019 × Rated Storage Volume in gallons).	
	For GIWHs (over the Entire Rated Storage Volume range): EF = 0.82 − (0.0019 × Rated Storage Volume in gallons).	
TSL 4	For GSWHs with a Rated Storage Volume at or below 60 gallons: EF = 0.675 − (0.0012 × Rated Storage Volume in gallons).	For GSWHs with a Rated Storage Volume above 60 gallons: EF = 0.717 − (0.0019 × Rated Storage Volume in gallons).
	For ESWHs with a Rated Storage Volume at or below 80 gallons: EF = 0.960 − (0.0003 × Rated Storage Volume in gallons).	For ESWHs with a Rated Storage Volume above 80 gallons: EF = 1.088 − (0.0019 × Rated Storage Volume in gallons).
	For OSWHs (over the Entire Rated Storage Volume range): EF = 0.68 − (0.0019 × Rated Storage Volume in gallons).	
	For GIWHs (over the Entire Rated Storage Volume range): EF = 0.82 − (0.0019 × Rated Storage Volume in gallons).	
TSL 5	For GSWHs with a Rated Storage Volume at or below 55 gallons: EF = 0.675 − (0.0015 × Rated Storage Volume in gallons).	For GSWHs with a Rated Storage Volume above 55 gallons: EF = 0.8012 − (0.00078 × Rated Storage Volume in gallons).
	For ESWHs with a Rated Storage Volume at or below 55 gallons: EF = 0.960 − (0.0003 × Rated Storage Volume in gallons).	For ESWHs with a Rated Storage Volume above 55 gallons: EF = 2.057 − (0.00113 × Rated Storage Volume in gallons).
	For OSWHs (over the Entire Rated Storage Volume range): EF = 0.68 − (0.0019 × Rated Storage Volume in gallons).	
	For GIWHs (over the Entire Rated Storage Volume range): EF = 0.82 − (0.0019 × Rated Storage Volume in gallons).	
TSL 6	For GSWHs with a Rated Storage Volume at or below 55 gallons: EF = 0.675 − (0.0012 × Rated Storage Volume in gallons).	For GSWHs with a Rated Storage Volume above 55 gallons: EF = 0.8012 − (0.00078 × Rated Storage Volume in gallons).
	For ESWHs with a Rated Storage Volume at or below 55 gallons: EF = 0.960 − (0.0003 × Rated Storage Volume in gallons).	For ESWHs with a Rated Storage Volume above 55 gallons: EF = 2.057 − (0.00113 × Rated Storage Volume in gallons).
	For OSWHs (over the Entire Rated Storage Volume range): EF = 0.68 − (0.0019 × Rated Storage Volume in gallons).	
	For GIWHs (over the Entire Rated Storage Volume range): EF = 0.82 − (0.0019 × Rated Storage Volume in gallons).	
TSL 7	For GSWHs with a Rated Storage Volume at or below 60 gallons: EF = 0.675 − 0.0012 × Rated Storage Volume in gallons).	For GSWHs with a Rated Storage Volume above 60 gallons: EF = 0.717 − (0.0019 × Rated Storage Volume in gallons).
	For ESWHs (over the Entire Rated Storage Volume range): EF = 2.057 − (0.00113 × Rated Storage Volume in gallons).	
	For OSWHs (over the Entire Rated Storage Volume range): EF = 0.68 − (0.0019 × Rated Storage Volume in gallons).	
	For GIWHs (over the Entire Rated Storage Volume range): EF = 0.82 − (0.0019 × Rated Storage Volume in gallons).	
TSL 8	For GSWHs (over the Entire Rated Storage Volume range): EF = 0.8012 − (0.00078 × Rated Storage Volume in gallons).	
	For ESWHs (over the Entire Rated Storage Volume range): EF = 2.406 − (0.00113 × Rated Storage Volume in gallons).	
	For OSWHs (over the Entire Rated Storage Volume range): EF = 0.74 − (0.0019 × Rated Storage Volume in gallons).	

TABLE VI.1—TRIAL STANDARD LEVELS FOR RESIDENTIAL WATER HEATERS (ENERGY FACTOR)—Continued

	For GIWHs (over the Entire Rated Storage Volume range): EF = 0.95 − (0.0019 × Rated Storage Volume in gallons).

2. Direct Heating Equipment

Table VI.2 presents the six TSLs DOE analyzed for DHE in the final rule. The only modifications made to the TSLs analyzed for the final rule compared to those analyzed for the December 2009 NOPR were to the efficiency levels in TSLs 3, 4, 5, and 6 for gas wall gravity DHE. These changes were made due to a review of the gas wall gravity units currently offered for sale and the adjustment of the max-tech efficiency level in response to commenters.

In general, TSL 1 consists of the efficiency levels that are close to the current shipment-weighted average efficiency. TSL 2, TSL 3, and TSL 4 consist of efficiency levels that have gradually higher efficiency than TSL 1. TSL 5 consists of the efficiency levels that include electronic ignition and fan assist (where applicable), and TSL 6 consists of the max-tech efficiency levels for all of the DHE product classes.

TABLE VI.2—TRIAL STANDARD LEVELS FOR DIRECT HEATING EQUIPMENT (AFUE)

Product class	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
Gas Wall Fan (over 42,000 Btu/h)	75%	76%	77%	80%	75%	80%
Gas Wall Gravity (over 27,000 and up to 46,000 Btu/h)	66%	66%	69%	69%	70%	70%
Gas Floor (over 37,000 Btu/h)	58%	58%	58%	58%	58%	58%
Gas Room (over 27,000 and up to 46,000 Btu/h)	66%	67%	68%	68%	83%	83%
Gas Hearth (over 27,000 and up to 46,000 Btu/h)	67%	67%	67%	72%	72%	93%

3. Gas-Fired Pool Heaters

Table VI.3 shows the six TSLs DOE analyzed for pool heaters, which are identical to the TSLs analyzed in the December 2009 NOPR. TSL 1 consists of the efficiency level that is close to the current shipment-weighted average efficiency. TSL 2 and TSL 3 consist of efficiency levels that have gradually higher efficiency than TSL 1. TSL 4 is the highest efficiency level with positive NPV. TSL 5 is the highest analyzed non-condensing efficiency level, and TSL 6 consists of the max-tech efficiency level.

TABLE VI.3—TRIAL STANDARD LEVELS FOR POOL HEATERS (THERMAL EFFICIENCY)

Product class	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
Gas-fired	81%	82%	83%	84%	86%	95%

B. Significance of Energy Savings

To estimate the energy savings due to potential standards, from 2013 to 2043 for DHE and pool heaters and from 2015 to 2045 for water heaters, DOE compared the energy consumption attributable to the three types of heating products under the base case (no standards) to energy consumption attributable to these products under each standards case (each TSL that DOE has considered). Table VI.4, Table VI.5, and Table VI.6 present DOE's national energy savings (NES) estimates (undiscounted) for each of the three types of heating products, by product class at each TSL. Chapter 10 of the TSD describes these estimates in more detail.

TABLE VI.4—WATER HEATERS: CUMULATIVE NATIONAL ENERGY SAVINGS IN QUADS

Product class	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6	TSL 7	TSL 8
Gas-Fired Storage	0.69	1.17	1.17	1.17	0.81	1.29	1.17	4.91
Electric Storage	0.29	0.41	0.79	1.09	1.67	1.67	8.90	11.22
Oil-Fired Storage	0.00	0.01	0.01	0.01	0.01	0.01	0.01	0.02
Gas-Fired Instantaneous	0.08	0.08	0.08	0.08	0.08	0.08	0.08	0.58
Total	1.07	1.66	2.05	2.35	2.58	3.06	10.16	16.73

TABLE VI.5—DIRECT HEATING EQUIPMENT: CUMULATIVE NATIONAL ENERGY SAVINGS IN QUADS

Product class	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
Gas Wall Fan	0.01	0.01	0.01	0.03	0.01	0.03
Gas Wall Gravity	0.01	0.01	0.03	0.03	0.06	0.06
Gas Floor	0.0001	0.0001	0.0001	0.0001	0.0001	0.0001
Gas Room	0.001	0.002	0.004	0.004	0.04	0.04
Gas Hearth	0.19	0.19	0.19	0.37	0.37	1.13
Total	0.20	0.21	0.23	0.43	0.48	1.26

TABLE VI.6—POOL HEATERS: CUMULATIVE NATIONAL ENERGY SAVINGS IN QUADS

	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
Gas-Fired	0.01	0.02	0.04	0.06	0.09	0.22

C. Economic Justification

1. Economic Impact on Consumers

a. Life-Cycle Costs and Payback Period

Consumers affected by amended standards usually experience higher product purchase prices and lower operating costs. Generally, these impacts are captured by changes in life-cycle costs and by the payback period. Therefore, DOE calculated the LCC and PBP for the standard levels considered in this rulemaking.

DOE's LCC and PBP analyses provide seven key outputs for each TSL, which are reported in Table VI.7 through Table VI.16 below. The first two of these outputs is the average LCC and average LCC savings. (A negative "LCC savings" for a standard level indicates that the life-cycle cost of a standards-compliant product would be higher than the life-cycle cost of a baseline product.) The next three outputs are the proportion of purchases of the product that already comply with the TSL and that would create a net life-cycle cost, no impact, or a net life-cycle savings for the purchaser.

The sixth and seventh outputs are the median and average PBPs, respectively, for the consumer purchasing a design that complies with the TSL compared with purchasing a baseline product. The PBP is the number of years it would take for the purchaser to recover, as a result of energy savings, the increased cost of a higher-efficiency product based on operating cost savings from the first year of ownership. The PBP is an economic benefit-cost measure that uses benefits and costs without discounting. DOE's analysis includes both the analysis contemplated under the rebuttable presumption test, which is based on energy use as determined under conditions prescribed by the DOE test procedure, and analysis of the payback period based on conditions of actual use of the product by purchasers. DOE derived the median and average PBPs in Table VI.7 through Table VI.16 by using the latter method. While DOE examined the rebuttable presumption criterion (*see* chapter 8 of the TSD), it also evaluated the standard levels adopted in today's rule through a more detailed analysis of the economic impacts of these levels pursuant to section 325(o)(2)(B)(i) of EPCA. (42 U.S.C. 6295(o)(2)(B)(i))

TSD chapter 8 provides detailed information on the LCC and PBP analyses.

TABLE VI.7—GAS-FIRED STORAGE WATER HEATERS: LCC AND PBP RESULTS

TSL	Energy factor	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1	0.62	$3,528	$16	25	36	39	2.0	17.0
2, 3, 4	0.63	3,537	7	32	22	45	4.5	18.6
5*	0.62	3,528	18	27	33	40	2.3	16.9
6*	0.63	3,537	9	34	21	46	4.7	18.3
7	0.67	3,793	−218	70	6	23	21.5	27.1
8	0.77	3,771	−195	70	1	28	15.6	16.8

*For TSL 5 and 6, the EF and the results represent shipments-weighted averages of the EFs and results that apply to small- and large-volume water heaters, respectively. For the other TSLs, the EF and the results refer to the representative rated volume (40 gal).

TABLE VI.8—ELECTRIC STORAGE WATER HEATERS: LCC AND PBP RESULTS

TSL	Energy factor	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$				Median years	Average years
				Net cost %	No impact %	Net benefit %		
1	0.92	$3,255	$5	11	44	45	4.0	10.2
2	0.93	3,245	11	12	39	48	4.0	10.0
3	0.94	3,236	18	21	17	62	5.0	9.3
4	0.95	3,236	18	32	10	59	6.7	9.9
5, 6	*1.04	3,188	64	33	9	58	6.8	10.2
7	2.00	3,136	112	50	5	45	9.4	26.2
8	2.35	3,076	171	50	1	49	9.0	20.0

*For TSL 5 and 6, the EF and the results represent shipments-weighted averages of the EFs and results that apply to small-and large-volume water heaters, respectively. For the other TSLs, the EF and the results refer to the representative rated volume (50 gal).

TABLE VI.9—OIL-FIRED STORAGE WATER HEATERS: LCC AND PBP RESULTS

TSL	Energy factor	LCC	Average LCC 2009$				Payback period	
			Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1	0.58	$8,102	$101	0	76	24	0.9	0.9
2	0.60	7,885	203	0	54	46	0.3	0.2
3, 4, 5, 6, 7	0.62	7,721	295	0	47	53	0.5	0.7
8	0.68	7,463	495	0	17	83	1.9	2.1

TABLE VI.10—GAS-FIRED INSTANTANEOUS WATER HEATERS: LCC AND PBP RESULTS

TSL	Energy factor	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1 through 7	0.82	$5,505	$9	5	91	4	14.8	24.3
8	0.95	5,913	−259	77	12	11	38.7	55.0

TABLE VI.11—GAS WALL FAN DHE: LCC AND PBP RESULTS

TSL	AFUE %	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1, 5	75	$7,170	$83	0	60	40	2.7	2.7
2	76	7,131	102	3	53	44	3.2	3.9
3	77	7,114	114	19	26	55	5.0	9.9
4, 6	80	7,189	43	53	7	40	12.2	33.7

TABLE VI.12—GAS WALL GRAVITY DHE: LCC AND PBP RESULTS

TSL	AFUE %	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1, 2	66	$6,848	$21	10	75	15	7.5	13.8
3, 4	69	6,760	64	33	37	30	11.0	22.5
5, 6	70	6,880	−56	70	0	30	16.5	18.6

TABLE VI.13—GAS FLOOR DHE: LCC AND PBP RESULTS

TSL	AFUE %	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1, 2, 3, 4, 5, 6	58	$7,755	$13	23	58	19	10.7	16.5

TABLE VI.14—GAS ROOM DHE: LCC AND PBP RESULTS

TSL	AFUE %	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1	66	$7,349	$26	9	74	16	6.7	11.8
2	67	7,284	60	12	50	38	4.5	8.3
3, 4	68	7,226	104	19	25	57	4.8	8.2
5, 6	83	6,628	702	32	0	68	6.9	8.7

TABLE VI.15—GAS HEARTH DHE: LCC AND PBP RESULTS

TSL	AFUE %	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1, 2, 3	67	$5,146	$112	3	61	37	0.0	3.1
4, 5	72	5,324	−28	55	23	21	17.1	47
6	93	5,475	−179	77	1	22	26.8	60.2

TABLE VI.16—GAS-FIRED POOL HEATERS: LCC AND PBP RESULTS

TSL	Thermal efficiency %	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1	81	$8,212	$25	5	72	23	2.7	5.4
2	82	8,217	22	27	51	22	8.6	15.2
3	83	8,264	−6	60	23	17	18.2	32.3
4	84	8,322	−52	64	21	15	19.2	39.0
5	86	8,959	−632	88	9	3	38.1	85.8
6	95	9,698	−1,361	95	1	4	33.2	74.1

b. Consumer Subgroup Analysis

For water heaters, DOE estimated consumer subgroup impacts for low-income households and senior-only households by determining the LCC impacts of the TSLs considered for gas-fired and electric storage water heaters. In addition, DOE estimated consumer subgroup impacts on households in multi-family housing and households in manufactured homes for the TSLs considered for gas-fired and electric storage water heaters. DOE also estimated the consumer subgroup impacts for low-income households and senior-only households for gas wall fan and gas wall gravity DHE.

For gas-fired storage water heaters, the impacts of the standard in today's final rule are roughly the same for the senior-only subgroup and the low-income subgroup as they are for the full household sample for this product class (*see* Table VI.17 and Table VI.18). For the multi-family subgroup, the results report an average LCC increase (*i.e.,* negative savings) of $13, and they also show a 36-percent share of households with a net LCC benefit, and a 31-percent share of households with a net LCC cost (*see* Table VI.19). For the manufactured home subgroup, the results report an average LCC increase (*i.e.,* negative savings) of $17, and they also show a 35-percent share of households with a net LCC benefit, and a 36-percent share of households with a net LCC cost (*see* Table VI.20).

TABLE VI.17—GAS-FIRED STORAGE WATER HEATERS: LCC AND PBP RESULTS FOR SENIOR-ONLY HOUSEHOLDS

TSL	Energy factor	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1	0.62	$3,072	$14	27	32	41	1.9	19.4
2, 3, 4	0.63	3,081	7	34	19	47	4.1	19.5
5*	0.62	3,071	16	27	31	41	2.0	19.4
6*	0.63	3,079	9	34	19	47	4.2	19.3
7	0.67	3,355	−235	71	6	22	22.5	27.8

TABLE VI.17—GAS-FIRED STORAGE WATER HEATERS: LCC AND PBP RESULTS FOR SENIOR-ONLY HOUSEHOLDS—Continued

TSL	Energy factor	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
8	0.77	3,377	−257	75	1	24	17.4	18.2

* For TSL 5 and TSL 6, the EF and the results represent shipments-weighted averages of the EFs and results that apply to small-and large-volume water heaters, respectively. For the other TSLs, the EF and the results refer to the representative rated volume (40 gal).

TABLE VI.18—GAS-FIRED STORAGE WATER HEATERS: LCC AND PBP RESULTS FOR LOW-INCOME HOUSEHOLDS

TSL	Energy factor	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1	0.62	$3,591	$9	29	31	40	2.1	18.7
2, 3, 4	0.63	3,610	−8	36	19	45	6.1	21.2
5*	0.62	3,586	15	29	31	41	2.1	18.7
6*	0.63	3,605	−2	36	19	45	6.2	21.2
7	0.67	3,877	−243	71	6	23	22.9	28.5
8	0.77	3,847	−213	70	2	28	16.4	17.6

* For TSL 5 and TSL 6, the EF and the results represent shipments-weighted averages of the EFs and results that apply to small-and large-volume water heaters, respectively. For the other TSLs, the EF and the results refer to the representative rated volume (40 gal).

TABLE VI.19—GAS-FIRED STORAGE WATER HEATERS: LCC AND PBP RESULTS FOR MULTI-FAMILY HOUSEHOLDS

TSL	Energy factor	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1	0.62	$2,825	−$11	31	33	36	2.4	26.5
2, 3, 4	0.63	2,868	−45	41	21	38	11.0	27.2
5*	0.62	2,827	−13	31	32	36	2.5	26.5
6*	0.63	2,870	−46	41	21	37	11.0	27.2
7	0.67	3,182	−324	74	6	19	27.2	35.2
8	0.77	3,239	−380	79	2	19	21.2	23.2

* For TSL 5 and TSL 6, the EF and the results represent shipments-weighted averages of the EFs and results that apply to small-and large-volume water heaters, respectively. For the other TSLs, the EF and the results refer to the representative rated volume (40 gal).

TABLE VI.20—GAS-FIRED STORAGE WATER HEATERS: LCC AND PBP RESULTS FOR MANUFACTURED HOME HOUSEHOLDS

TSL	Energy factor	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1	0.62	$4,035	−$17	36	29	35	9.9	25.1
2, 3, 4	0.63	4,082	−59	48	17	34	13.1	26.7
5*	0.62	4,035	−17	36	29	35	9.9	25.1
6*	0.63	4,082	−59	48	17	34	13.1	26.7
7	0.67	4,275	−232	69	6	25	21.1	27.3
8	0.77	4,207	−164	64	2	34	14.7	17.0

* For TSL 5 and TSL 6, the EF and the results represent shipments-weighted averages of the EFs and results that apply to small-and large-volume water heaters, respectively. For the other TSLs, the EF and the results refer to the representative rated volume (40 gal).

For electric storage water heaters, the impacts of the standard in today's final rule are approximately the same for the senior-only subgroup as they are for the full household sample for this product class (*see* Table VI.21). For the low-income subgroup, the results show an average LCC savings of $18, a 53-percent share of households with a net LCC

benefit, and a 39-percent share of households with a net LCC cost (*see* Table VI.22). For the multi-family subgroup, the results report an average LCC increase (*i.e.,* negative savings) of $8, and they also show a 53-percent share of households with a net LCC benefit, and a 38-percent share of households with a net LCC cost (*see* Table VI.23). For the manufactured home subgroup, the results report an average LCC increase (*i.e.,* negative savings) of $20, and they also show a 38-percent share of households with a net LCC benefit, and a 54-percent share of households with a net LCC cost (*see* Table VI.24).

TABLE VI.21—ELECTRIC STORAGE WATER HEATERS: LCC AND PBP RESULTS FOR SENIOR-ONLY HOUSEHOLDS

TSL	Energy factor	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1	0.92	$2,859	$6	11	42	47	3.8	10.1
2	0.93	2,849	11	12	38	50	3.8	9.9
3	0.94	2,839	19	21	16	63	5.0	9.2
4	0.95	2,837	20	30	10	60	6.3	9.6
5, 6	*1.04	2,826	31	32	9	59	6.6	10.1
7	2.00	2,937	−76	59	5	36	11.0	21.6
8	2.35	2,895	−34	58	1	41	10.5	17.5

*For TSL 5 and TSL 6, the EF and the results represent shipments-weighted averages of the EFs and results that apply to small-and large-volume water heaters, respectively. For the other TSLs, the EF and the results refer to the representative rated volume (50 gal).

TABLE VI.22—ELECTRIC STORAGE WATER HEATERS: LCC AND PBP RESULTS FOR LOW-INCOME HOUSEHOLDS

TSL	Energy factor	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1	0.92	$3,203	−$3	15	39	46	4.2	12.4
2	0.93	3,196	1	16	36	48	4.2	12.2
3	0.94	3,196	0	29	14	57	5.5	11.1
4	0.95	3,197	−1	38	9	53	7.1	11.3
5, 6	*1.04	3,178	18	39	9	53	7.3	11.5
7	2.00	3,132	61	54	5	41	10.1	28.4
8	2.35	3,078	114	54	1	45	9.9	23.0

*For TSL 5 and TSL 6, the EF and the results represent shipments-weighted averages of the EFs and results that apply to small- and large-volume water heaters, respectively. For the other TSLs, the EF and the results refer to the representative rated volume (50 gal).

TABLE VI.23—ELECTRIC STORAGE WATER HEATERS: LCC AND PBP RESULTS FOR MULTI-FAMILY HOUSEHOLDS

TSL	Energy factor	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1	0.92	$2,015	−$2	14	35	50	4.0	11.6
2	0.93	2,009	1	15	32	52	4.0	11.3
3	0.94	2,017	−6	31	13	56	5.6	11.7
4	0.95	2,018	−7	37	9	54	6.9	11.6
5, 6	*1.04	2,019	−8	38	9	53	7.0	11.9
7	2.00	2,468	−436	79	5	16	25.5	67.9
8	2.35	2,479	−447	81	1	18	24.4	50.8

*For TSL 5 and TSL 6, the EF and the results represent shipments-weighted averages of the EFs and results that apply to small- and large-volume water heaters, respectively. For the other TSLs, the EF and the results refer to the representative rated volume (50 gal).

TABLE VI.24—ELECTRIC STORAGE WATER HEATERS: LCC AND PBP RESULTS FOR MANUFACTURED HOME HOUSEHOLDS

TSL	Energy factor	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
1	0.92	$3,152	−$32	31	35	33	7.0	21.8
2	0.93	3,151	−31	33	33	35	7.7	21.4

TABLE VI.24—ELECTRIC STORAGE WATER HEATERS: LCC AND PBP RESULTS FOR MANUFACTURED HOME HOUSEHOLDS—Continued

TSL	Energy factor	LCC					Payback period	
		Average LCC 2009$	Average LCC savings 2009$	Households with			Median years	Average years
				Net cost %	No impact %	Net benefit %		
3	0.94	3,153	−33	47	14	40	13.0	15.4
4	0.95	3,154	−35	54	9	38	12.9	14.8
5, 6	*1.04	3,140	−20	54	9	38	13.4	15.0
7	2.00	3,103	14	56	5	39	10.5	25.0
8	2.35	3,055	61	55	1	44	10.1	21.4

*For TSL 5 and TSL 6, the EF and the results represent shipments-weighted averages of the EFs and results that apply to small-and large-volume water heaters, respectively. For the other TSLs, the EF and the results refer to the representative rated volume (50 gal).

For gas wall fan and gas wall gravity DHE, DOE estimated that the impacts of the standards in today's final rule are roughly the same for the senior-only sample and the low-income sample as they are for the full household sample for these product classes. For gas hearth DHE, DOE performed the senior-only analysis but did not perform the low-income analysis due to the extremely small sample size and relatively high product cost. The results for the gas hearth DHE senior-only sample were about the same as for the full household sample. (*See* tables in chapter 11 of the TSD).

DOE did not estimate the impacts of consumer subgroups for oil-fired storage water heaters, gas floor DHE, and gas room DHE due to low product shipments, and for gas-fired instantaneous water heaters due to insufficient data. For pool heaters, DOE did not perform consumer subgroup analyses since this product is typically not owned by these subgroups.

Chapter 11 of the TSD explains DOE's methodology for conducting the consumer subgroup analysis and presents the detailed results of that analysis for each considered efficiency level.

c. Rebuttable Presumption Payback

As discussed in section III.D.2, EPCA provides a rebuttable presumption that an energy conservation standard is economically justified if the increase in purchase cost for a product that meets the standard is less than three times the value of the first-year energy (and, as applicable, water) savings resulting from the standard. DOE's LCC and PBP analyses generate values that calculate the payback period for consumers of potential energy conservation standards, which include, but are not limited to, the payback period contemplated under the rebuttable presumption test discussed above. However, DOE routinely conducts a full economic analysis that considers the full range of impacts, including those to the consumer, manufacturer, Nation, and environment, as required under 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE to evaluate definitively the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification).

As required by EPCA, DOE based the calculation of rebuttable presumption payback period on the assumptions in the DOE test procedures for each of the three types of heating products. For water heaters and DHE, respectively, Table VI.24 and Table VI.25 show the rebuttable presumption PBPs for those TSLs that have a rebuttable presumption payback period of less than 3 years. For pool heaters, only one of the considered efficiency levels has a rebuttable presumption payback period of less than 3 years—81 percent thermal efficiency has a rebuttable presumption payback period of 2.7 years.

TABLE VI.24—WATER HEATERS: REBUTTABLE PRESUMPTION PAYBACK PERIODS

TSL	Payback period, years			
	Gas-fired storage	Electric storage	Oil-fired storage	Gas-fired instantaneous
1	>3	>3	0.8	>3
2	>3	>3	0.4	>3
3	>3	>3	0.6	>3
4	>3	>3	0.6	>3
5	>3	>3	0.6	>3
6	>3	>3	0.6	>3
7	>3	>3	0.6	>3
8	>3	>3	0.9	>3

TABLE VI.25—DIRECT HEATING EQUIPMENT: REBUTTABLE PRESUMPTION PAYBACK PERIODS

TSL	Payback period, *years*				
	Gas wall fan DHE	Gas wall gravity DHE	Gas furnace DHE	Gas wall room DHE	Gas hearth DHE
1	>3	>3	>3	>3	2.5
2	>3	>3	>3	>3	2.5

TABLE VI.25—DIRECT HEATING EQUIPMENT: REBUTTABLE PRESUMPTION PAYBACK PERIODS—Continued

TSL	Payback period, *years*				
	Gas wall fan DHE	Gas wall gravity DHE	Gas furnace DHE	Gas wall room DHE	Gas hearth DHE
3	>3	>3	>3	>3	2.5
4	>3	>3	>3	>3	>3
5	>3	>3	>3	>3	>3
6	>3	>3	>3	>3	>3

2. Economic Impact on Manufacturers

For the MIA in the December 2009 NOPR, DOE used the INPV to compare the financial impacts of different TSLs on water heater, DHE, and pool heater manufacturers. 74 FR 65852, 65935–47 (Dec. 11, 2009). DOE presented the results by grouping product classes made by the same manufacturers and uses the scenarios that show the likely changes in industry value following amended energy conservation standards. DOE used the GRIM to compare the INPV of the base case (no new energy conservation standards) to that of each TSL for each covered product. The INPV is the sum of all net cash flows discounted by the industry's cost of capital (discount rate). The difference in INPV between the base case and the standards case is an estimate of the economic impacts that implementing that standard level would have on the entire industry.

For today's final rule, DOE continues to use the methodology presented in the December 2009 NOPR (74 FR 65852, 65915–22 (Dec. 11, 2009)) and in section IV.I. DOE modeled two different markup scenarios to estimate the potential impacts of amended energy conservation standards on manufacturers. To assess the lower end of the range of potential impacts on manufacturers, DOE modeled the preservation of return on invested capital scenario. In addition to the impact of the main NIA shipment scenario and the required capital and product conversion costs on INPV, this case models a situation in which manufacturers would maintain the base-case return on invested capital in the standards case. This scenario represents the lower (more favorable) end of the range of potential impacts on manufacturers because the industry generates a historical rate of operating profit on the physical and financial investments required by energy conservation standards. To assess the higher end of the range of potential impacts on the manufacturers of the three types of heating products, DOE modeled the preservation of operating profit markup scenario in which higher energy conservation standards result in lower manufacturer markups. This scenario models a scenario in which the higher production costs of more-efficient technology and required investments are not fully passed on to customers, consequently lowering operating profit margins. This scenario represents the upper end of the range of potential impacts on manufacturers only because no additional operating profit is earned on the investments required to meet the amended energy conservation standards.

In overview, DOE notes that for water heaters, the main NIA scenario used the Reference Case gas-fired instantaneous water heater market share scenario, the *AEO* Reference Case economic growth scenario, and the moderate rate of efficiency growth scenarios. The main NIA scenario for water heaters also accounts for fuel switching at a level that effectively requires HPWHs for all rated storage volumes (final rule TSL 7 and TSL 8) and capacity switching at a level that required advanced technology for water heaters with rated storage volumes above 55 gallons (final rule TSL 5 and TSL 6). In all standards-case shipment scenarios for all three types of heating products, DOE assumed that shipments at efficiencies below the projected minimum standard levels would roll up to the new standard levels in response to amended energy conservation standards.

The sections below outline comments on the economic impacts on manufacturers presented in the December 2009 NOPR and provide DOE's response. The complete MIA results section can be found in the December 2009 NOPR (74 FR 65852, 65935–54 (Dec. 11, 2009)) and chapter 12 of the TSD.

a. Cash-Flow Analysis Results for Water Heaters

i. Cash-Flow Analysis Results for Gas-Fired and Electric Storage Water Heaters

TABLE VI.26—MANUFACTURER IMPACT ANALYSIS FOR GAS-FIRED AND ELECTRIC STORAGE WATER HEATERS—PRESERVATION OF RETURN ON INVESTED CAPITAL MARKUP SCENARIO

	Units	Base case	Trial standard level							
			1	2	3	4	5	6	7	8
INPV	(2009$ millions)	$880.4	$875.5	$876.0	$875.1	$875.5	$854.4	$856.8	$869.9	$959.6
Change in INPV	(2009$ millions)		−4.9	−4.3	−5.2	−4.8	−25.9	−23.6	−10.5	79.2
	(%)		−0.56%	−0.49%	−0.59%	−0.55%	−2.94%	−2.68%	−1.19%	9.00%
Product Conversion Costs	(2009$ millions)		12.1	14.5	14.5	14.5	31.8	31.8	61.1	79.7
Capital Conversion Costs	(2009$ millions)		0.0	4.3	4.3	40.7	63.7	63.7	76.0	208.0
Total Conversion Costs.	(2009$ millions)		12.1	18.7	18.7	55.1	95.4	95.4	137.1	287.8

TABLE VI.27—MANUFACTURER IMPACT ANALYSIS FOR GAS-FIRED AND ELECTRIC STORAGE WATER HEATERS—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO

	Units	Base case	Trial standard level							
			1	2	3	4	5	6	7	8
INPV	(2009$ millions)	$880.4	$866.1	$849.0	$842.1	$790.9	$757.8	$745.7	$530.2	$233.4
Change in INPV	(2009$ millions)		−14.2	−31.4	−38.3	−89.4	−122.6	−134.6	−350.2	−647.0
	(%)		−1.62	−3.56	−4.35	−10.16	−13.93	−15.29	−39.78	−73.49
Product Conversion Costs	(2009$ millions)		12.1	14.5	14.5	14.5	31.8	31.8	61.1	79.7
Capital Conversion Costs	(2009$ millions)		0.0	4.3	4.3	40.7	63.7	63.7	76.0	208.0
Total Conversion Costs	(2009$ millions)		12.1	18.7	18.7	55.1	95.4	95.4	137.1	287.8

The December 2009 NOPR discusses the estimated impact of amended energy conservation standards on INPV for gas-fired and electric storage water heater manufacturers in further detail. 74 FR 65852, 65936–39 (Dec. 11, 2009). DOE did not receive any comments on the gas-fired and electric storage water heaters INPV results. Those comments related to conversion costs and methodology are discussed in section IV.I.1.

ii. Cash-Flow Analysis Results for Oil-Fired Storage Water Heaters

TABLE VI.28—MANUFACTURER IMPACT ANALYSIS FOR OIL-FIRED STORAGE WATER HEATERS—PRESERVATION OF RETURN ON INVESTED CAPITAL MARKUP SCENARIO

	Units	Base case	Trial standard level							
			1	2	3	4	5	6	7	8
INPV	(2009$ millions)	$9.1	$8.9	$8.9	$8.9	$8.9	$8.9	$8.9	$8.9	$7.7
Change in INPV	(2009$ millions)		(0.2)	(0.2)	(0.2)	(0.2)	(0.2)	(0.2)	(0.2)	(1.4)
	(%)		−1.98	−1.85	−2.01	−2.01	−2.01	−2.01	−2.01	−15.37
Product Conversion Costs	(2009$ millions)		0.3	0.3	0.3	0.3	0.3	0.3	0.3	1.1
Capital Conversion Costs	(2009$ millions)		0.2	0.2	0.2	0.2	0.2	0.2	0.2	4.0
Total Conversion Costs	(2009$ millions)		0.5	0.5	0.5	0.5	0.5	0.5	0.5	5.1

TABLE VI.29—MANUFACTURER IMPACT ANALYSIS FOR OIL-FIRED STORAGE WATER HEATERS—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO

	Units	Base case	Trial standard level							
			1	2	3	4	5	6	7	8
INPV	(2009$ millions)	$9.1	$8.8	$8.8	$8.7	$8.7	$8.7	$8.7	$8.7	$5.3
Change in INPV	(2009$ millions)		(0.4)	(0.3)	(0.4)	(0.4)	(0.4)	(0.4)	(0.4)	(3.8)
	(%)		−3.85	−3.56	−4.23	−4.23	−4.23	−4.23	−4.23	−41.44
Product Conversion Costs	(2009$ millions)		0.3	0.3	0.3	0.3	0.3	0.3	0.3	1.1
Capital Conversion Costs	(2009$ millions)		0.2	0.2	0.2	0.2	0.2	0.2	0.2	4.0
Total Conversion Costs	(2009$ millions)		0.5	0.5	0.5	0.5	0.5	0.5	0.5	5.1

The December 2009 NOPR discusses the estimated impact of amended energy conservation standards on INPV for oil-fired storage water heater manufacturers in further detail. 74 FR 65852, 65939–40 (Dec. 11, 2009). DOE did not receive any comments on the oil-fired water heaters INPV results. Those comments related to conversion costs and methodology are discussed in section IV.I.1.

iii. Cash-Flow Analysis Results for Gas-Fired Instantaneous Water Heaters

TABLE VI.30—MANUFACTURER IMPACT ANALYSIS FOR GAS-FIRED INSTANTANEOUS WATER HEATERS –PRESERVATION OF RETURN ON INVESTED CAPITAL MARKUP SCENARIO

	Units	Base case	Trial standard level							
			1	2	3	4	5	6	7	8
INPV	(2009$ millions)	$648.2	$650.6	$650.6	$650.6	$650.6	$650.6	$650.6	$650.6	$739.7
Change in INPV	(2009$ millions)		2.3	2.3	2.3	2.3	2.3	2.3	2.3	91.4
	(%)		0.36	0.36	0.36	0.36	0.36	0.36	0.36	14.10
Product Conversion Costs	(2009$ millions)		0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.8
Capital Conversion Costs	(2009$ millions)		0.0	0.00	0.00	0.0	0.0	0.0	0.0	10.6
Total Conversion Costs	(2009$ millions)		0.0	0.0	0.0	0.0	0.0	0.0	0.0	19.4

TABLE VI.31—MANUFACTURER IMPACT ANALYSIS FOR GAS-FIRED INSTANTANEOUS STORAGE WATER HEATERS—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO

	Units	Base case	Trial standard level							
			1	2	3	4	5	6	7	8
INPV	(2009$ millions)	$648.2	$647.0	$647.0	$647.0	$647.0	$647.0	$647.0	$647.0	$590.6
Change in INPV	(2009$ millions)		(1.2)	(1.2)	(1.2)	(1.2)	(1.2)	(1.2)	(1.2)	(57.6)
	(%)		−0.19%	−0.19%	−0.19%	−0.19%	−0.19%	−0.19%	−0.19%	−8.89%
Product Conversion Costs	(2009$ millions)		0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.8
Capital Conversion Costs	(2009$ millions)		0.0	0.00	0.00	0.0	0.0	0.0	0.0	10.6
Total Conversion Costs	(2009$ millions)		0.0	0.0	0.0	0.0	0.0	0.0	0.0	19.4

The December 2009 NOPR discusses the estimated impact of amended energy conservation standards on INPV for gas-fired instantaneous water heater manufacturers in further detail. 74 FR 65852, 65940–41 (Dec. 11, 2009). DOE did not receive any comments on the gas-fired instantaneous water heater INPV results.

b. Cash-Flow Analysis Results for Direct Heating Equipment

i. Cash-Flow Analysis Results for Traditional Direct Heating Equipment (Gas Wall Fan, Gas Wall Gravity, Gas Floor, and Gas Room Direct Heating Equipment)

TABLE VI.32—MANUFACTURER IMPACT ANALYSIS FOR TRADITIONAL DIRECT HEATING EQUIPMENT—PRESERVATION OF RETURN ON INVESTED CAPITAL MARKUP SCENARIO

	Units	Base case	Trial standard level					
			1	2	3	4	5	6
INPV	(2009$ millions)	$16.6	$15.7	$15.4	$14.7	$14.7	$12.8	$12.7
Change in INPV	(2009$ millions)		(0.9)	(1.2)	(1.9)	(1.9)	(3.8)	(3.9)
	(%)		−5.24%	−7.17%	−11.31%	−11.62%	−22.74%	−23.65%
Product Conversion Costs.	(2009$ millions)		0.95	1.38	2.41	2.95	5.02	5.91
Capital Conversion Costs.	(2009$ millions)		1.96	3.24	5.60	6.95	6.75	9.11
Total Conversion Costs	(2009$ millions)		2.91	4.62	8.00	9.90	11.77	15.02

TABLE VI.33—MANUFACTURER IMPACT ANALYSIS FOR TRADITIONAL DIRECT HEATING EQUIPMENT—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO

	Units	Base case	Trial standard level					
			1	2	3	4	5	6
INPV	(2009$ millions)	$16.6	$14.1	$12.7	$9.6	$7.8	$6.2	$3.2
Change in INPV	(2009$ millions)		(2.5)	(3.9)	(7.0)	(8.8)	(10.4)	(13.4)
	(%)		−14.88%	−23.61%	−42.38%	−53.12%	−62.40%	−80.85%
Product Conversion Costs.	(2009$ millions)		0.95	1.38	2.41	2.95	5.02	5.91
Capital Conversion Costs.	(2009$ millions)		1.96	3.24	5.60	6.95	6.75	9.11
Total Conversion Costs	(2009$ millions)		2.91	4.62	8.00	9.90	11.77	15.02

The December 2009 NOPR discusses the estimated impact of amended energy conservation standards on INPV for traditional DHE manufacturers in further detail. 74 FR 65852, 65942–44 (Dec. 11, 2009). DOE addresses all the comments about the impacts on traditional DHE manufacturers in sections IV.I.4 and VII.B of today's final rule.

ii. Cash-Flow Analysis Results for Gas Hearth Direct Heating Equipment

TABLE VI.34—MANUFACTURER IMPACT ANALYSIS FOR GAS HEARTH DIRECT HEATING EQUIPMENT—PRESERVATION OF RETURN ON INVESTED CAPITAL MARKUP SCENARIO

	Units	Base case	Trial standard level					
			1	2	3	4	5	6
INPV	(2009$ millions)	$77.1	$76.2	$76.2	$76.2	$78.7	$78.7	$85.7
Change in INPV	(2009$ millions)		(0.9)	(0.9)	(0.9)	1.6	1.6	8.6
	(%)		−1.22%	−1.22%	−1.22%	2.04%	2.04%	11.09%

TABLE VI.34—MANUFACTURER IMPACT ANALYSIS FOR GAS HEARTH DIRECT HEATING EQUIPMENT—PRESERVATION OF RETURN ON INVESTED CAPITAL MARKUP SCENARIO—Continued

	Units	Base case	Trial standard level					
			1	2	3	4	5	6
Product Conversion Costs.	(2009$ millions)		0.56	0.56	0.56	1.46	1.46	8.42
Capital Conversion Costs.	(2009$ millions)		0.21	0.21	0.21	0.55	0.55	4.20
Total Conversion Costs	(2009$ millions)		0.77	0.77	0.77	2.01	2.01	12.62

TABLE VI.35—MANUFACTURER IMPACT ANALYSIS FOR GAS HEARTH DIRECT HEATING EQUIPMENT—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO

	Units	Base case	Trial standard level					
			1	2	3	4	5	6
INPV	(2009$ millions)	$77.1	$76.9	$76.9	$76.9	$63.9	$63.9	$23.5
Change in INPV	(2009$ millions)		(0.2)	(0.2)	(0.2)	(13.2)	(13.2)	(53.6)
	(%)		−0.30%	−0.30%	−0.30%	−17.13%	−17.13%	−69.49%
Product Conversion Costs.	(2009$ millions)		0.56	0.56	0.56	1.46	1.46	8.42
Capital Conversion Costs.	(2009$ millions)		0.21	0.21	0.21	0.55	0.55	4.20
Total Conversion Costs	(2009$ millions)		0.77	0.77	0.77	2.01	2.01	12.62

The December 2009 NOPR discusses the estimated impact of amended energy conservation standards on INPV for gas hearth DHE manufacturers in further detail. 74 FR 65852, 65944–45 (Dec. 11, 2009). DOE did not receive any comments on the gas hearth DHE INPV results.

c. Cash-Flow Analysis Results for Pool Heaters

TABLE VI.36—MANUFACTURER IMPACT ANALYSIS FOR GAS-FIRED POOL HEATERS—PRESERVATION OF RETURN ON INVESTED CAPITAL MARKUP SCENARIO

	Units	Base case	Trial standard level					
			1	2	3	4	5	6
INPV	(2009$ millions)	$49.0	$49.1	$49.3	$48.2	$48.7	$49.8	$56.4
Change in INPV	(2009$ millions)		0.0	0.3	(0.8)	(0.3)	0.8	7.3
	(%)		0.10%	0.54%	−1.72%	−0.63%	1.61%	14.93%
Product Conversion Costs.	(2009$ millions)		0.0	0.0	2.7	2.7	4.8	5.7
Capital Conversion Costs.	(2009$ millions)		0.0	0.3	1.3	1.5	4.6	7.4
Total Conversion Costs	(2009$ millions)		0.0	0.3	4.0	4.2	9.4	13.1

TABLE VI.37—MANUFACTURER IMPACT ANALYSIS FOR GAS-FIRED POOL HEATERS—PRESERVATION OF OPERATING PROFIT MARKUP SCENARIO

	Units	Base case	Trial standard level					
			1	2	3	4	5	6
INPV	(2009$ millions)	$49.0	$48.9	$48.2	$44.0	$42.4	$31.9	$10.8
Change in INPV	(2009$ millions)		(0.1)	(0.8)	(5.0)	(6.6)	(17.2)	(38.3)
	(%)		−0.25%	−1.72%	−10.22%	−13.48%	−35.05%	−78.00%
Product Conversion Costs.	(2009$ millions)		0.0	0.0	2.7	2.7	4.8	5.7
Capital Conversion Costs.	(2009$ millions)		0.0	0.3	1.3	1.5	4.6	7.4
Total Conversion Costs	(2009$ millions)		0.0	0.3	4.0	4.2	9.4	13.1

The December 2009 NOPR discusses the estimated impact of amended energy conservation standards on INPV for gas-fired pool heaters in further detail. 74 FR 65852, 65945–47 (Dec. 11, 2009). DOE did not receive any comments on the pool heaters INPV results. Those comments related to conversion costs

and methodology are discussed in section IV.I.3.

d. Impacts on Employment

As discussed in detail in the December 2009 NOPR and in today's final rule, DOE quantitatively assessed the impacts of potential amended energy conservation standards on gross employment for each of the three types of heating products that are the subject of this rulemaking. DOE presented a range of the potential production employment levels that could result following the implementation of amended energy conservation standards. The upper end of the results represented the maximum potential increase in production workers after amended energy conservation standards if manufacturers continue to produce the same scope of covered products in the same production facilities. The lower end of the range of employment results included the estimate of the total number of U.S. production workers in the industry that could lose their jobs if all existing production were to no longer be made domestically. For example, DOE calculates that the impacts on gas-fired and electric storage water heaters could range from an increase of 439 employees to a decrease of 3,610. For oil-fired water heaters, DOE expects an increase of one employee to a decrease of 37 employees. Similarly, at the upper end of modeled impacts, the traditional DHE, gas hearth DHE, and pool heater industries could experience an increase of six, six, and 19 employees, respectively. At the low end, these three industries could sustain decreases in direct employment of 275, 1280, and 512 employees, respectively. 74 FR 65852, 65947–51 (Dec. 11, 2009). Further details are also found in chapter 12 of the TSD. DOE discusses and responds to public comments received regarding the impacts on the direct employment in section IV.I.4.

e. Impacts on Manufacturing Capacity

In the December 2009 NOPR, DOE provided a complete discussion of the potential impacts on manufacturing capacity for the three types of heating products as a result of amended energy conservation standards. 74 FR 65852, 65951–53 (Dec. 11, 2009).

In response to that discussion, Raypak stated that it does not believe three years would allow sufficient time for the proper development, testing, and tooling necessary to achieve reliable pool heater products, because pool heaters are installed outdoors and face harsher operating conditions than the other products covered by this rulemaking. (Raypak, No. 67 at p. 3) The commenter agreed with DOE's statement that setting an amended energy conservation standard for pool heaters at or above TSL 5, which would require condensing or near-condensing technology, could lead to short-term capacity problems if manufacturers cannot make the substantially higher tooling, equipment, and assembly changes required at these levels in time to meet the standard. Moreover, Raypak argued that these same issues exist at TSL 3 and TSL 4, because at TSL 3 and above manufacturers would have difficulty changing their production lines and tooling to a new construction while still producing product to meet current market demands. (Raypak, No. 67 at p. 2; Public Meeting Transcript, No. 57.4 at pp. 308–310)

In response, DOE agrees that the proposed standard in the December 2009 NOPR would require substantial changes for pool heater manufacturers. At an 84-percent thermal efficiency level, manufacturers would be required to make multiple improvements over the most common atmospheric models on the market today. However, DOE did not receive any comments that suggested the conversion costs for the industry presented in the NOPR were not representative at any TSL. Also, multiple manufacturers have products that meet and/or exceed the proposed standard in the December 2009 NOPR. While manufacturers would be required to spend resources to increase the production of those products or to modify existing products, DOE believes that manufacturers have the experience necessary to achieve the requisite operating conditions at the level proposed in the December 2009 NOPR (TSL 4) and, in general, to offer durable products by the compliance date for the amended standards being adopted in this final rule.

f. Cumulative Regulatory Burden

While any one regulation may not impose a significant burden on manufacturers, the combined effects of several impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Assessing the impact of a single regulation may overlook this cumulative regulatory burden. In addition to energy conservation standards, other regulations can significantly affect manufacturers' financial operations. The cumulative regulatory burden focuses on the impacts on manufacturers of other Federal requirements with a compliance date three years prior to and three years after the anticipated compliance dates of the amended energy conservation standards of this rulemaking. The cumulative burden was outlined in the December 2009 NOPR, which included a discussion of the impact of low and ultra-low NO_X regulations and other environmental and safety regulations. 74 FR 65852, 65953 (Dec. 11, 2009). For further detail, *see* the cumulative regulatory burden discussion in Chapter 12 of the TSD.

Regarding the cumulative regulatory burden discussed in the NOPR, BWC stated that refrigerant regulations are constantly changing and could force manufacturers to redesign heat pump water heaters that have been recently commercialized. To this point, BWC noted that R–134a is being phased out in Europe, but the prospect of a similar phase-out in the U.S. was not considered in the NOPR analysis. (BWC, No. 61 at p. 2) Rheem also stated that proposed legislation that phases out hydrofluorocarbons (HFCs) would require double the amount of refrigerant, because the alternative is not as efficient. Rheem also added that a cap-and-trade program would have a significant effect on the heat pump water heater business. (Rheem, Public Meeting Transcript No. 57.4 at pp. 294–295)

DOE acknowledges that an HFC phase-out or alternative legislation requiring a refrigerant change could necessitate substantial design changes for heat pump water heaters. However, for this heating products energy conservation standards rulemaking, DOE did not consider proposed legislation that would require a reduction in consumption of HFCs including refrigerants (*i.e.,* phase-down) or a cap and trade program. It would be highly speculative to try to predict the passage of such legislation, much less the details of its provisions, all of which are highly uncertain.

BWC stated that DOE should consider that additional Air Quality Management Districts have enacted standards since the rulemaking began. (BWC, No. 61 at pp. 3–4) In response, DOE has monitored the Air Quality Management Districts' regulations. In the analysis, DOE assumed that the Air Quality Managements Districts with ultra-low NO_X requirements would represent 50 percent of shipments to California, or 8.7 percent of shipments nationally, by the compliance date of today's final rule in 2015. Thus, DOE's analysis of the ultra-low NO_X water heater shipments is up to date. DOE accounted for the higher costs of these ultra-low NO_X gas-fired water heaters in both the LCC and the MIA.

AHRI stated lower NO_X requirements will affect future designs of gas-fired

instantaneous water heaters and may cause design changes that reduce the efficiency of the product. (AHRI, No. 91 at p. 3)

DOE accounted for the added production costs for manufacturers of gas-fired storage water heaters to comply with regional ultra-low NO_X requirements (*see* section IV.C.2). DOE agrees with AHRI that the California Air Quality Management Districts will begin to regulate the emissions of gas-fired instantaneous water heaters beginning in 2012. However, DOE is not aware of any ultra-low NO_X instantaneous gas-fired water heaters currently on the market and could not create a separate cost curve to account for the additional cost of instantaneous water heaters.

Raypak stated that pool heaters are not exempt from ultra-low NO_X requirements, but have only been exempted from any revisions to the existing requirements. Raypak stated that pool heaters are required to meet a maximum of 55 ppm of NO_X in the South Coast Air Quality Management District. In addition, the Bay Area Air Quality Management District has implemented new NO_X requirements for pool heaters starting on January 1, 2012. (Raypak, No. 67 at p. 2; Public Meeting Transcript, No. 57.4 at pp. 336–37)

DOE agrees with Raypak that it should have indicated that gas-fired pool heaters were only exempted from revisions to existing low-NO_X requirements that would have required more-stringent emission standards. Furthermore, DOE agrees with Raypak that gas-fired pool heaters must meet the local low-NO_X requirements in the Air Quality Management Districts shown in Table 12.7.9 of the TSD. In the engineering analysis, DOE examined several low-NO_X pool heaters and believes its analysis is representative of both types of pool heaters. Chapter 12 of the TSD also addresses in greater detail the issue of cumulative regulatory burden.

g. Impacts on Manufacturers That Are Small Businesses

As discussed in the December 2009 NOPR, DOE identified small business manufacturers of all three types of heating products. 74 FR 65852, 65953–54 (Dec. 11, 2009). Due to the large number of comments about the impacts on traditional DHE manufacturers, DOE has moved and addressed all these comments in sections IV.I and VII.B. Section VII.B also contains DOE's discussion about the impacts of amended energy conservation standards on small business manufacturers.

3. National Net Present Value of Consumer Costs and Benefits and National Employment Impacts

The NPV analysis estimates the cumulative benefits or costs to the Nation of total heating product consumer costs and savings that would result from particular standard levels. The NPV analysis estimates the national economic impacts of each such level relative to the base case. In accordance with the OMB Circular A–4, DOE calculated the NPV using both a 7-percent and a 3-percent real discount rate. Table VI.38 through Table VI.40 show the consumer NPV results for each TSL DOE considered for the three types of heating products. See chapter 10 of the December 2009 NOPR TSD for more detailed NPV results.

TABLE VI.38—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR WATER HEATERS

[Impacts for units sold from 2015 to 2045]

Product class	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6	TSL 7	TSL 8
				billion 2009 dollars				
Discounted at 3%:								
Gas-Fired Storage	2.72	3.13	3.13	3.13	2.38	2.78	3.13	−7.47
Electric Storage	1.35	2.10	3.46	3.96	5.84	5.84	19.80	32.24
Oil-Fired Storage	0.08	0.15	0.22	0.22	0.22	0.22	0.22	0.38
Gas-Fired Instantaneous.	0.24	0.24	0.24	0.24	0.24	0.24	0.24	−8.27
Total	4.39	5.62	7.05	7.55	8.67	9.08	23.39	16.87
Discounted at 7%:								
Gas-Fired Storage	0.59	0.22	0.22	0.22	0.27	−0.10	0.22	−9.95
Electric Storage	0.35	0.61	0.85	0.73	1.03	1.03	−0.52	3.25
Oil-Fired Storage	0.03	0.06	0.09	0.09	0.09	0.09	0.09	0.15
Gas-Fired Instantaneous.	−0.004	−0.004	−0.004	−0.004	−0.004	−0.004	−0.004	−5.02
Total	0.96	0.88	1.55	1.03	1.39	1.01	−0.22	−11.57

TABLE VI.39—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR DIRECT HEATING EQUIPMENT

[Impacts for units sold from 2013 to 2043]

Product class	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
			billion 2009 dollars			
Discounted at 3%:						
Gas Wall Fan	0.06	0.07	0.07	−0.01	0.06	−0.01
Gas Wall Gravity	0.04	0.04	0.07	0.07	−0.12	−0.12
Gas Floor	0.0002	0.0002	0.0002	0.0002	0.0002	0.0002
Gas Room	0.01	0.02	0.03	0.03	0.20	0.20
Gas Hearth	1.21	1.21	1.21	−1.35	−1.35	−5.04
Total	1.32	1.34	1.39	−1.26	−1.22	−4.97
Discounted at 7%:						
Gas Wall Fan	0.02	0.03	0.03	−0.03	0.02	−0.03

TABLE VI.39—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR DIRECT HEATING EQUIPMENT—Continued

[Impacts for units sold from 2013 to 2043]

Product class	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
Gas Wall Gravity	0.01	0.01	0.02	0.02	−0.14	−0.14
Gas Floor	0.0001	0.0001	0.0001	0.0001	0.0001	0.0001
Gas Room	0.003	0.01	0.01	0.01	0.07	0.07
Gas Hearth	0.50	0.50	0.50	−1.19	−1.19	−4.28
Total	0.54	0.55	0.56	−1.19	−1.24	−4.38

TABLE VI.40—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR POOL HEATERS

[Impacts for units sold from 2013 to 2043]

	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
	billion 2009 dollars					
Discounted at 3%	0.10	0.10	−0.01	−0.15	−2.33	−4.57
Discounted at 7%	0.04	0.04	−0.06	−0.16	−1.39	−2.87

DOE also estimated for each TSL the indirect employment impact of standards—the impact on the economy in general—in addition to considering the direct employment impacts on manufacturers of products covered in this rulemaking as discussed in section IV.I.4. DOE expects that consumers will redirect the net monetary savings from standards to other forms of economic activity, and that these shifts in spending and economic activity will affect the demand for labor. As shown in Table VI.41, DOE estimates that net indirect employment impacts from energy conservation standards for water heaters would be positive, though very small relative to total national employment. These increases would likely be sufficient to offset fully any adverse impacts on employment that might occur in the water heater industry. The estimated impacts from the amended standards for DHE and pool heaters are much smaller. For details on the employment impact analysis methods and results, *see* TSD Chapter 14.

TABLE VI.41—INCREASE IN NATIONAL INDIRECT EMPLOYMENT UNDER WATER HEATER TSLS

Trial standard level	2015 thousands	2020 thousands	2030 thousands	2044 thousands
1	−0.40	0.44	1.56	2.06
2	−0.72	0.48	2.08	2.80
3	−0.83	1.04	3.54	4.60
4	−0.97	1.43	4.63	5.96
5	−0.85	3.07	8.34	10.41
6	−1.20	2.89	8.37	10.56
7	−3.89	12.70	34.97	43.46
8	−8.21	13.82	43.69	56.26

4. Impact on Utility or Performance of Products

As indicated in section III.D.1.d, DOE has concluded that the TSLs it considered for the three types of heating products would not lessen the utility or performance of those products. Manufacturers of these products currently offer heating products that meet or exceed the efficiency levels being considered and would not necessitate changes in product design that would reduce the overall utility or performance of the three types of heating products that are the subject of this rulemaking. Therefore, DOE has concluded that none of the TSLs presented in today's final rule would reduce the utility or performance of the products under consideration.

5. Impact of Any Lessening of Competition

As discussed in the December 2009 NOPR (74 FR 65852, 65863, 65956 (Dec. 11, 2009)) and in section III.D.1.e of this preamble, DOE considers any lessening of competition likely to result from standards; the Attorney General determines, in writing, the impact, if any, of any such lessening of competition. (42 U.S.C. 6295(o)(2)(B)(i)(V) and (ii)) The Attorney General's determination (DOJ determination) is summarized below, along with DOE's response, and it is also reprinted in its entirety at the end of this final rule.

After considering the NOPR, DOJ determined that DOE's proposed standards for water heaters, pool heaters, and gas hearth DHE are not likely to lead to a lessening of competition; however, DOJ expressed concern that the proposed standards could adversely affect competition in the traditional DHE product categories. DOJ noted that only three manufacturers currently market products for each of the four traditional DHE categories. DOJ stated that the proposed standards could require manufacturers, even those currently producing models that meet the proposed standards, to make a substantial capital investment to convert or expand their production facilities. DOJ also stated that it also appeared that each manufacturer would have to commit significant resources for research and development. DOJ believed these costs create a significant risk that

no more than one or two DHE manufacturers would choose to continue to produce products in any one DHE category. DOJ asked DOE to consider the possible impact on competition in determining its final energy efficiency standards for DHE. (DOJ, No. 99 at p. 2)

DOE is also concerned about the impacts on competition in the traditional DHE market. For any new or amended energy conservation standard, DOE must consider the impacts on manufacturers and consumers of the products in addition to the impacts of any lessening of competition. (42 U.S.C. 6295(o)(2)(B)(i)) DOE notes that the potential impacts on small business manufacturers factored heavily in DOE's proposed standard. 74 FR 65852, 65972–73 (Dec. 11, 2009).

DOE has carefully considered the potential adverse impacts on traditional DHE manufacturers in setting the amended energy conservation standards (*see* section VI.D.3). In total, DOE estimates that it will take approximately $4.6 million for the traditional DHE industry to upgrade all of it products to meet the amended energy conservation standards. Despite including the conversion costs for the additional product lines that were released since the December 2009 NOPR analysis was completed, the total conversion costs estimated by the industry to upgrade all products that do not meet the amended energy conservation standards is down $1.8 million from the $6.4 million total estimated for the proposed standards in the December 2009 NOPR. The conversion costs have been revised downward for gas wall gravity DHE due to the changes in the engineering analysis and a new TSL structure for gas wall gravity DHE that resulted in AFUE requirements that were 5 percentage points less stringent than the level proposed in the December 2009 NOPR. Finally, for other product categories, setting a lower TSL than proposed in the December 2009 NOPR also resulted in fewer product lines across the industry that need to be upgraded to meet the level established by today's final rule.

For the amended energy conservation standards for traditional DHE, one major manufacturer has a total of 3 product lines (7 models) that do not meet the amended energy conservation standards in the two smallest categories (gas floor and gas room DHE) but has a majority of product lines and models that meet the amended standards in the two largest product categories (gas wall fan and gas wall gravity). The other two major manufacturers have existing product lines that meet the amended energy conservation standards in all 4 product categories. Therefore, without incurring any conversion costs, at least two manufacturers already have existing products in all four product categories. In the most important gas wall gravity category, 57 percent of the existing models and 71 percent of the existing product lines identified by DOE already meet the amended energy conservation standards. One manufacturer indicated in written comments that the important gas wall gravity products that meet the amended energy conservation standard represent a small portion of total sales. However, DOE believes it has addressed the concerns of this manufacturer by setting an amended energy conservation standard that would require much less substantial changes than those proposed in the December 2009 NOPR (a two percentage point improvement in AFUE versus the six percentage point improvement in AFUE proposed in the December 2009 NOPR). While the $4.6 million in total conversion costs to upgrade all product lines that do not meet the amended energy conservation standards is substantial, DOE believes that a combination of products that meet the amended energy conservation standards and selectively upgrading popular product lines that fall below the standards will allow all three traditional DHE manufacturers to maintain a viable production volume. Because DOE has fully addressed the comments raised about the impacts on traditional DHE manufacturers, has considered the potential impacts on small business manufacturers of traditional DHE, and has adopted a less stringent standard than originally proposed for these products, DOE believes it has taken the potential impacts on competition in the traditional DHE market into consideration for today's final rule.

DOE also prepared a final regulatory flexibility analysis (FRFA) for direct heating equipment pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). In particular, the FRFA carefully considers the impacts of the rule on the two manufacturers in the traditional DHE market that are small businesses. DOE's FRFA is found in section VII.B of today's final rule.

Several comments on the December 2009 NOPR raised issues related to competitive impacts. These comments and DOE's response are discussed below. In both its written submission and comments at the NOPR public meeting, Empire expressed concern about the potential for amended standards to create monopolies in certain DHE product categories. (Empire, Public Meeting Transcript, No. 57.4 at p. 300; Empire, No. 100 at p. 1) In addition, Empire stated that in order to increase efficiency, the industry would need to spend millions of dollars. With the small number of shipments and the shrinking market for traditional DHE, Empire opined that manufacturers would likely eliminate product categories. For those few categories where only one manufacturer meets the minimums (*e.g.,* floor furnaces), a monopoly would be created. (Empire, No. 100 at p. 2)

In response and as noted above, DOE is concerned about the impacts on competition in the traditional DHE market and has considered these impacts for today's final rule. In response to the concern that the amended energy conservation standards could create a monopoly in the floor furnace category, DOE notes that two of the major manufacturers currently offer products in the AHRI certification database that meet the required efficiencies, which implies that the creation of a monopoly is unlikely to result due to amended energy conservation standards. Additionally, DOE also recognizes that the traditional DHE market is mostly a replacement market. Even if only one manufacturer offered floor furnaces, for example, in response to the energy conservation standards, all other DHE categories are also potential substitutes. Finally, DOE has included the conversion costs for manufacturers to convert all existing products that do not meet the required efficiencies. While manufacturers currently in the industry would likely upgrade their most popular products that did not meet the standards, DOE notes that these conversion costs could also be made by manufacturers that are not currently in the market (*i.e.,* new entrants to the market).

Rheem stated that the U.S. residential water heater market currently has little or no presence of max-tech systems. Rheem commented that as a current manufacturer of conventional storage water heater products, it would be competitively disadvantaged by a standard at TSL 5 or higher in the December 2009 NOPR, as compared to companies that do not manufacture conventional technology. (Rheem, No. 89 at p. 9)

In response, DOE does not believe offering conventional technology would place a manufacturer at a disadvantage if DOE selected a TSL that used advanced technology. While TSL 5 or higher would drive a market for the advanced technology, full-line manufacturers that offer commercial condensing products, for example, could actually be in a better position because of their experience with the

condensing technology. Most water heaters sales are made on a replacement basis. The large installed base of existing manufacturers could make it more difficult for new entrants to gain market share if customers look for a similar replacement. Also, the major manufacturers have very established brands. In short, there are too many factors to conclude that manufacturers who produce conventional storage water heaters would be placed at a competitive disadvantage.

Bock claimed that the proposed amended energy conservation standards for oil-fired water heaters would lessen competition. Bock stated that many manufacturers have exited the market since the last water heater rulemaking in the 1990s (Bock, No. 101 at p. 3)

In response, DOE notes that whether a given manufacturer chooses to exit the residential oil-fired water heater market will depend on a variety of internal and external factors, and DOE also believes that the decision of any manufacturer to exit the market would not necessarily result in a lessening of competition. Consumers today have a number of fuel sources that could be substituted for oil-fired products if any decrease in competition resulted in higher prices for consumers. Furthermore, any increase in prices could also attract new entrants to the market. While there are only two manufacturers that have a significant market share in the residential oil-fired water heater market, there are a number of manufacturers that offer lower volumes of residential oil-fired water heaters, commercial oil-fired water heaters, and oil-fired boilers. Any of these manufacturers could find it attractive to enter this market or expand production, if other manufacturers exited the residential oil-fired water heater market. Finally, as noted above, DOJ did not express concern about the potential lessening of competition in the oil-fired water heater market at the proposed standard level. (DOJ, No. 99 at pp. 1–2)

6. Need of the Nation To Conserve Energy

Improving the energy efficiency of heating products, where economically justified, would likely improve the security of the Nation's energy system by reducing overall demand for energy, thereby reducing the Nation's reliance on foreign sources of energy. Reduced electricity demand may also improve the reliability of the electricity system, particularly during peak-load periods. As a measure of this reduced demand, DOE expects the energy savings from today's standards for the three types of heating products to eliminate the need for approximately 0.857 gigawatts (GW) of generating capacity by 2045.

As discussed in section IV.K.1, DOE analyzed the potential impact on natural gas prices resulting from amended standards on water heaters and the associated benefits for all natural gas users in all sectors of the economy. DOE also analyzed the potential impact on electricity prices resulting from amended standards on water heaters and the associated benefits for all electricity users in all sectors of the economy. The estimated present value of the benefits to consumers are presented in chapter 13 of the TSD.

As discussed in section IV.K.1, DOE believes that there is uncertainty about the extent to which the calculated impacts from reduced energy prices are a benefits transfer from energy producers to energy consumers. Therefore, DOE has concluded that, at present, it should not give a heavy weight to this factor in its consideration of the economic justification of standards on heating products. DOE is continuing to investigate the extent to which benefits associated with change in energy prices projected to result from standards represents a net gain to society.

Enhanced energy efficiency also produces environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases associated with energy production. Table VI.42 and Table VI.43 provide DOE's estimate of cumulative CO_2, NO_X, and Hg emissions reductions expected to result from the TSLs considered in this rulemaking. The estimated cumulative CO_2, NO_X, and Hg emissions reductions for the standards in today's rule are 164 Mt for CO_2, 125 kt for NO_X, and 0.54 tons for Hg. The expected energy savings from these standards may also reduce the cost of maintaining nationwide emissions standards and constraints. In the environmental assessment (chapter 16 of the TSD), DOE reports estimated annual changes in CO_2, NO_X, and Hg emissions attributable to each TSL.

TABLE VI.42—SUMMARY OF EMISSIONS REDUCTIONS UNDER WATER HEATER TSLS

[Cumulative for products sold from 2015 to 2045]

Emission type	TSL							
	1	2	3	4	5	6	7	8
CO_2 (Mt)	74.3	122	131	137	154	209	609	1,001
NO_X (kt)	57.5	94.3	101	106	116	159	456	755
Hg (t)	0.056	0.090	0.103	0.113	0.553	0.704	2.32	3.59

TABLE VI.43—SUMMARY OF EMISSIONS REDUCTIONS UNDER DIRECT HEATING EQUIPMENT AND POOL HEATER TSLS

[Cumulative for products sold from 2013 to 2043]

Emission type	TSL					
	1	2	3	4	5	6
Direct Heating Equipment						
CO_2 (Mt)	8.3	8.8	9.3	17.9	20.2	49.9
NO_X (kt)	7.5	8.1	8.5	16.4	18.6	46.0
Hg (t)	(0.01)	(0.01)	(0.01)	0.03	0.03	0.08
Pool Heaters						
CO_2 (Mt)	0.41	0.75	1.72	2.38	3.61	8.89

TABLE VI.43—SUMMARY OF EMISSIONS REDUCTIONS UNDER DIRECT HEATING EQUIPMENT AND POOL HEATER TSLS—Continued

[Cumulative for products sold from 2013 to 2043]

Emission type	TSL					
	1	2	3	4	5	6
NO_X (kt)	0.37	0.67	1.53	2.10	3.18	7.84
Hg (t)	0.00	0.00	0.00	0.00	0.00	0.00

As noted in section IV.L of this final rule, DOE does not report SO_2 emissions reductions from power plants because DOE is uncertain that an energy conservation standard would affect the overall level of U.S. SO_2 emissions due to emissions caps. DOE also did not include NO_X emissions reduction from power plants in States subject to CAIR because an energy conservation standard would likely not affect the overall level of NO_X emissions in those States due to the emissions caps mandated by CAIR.

It should be noted that, for DHE, DOE estimates a very small increase in Hg emissions under the adopted standard. The reason for this result is that the more-efficient products save natural gas, but they also use more electricity due to electronic ignition and, for some DHE TSLs, use of a fan. This results in higher electricity generation than in the *AEO* Reference Case, which leads to higher emissions. For CO_2 and NO_X, the higher emissions from the power sector are more than canceled out by lower household emissions from gas combustion, such that total emissions decrease under the considered TSLs. For Hg, this is not the case because there are no offsetting household emissions.

In the December 2009 NOPR, DOE investigated and considered the potential monetary benefit of reduced CO_2 emissions that could result from the TSLs it considered. 74 FR 65852, 65924–28 (Dec. 11, 2009). DOE valued the potential global benefits resulting from such reductions at the interim values of $5, $10, $20, $34, and $57 per metric ton in 2007 (in 2008$), and also valued the domestic benefits at approximately $1 per metric ton. For today's final rule, DOE has updated its analysis to reflect the outcome of the most recent interagency process regarding the social cost of carbon dioxide emissions (SCC). *See* section IV.M for a full discussion. The four values of CO_2 emissions reductions resulting from that process (expressed in 2007$) are $4.70/ton (the average value from a distribution that uses a 5-percent discount rate), $21.40/ton (the average value from a distribution that uses a 3-percent discount rate), $35.10/ton (the average value from a distribution that uses a 2.5-percent discount rate), and $64.90/ton (the 95th-percentile value from a distribution that uses a 3-percent discount rate). These values correspond to the value of emission reductions in 2010; the values for later years are higher due to increasing damages as the magnitude of climate change increases. Table VI.44, Table VI.45, and Table VI.46 present the global values of emissions reductions at each TSL. For each of the four cases, DOE calculated a present value of the stream of annual values using the same discount rate as was used in the studies upon which the dollar-per-ton values are based. DOE calculated domestic values as a range from 7 percent to 23 percent of the global values, and these results are presented in Table VI.47, Table VI.48, and Table VI.49.

TABLE VI.44—ESTIMATES OF GLOBAL PRESENT VALUE OF CO_2 EMISSIONS REDUCTIONS FOR THE PERIOD 2015–2045 UNDER WATER HEATER TRIAL STANDARD LEVELS

TSL	Cumulative CO_2 emission reductions, *Mt*	Global Value of CO_2 Emission Reductions, *Million 2009$*			
		5% discount rate, average*	3% discount rate, average*	2.5% discount rate, average*	3% discount rate, 95th percentile*
1	74.3	266	1,351	2,285	4,122
2	122	436	2,213	3,742	6,750
3	131	468	2,374	4,014	7,242
4	137	492	2,496	4,220	7,614
5	154	524	2,682	4,545	8,179
6	209	714	3,653	6,190	11,142
7	609	2,060	10,560	17,898	32,204
8	1,001	3,399	17,411	29,505	53,098

* Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC with each year.

TABLE VI.45—ESTIMATES OF GLOBAL PRESENT VALUE OF CO_2 EMISSIONS REDUCTIONS FOR THE PERIOD 2013–2043 UNDER DIRECT HEATING EQUIPMENT TRIAL STANDARD LEVELS

TSL	Cumulative CO_2 emission reductions, *Mt*	Global value of CO_2 emission reductions, *million 2009$*			
		5% discount rate, average*	3% discount rate, average*	2.5% discount rate, average*	3% discount rate, 95th percentile*
1	8.2	31	154	259	470
2	8.8	33	165	278	503
3	9.3	35	174	293	530
4	17.9	67	335	565	1,023
5	20.2	76	378	637	1,154
6	49.9	187	933	1,572	2,849

* Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC with each year.

TABLE VI.46—ESTIMATES OF GLOBAL PRESENT VALUE OF CO_2 EMISSIONS REDUCTIONS FOR THE PERIOD 2013–2043 UNDER POOL HEATER TRIAL STANDARD LEVELS

TSL	Cumulative CO_2 emission reductions, *Mt*	Global value of CO_2 emission reductions, *million 2009$*			
		5% discount rate, average*	3% discount rate, average*	2.5% discount rate, average*	3% discount rate, 95th percentile*
1	0.4	2	8	13	24
2	0.8	3	14	24	43
3	1.7	6	32	54	99
4	2.4	9	45	75	136
5	3.6	14	68	114	206
6	8.9	33	167	281	509

* Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC with each year.

TABLE VI.47—ESTIMATES OF DOMESTIC PRESENT VALUE OF CO_2 EMISSIONS REDUCTIONS FOR THE PERIOD 2015–2045 UNDER WATER HEATER TRIAL STANDARD LEVELS

TSL	Domestic value of CO_2 emission reductions, *million 2009$* *			
	5% discount rate, average**	3% discount rate, average**	2.5% discount rate, average**	3% discount rate, 95th percentile**
1	18.6 to 61.3	94.6 to 311	160 to 526	289 to 948.
2	30.5 to 100	155 to 509	262 to 861	473 to 1,553.
3	32.8 to 108	166 to 546	281 to 923	507 to 1,666.
4	34.4 to 113	175 to 574	295 to 971	533 to 1,751.
5	36.7 to 120	188 to 617	318 to 1,045	573 to 1,881.
6	50.0 to 164	256 to 840	433 to 1,424	780 to 2,563.
7	144 to 474	739 to 2,429	1,253 to 4,117	2,254 to 7,407.
8	248 to 782	1,219 to 4,005	2,065 to 6,786	3,717 to 12,212.

* Domestic values are presented as a range between 7% and 23% of the global values.

** Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC with each year.

TABLE VI.48—ESTIMATES OF DOMESTIC PRESENT VALUE OF CO_2 EMISSIONS REDUCTIONS FOR THE PERIOD 2013–2043 UNDER DIRECT HEATING EQUIPMENT TRIAL STANDARD LEVELS

TSL	Domestic value of CO_2 emission reductions, *million 2009$* *			
	5% discount rate, average**	3% discount rate, average**	2.5% discount rate, average**	3% discount rate, 95th percentile**
1	2.2 to 7.1	10.8 to 35.4	18.2 to 59.6	32.9 to 108.0.
2	2.3 to 7.6	11.5 to 37.9	19.5 to 63.9	35.2 to 115.8.
3	2.4 to 8.0	12.2 to 39.9	20.5 to 67.3	37.1 to 121.9.
4	4.7 to 15.4	23.5 to 77.1	39.5 to 129.9	71.6 to 235.4.
5	5.3 to 17.4	26.5 to 87.0	44.6 to 146.6	80.8 to 265.5.
6	13.1 to 43.0	65.3 to 214.7	110.1 to 361.7	199.4 to 655.2.

* Domestic values are presented as a range between 7% and 23% of the global values.

** Columns are labeled by the discount rate used to calculate SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC with each year.

TABLE VI.49—ESTIMATES OF DOMESTIC PRESENT VALUE OF CO_2 EMISSIONS REDUCTIONS FOR THE PERIOD 2013–2043 UNDER POOL HEATERS TRIAL STANDARD LEVELS

TSL	Domestic value of CO_2 emission reductions, *million 2009$* *			
	5% discount rate, average**	3% discount rate, average**	2.5% discount rate, average**	3% discount rate, 95th percentile**
1	0.1 to 0.4	0.5 to 1.8	0.9 to 3.0	1.7 to 5.5.
2	0.2 to 0.7	1.0 to 3.2	1.7 to 5.4	3.0 to 9.9.
3	0.5 to 1.5	2.3 to 7.4	3.8 to 12.5	6.9 to 22.7.
4	0.6 to 2.1	3.1 to 10.3	5.3 to 17.3	9.5 to 31.4.
5	1.0 to 3.1	4.7 to 15.5	8.0 to 26.2	14.4 to 47.5.
6	2.3 to 7.7	11.7 to 38.3	19.6 to 64.6	35.6 to 117.0.

* Domestic values are presented as a range between 7% and 23% of the global values.
** Columns are labeled by the discount rate used to calculate the SCC and whether it is an average value or drawn from a different part of the distribution. Values presented in the table are based on escalating 2007$ to 2009$ for consistency with other values presented in this notice, and incorporate the escalation of the SCC with each year.

DOE is well aware that scientific and economic knowledge about the contribution of CO_2 and other GHG emissions to changes in the future global climate and the potential resulting damages to the world economy continues to evolve rapidly. Thus, any value placed in this rulemaking on reducing CO_2 emissions is subject to change. DOE, together with other Federal agencies, will continue to review various methodologies for estimating the monetary value of reductions in CO_2 and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public record for this and other rulemakings, as well as other methodological assumptions and issues. However, consistent with DOE's legal obligations, and taking into account the uncertainty involved with this particular issue, DOE has included in this rule the most recent values and analyses resulting from the ongoing interagency review process.

DOE also estimated a range for the cumulative monetary value of the economic benefits associated with NO_X emissions reductions anticipated to result from amended standards for heating products. The dollar-per-ton values that DOE used are discussed in section IV.M of this final rule. Table VI.50 through Table VI.55 present the estimates calculated using seven-percent and three-percent discount rates, respectively.

TABLE VI.50—ESTIMATES OF VALUE OF REDUCTIONS OF NO_X EMISSIONS UNDER WATER HEATER TRIAL STANDARD LEVELS AT A SEVEN-PERCENT DISCOUNT RATE

TSL	Cumulative NO_X emission reductions, kt	Value of NO_X emission reductions, million 2009$
1	57.5	6.6 to 67.8.
2	94.3	10.8 to 111.
3	101	11.6 to 119.
4	106	12.1 to 125.
5	116	11.0 to 113.
6	159	15.2 to 157.
7	456	42.6 to 438.
8	755	71.4 to 734.

TABLE VI.51—ESTIMATES OF VALUE OF REDUCTIONS OF NO_X EMISSIONS UNDER WATER HEATER TRIAL STANDARD LEVELS AT A THREE-PERCENT DISCOUNT RATE

TSL	Cumulative NO_X emission reductions, kt	Value of NO_X emission reductions, million 2009$
1	57.5	13.7 to 141.
2	94.3	22.5 to 231.
3	101	24.0 to 247.
4	106	25.2 to 259.
5	116	25.4 to 261.
6	159	34.9 to 358.
7	456	99.1 to 1,018.
8	755	165 to 1,694.

TABLE VI.52—ESTIMATES OF VALUE OF REDUCTIONS OF NO_X EMISSIONS UNDER DIRECT HEATING EQUIPMENT TRIAL STANDARD LEVELS AT A SEVEN-PERCENT DISCOUNT RATE

TSL	Cumulative NO_X emission reductions, kt	Value of NO_X emission reductions, million 2009$
1	7.5	1.0 to 10.2.
2	8.1	1.1 to 10.9.
3	8.5	1.1 to 11.4.
4	16.4	2.2 to 22.3.
5	18.6	2.5 to 25.3.
6	46.0	6.1 to 62.5.

TABLE VI.53—ESTIMATES OF VALUE OF REDUCTIONS OF NO_X EMISSIONS UNDER DIRECT HEATING EQUIPMENT TRIAL STANDARD LEVELS AT A THREE-PERCENT DISCOUNT RATE

TSL	Cumulative NO_X emission reductions, kt	Value of NO_X emission reductions, million 2009$
1	7.5	1.9 to 19.6.
2	8.1	2.0 to 21.0.
3	8.5	2.1 to 22.1.
4	16.4	4.2 to 42.9.
5	18.6	4.7 to 48.7.
6	46.0	11.7 to 120.2.

TABLE VI.54—ESTIMATES OF VALUE OF REDUCTIONS OF NO_X EMISSIONS UNDER POOL HEATER TRIAL STANDARD LEVELS AT A SEVEN-PERCENT DISCOUNT RATE

TSL	Cumulative NO_X emission reductions, kt	Value of NO_X emission reductions, million 2009$
1	0.4	0.1 to 0.5.
2	0.7	0.1 to 0.9.
3	1.5	0.2 to 2.2.
4	2.1	0.3 to 2.9.
5	3.2	0.4 to 4.5.
6	7.8	1.1 to 11.0.

TABLE VI.55—ESTIMATES OF VALUE OF REDUCTIONS OF NO_X EMISSIONS UNDER POOL HEATER TRIAL STANDARD LEVELS AT A THREE-PERCENT DISCOUNT RATE

TSL	Cumulative NO_X emission reductions, kt	Value of NO_X emission reductions, million 2009$
1	0.4	0.1 to 1.0.
2	0.7	0.2 to 1.8.
3	1.5	0.4 to 4.1.
4	2.1	0.5 to 5.6.
5	3.2	0.8 to 8.4.
6	7.8	2.0 to 20.8.

The NPV of the monetized benefits associated with emissions reductions can be viewed as a complement to the NPV of the consumer savings calculated for each TSL considered in this rulemaking. Table VI.57 through Table VI.62 present the NPV values for heating products that would result if DOE were to add the estimates of the potential economic benefits resulting from reduced CO_2 and NO_X emissions in each of four valuation scenarios to the NPV of consumer savings calculated for each TSL considered in this rulemaking, at both a seven-percent and three-percent discount rate. The CO_2 values used in the columns of each table correspond to the four scenarios for the valuation of CO_2 emission reductions presented in section IV.M. Table VI.56 shows an example of the calculation of the NPV including benefits from emissions reductions for the case of TSL 5 for water heaters.

Although adding the value of consumer savings to the values of emission reductions provides a valuable perspective, the following should be considered: (1) The national consumer savings are domestic U.S. consumer

monetary savings found in market transactions, while the values of emissions reductions are based on estimates of marginal social costs, which, in the case of CO_2, are based on a global value; (2) The assessments of consumer savings and emission-related benefits are performed with different computer models, leading to different timeframes for analysis. For heating products, the present value of national consumer savings is measured for the period in which units shipped (2015 to 2045 for water heaters, and 2013 to 2043 for DHE and pool heaters) continue to operate. However, the time frames of the benefits associated with the emission reductions differ. For example, the value of CO_2 emissions reductions reflects the present value of all future climate-related impacts due to emitting a ton of carbon dioxide in that year, out to 2300.

TABLE VI.56—ESTIMATE OF ADDING NET PRESENT VALUE OF CONSUMER SAVINGS TO PRESENT VALUE OF MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS AT TSL 5 FOR WATER HEATERS

Category	Present value billion 2009$	Discount rate (percent)
Benefits		
Operating Cost Savings	12.4	7
	29.2	3
CO_2 Monetized Value (at $4.7/Metric Ton)*	0.5	5
CO_2 Monetized Value (at $21.4/Metric Ton)*	2.7	3
CO_2 Monetized Value (at $35.1/Metric Ton)*	4.5	2.5
CO_2 Monetized Value (at $64.9/Metric Ton)*	8.2	3
NO_X Monetized Value (at $2,437/Metric Ton)	0.1	7
	0.1	3
Total Monetary Benefits **	15.2	7
	32.1	3
Costs		
Total Monetary Costs	−11.1	7
	−20.6	3
Net Benefits/Costs		
Including CO_2 and NO_X**	4.1	7
	11.5	3

*These values represent global values (in 2007$) of the social cost of CO_2 emissions in 2010 under several scenarios. The values of $4.7, $21.4, and $35.1 per ton are the averages of SCC distributions calculated using 5%, 3%, and 2.5% discount rates, respectively. The value of $64.9 per ton represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. *See* section IV.M for details.

**Total Monetary Benefits for both the 3% and 7% cases utilize the central estimate of social cost of CO_2 emissions calculated at a 3% discount rate (averaged across three IAMs), which is equal to $21.4/ton in 2010 (in 2007$).

TABLE VI.57—ESTIMATES OF ADDING NET PRESENT VALUE OF CONSUMER SAVINGS (AT 7% DISCOUNT RATE) TO NET PRESENT VALUE OF LOW, CENTRAL, AND HIGH-END MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS AT TRIAL STANDARD LEVELS FOR WATER HEATERS

TSL	Consumer NPV at 7% discount rate added with:			
	CO_2 value of $4.7/metric ton CO_2* and Low value for NO_X** *billion 2009$*	CO_2 value of $21.4/metric ton CO_2* and Medium value for NO_X*** *billion 2009$*	CO_2 Value of $35.1/metric ton CO_2* and Medium value for NO_X*** *billion 2009$*	CO_2 value of $64.9/metric ton CO_2* and high value for NO_X**** *billion 2009$*
1	1.24	2.35	3.29	5.15
2	1.33	3.16	4.69	7.74
3	1.63	3.59	5.23	8.52
4	1.54	3.60	5.32	8.77
5	1.92	4.13	5.99	9.68
6	1.74	4.75	7.29	12.31
7	1.89	10.59	17.92	32.43
8	(8.10)	6.24	18.34	42.26

*These label values per ton represent the global SCC of CO_2 in 2010, in 2007$. Their present values have been calculated with scenario-consistent discount rates. *See* section IV.M for a full discussion of the derivation of these values.

**Low values correspond to $447 per ton of NO_X emissions.

***Medium values correspond to $2,519 per ton of NO_X emissions.

****High values correspond to $4,591 per ton of NO_X emissions.

TABLE VI.58—ESTIMATES OF ADDING NET PRESENT VALUE OF CONSUMER SAVINGS (AT 3% DISCOUNT RATE) TO NET PRESENT VALUE OF LOW, CENTRAL, AND HIGH-END MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS AT TRIAL STANDARD LEVELS FOR WATER HEATERS

TSL	Consumer NPV at 3% Discount Rate added with:			
	CO_2 value of $4.7/metric ton CO_2* and Low value for NO_X** *billion 2009$*	CO_2 value of $21.4/metric ton CO_2* and Medium value for NO_X*** *billion 2009$*	CO_2 value of $35.1/metric ton CO_2* and Medium value for NO_X*** *billion 2009$*	CO_2 value of $64.9/metric ton CO_2* and High value for NO_X**** *billion 2009$*
1	4.67	5.82	6.75	8.65
2	6.08	7.96	9.49	12.60
3	7.54	9.56	11.20	14.54
4	8.07	10.19	11.91	15.42
5	9.22	11.50	13.36	17.11
6	9.83	12.93	15.47	20.58
7	25.55	34.51	41.84	56.61
8	20.44	35.21	47.31	71.67

* These label values per ton represent the global SCC of CO_2 in 2010, in 2007$. Their present values have been calculated with scenario-consistent discount rates. *See* section IV.M for a full discussion of the derivation of these values.
** Low value corresponds to $447 per ton of NO_X emissions.
*** Medium value corresponds to $2,519 per ton of NO_X emissions.
**** High value corresponds to $4,591 per ton of NO_X emissions.

TABLE VI.59—ESTIMATES OF ADDING NET PRESENT VALUE OF CONSUMER SAVINGS (AT 7% DISCOUNT RATE) TO NET PRESENT VALUE OF LOW, CENTRAL, AND HIGH-END MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS AT TRIAL STANDARD LEVELS FOR DIRECT HEATING EQUIPMENT

TSL	Consumer NPV at 7% discount rate added with:			
	CO_2 value of $4.7/metric ton CO_2* and low value for NO_X** *billion 2009$*	CO_2 value of $21.4/metric ton CO_2* and medium value for NO_X*** *billion 2009$*	CO_2 value of $35.1/metric ton CO_2* and medium value for NO_X*** *billion 2009$*	CO_2 value of $64.9/metric ton CO_2* and high value for NO_X**** *billion 2009$*
1	0.58	0.70	0.81	1.02
2	0.61	0.74	0.86	1.09
3	0.60	0.74	0.86	1.10
4	(1.12)	(0.84)	(0.61)	(0.14)
5	(1.16)	(0.85)	(0.59)	(0.06)
6	(4.18)	(3.41)	(2.77)	(1.47)

* These label values per ton represent the global SCC of CO_2 in 2010, in 2007$. Their present values have been calculated with scenario-consistent discount rates. *See* section IV.M for a full discussion of the derivation of these values.
** Low value corresponds to $447 per ton of NO_X emissions.
*** Medium value corresponds to $2,519 per ton of NO_X emissions.
**** High value corresponds to $4,591 per ton of NO_X emissions.
Parentheses indicate negative (−) values.

TABLE VI.60—ESTIMATES OF ADDING NET PRESENT VALUE OF CONSUMER SAVINGS (AT 3% DISCOUNT RATE) TO NET PRESENT VALUE OF LOW, CENTRAL, AND HIGH-END MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS AT TRIAL STANDARD LEVELS FOR DIRECT HEATING EQUIPMENT

TSL	Consumer NPV at 3% discount rate added with:			
	CO_2 value of $4.7/metric ton CO_2* and low value for NO_X** *billion 2009$*	CO_2 value of $21.4/metric ton CO_2* and medium value for NO_X*** *billion 2009$*	CO_2 value of $35.1/metric ton CO_2* and medium value for NO_X*** *billion 2009$*	CO_2 value of $64.9/metric ton CO_2* and high value for NO_X**** *billion 2009$*
1	1.35	1.48	1.59	1.80
2	1.42	1.56	1.68	1.91
3	1.43	1.58	1.70	1.94
4	(1.18)	(0.90)	(0.67)	(0.19)
5	(1.14)	(0.81)	(0.55)	(0.02)
6	(4.77)	(3.97)	(3.33)	(2.00)

* These label values per ton represent the global SCC of CO_2 in 2010, in 2007$. Their present values have been calculated with scenario-consistent discount rates. *See* section IV.M for a full discussion of the derivation of these values.
** Low value corresponds to $447 per ton of NO_X emissions.
*** Medium value corresponds to $2,519 per ton of NO_X emissions.
**** High value corresponds to $4,591 per ton of NO_X emissions.
Parentheses indicate negative (−) values.

TABLE VI.61—ESTIMATES OF ADDING NET PRESENT VALUE OF CONSUMER SAVINGS (AT 7% DISCOUNT RATE) TO NET PRESENT VALUE OF LOW, CENTRAL, AND HIGH-END MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS AT TRIAL STANDARD LEVELS FOR POOL HEATERS

TSL	Consumer NPV at 7% discount rate added with:			
	CO_2 value of $4.7/metric ton CO_2* and low value for NO_X** *billion 2009$*	CO_2 value of $21.4/metric ton CO_2* and medium value for NO_X*** *billion 2009$*	CO_2 value of $35.1/metric ton CO_2* and medium value for NO_X*** *billion 2009$*	CO_2 value of $64.9/metric ton CO_2* and high value for NO_X**** *billion 2009$*
1	0.05	0.05	0.06	0.07
2	0.04	0.05	0.06	0.08
3	(0.05)	(0.03)	(0.00)	0.04
4	(0.15)	(0.11)	(0.08)	(0.02)
5	(1.38)	(1.32)	(1.28)	(1.18)
6	(2.84)	(2.70)	(2.59)	(2.35)

* These label values per ton represent the global SCC of CO_2 in 2010, in 2007$. Their present values have been calculated with scenario-consistent discount rates. *See* section IV.M for a full discussion of the derivation of these values.
** Low value corresponds to $447 per ton of NO_X emissions.
*** Medium value corresponds to $2,519 per ton of NO_X emissions.
**** High value corresponds to $4,591 per ton of NO_X emissions.
Parentheses indicate negative (−) values.

TABLE VI.62—ESTIMATES OF ADDING NET PRESENT VALUE OF CONSUMER SAVINGS (AT 3% DISCOUNT RATE) TO NET PRESENT VALUE OF LOW, CENTRAL, AND HIGH-END MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS AT TRIAL STANDARD LEVELS FOR POOL HEATERS

TSL	Consumer NPV at 3% discount rate added with:			
	CO_2 value of $4.7/metric ton CO_2* and low value for NO_X** *billion 2009$*	CO_2 value of $21.4/metric ton CO_2* and medium value for NO_X*** *billion 2009$*	CO_2 value of $35.1/metric ton CO_2* and medium value for NO_X*** *billion 2009$*	CO_2 value of $64.9/metric ton CO_2* and high value for NO_X**** *billion 2009$*
1	0.10	0.11	0.11	0.12
2	0.11	0.12	0.13	0.15
3	(0.01)	0.02	0.04	0.09
4	(0.14)	(0.10)	(0.07)	(0.01)
5	(2.31)	(2.26)	(2.21)	(2.11)
6	(4.53)	(4.39)	(4.28)	(4.04)

* These label values per ton represent the SCC of CO_2 in 2010, in 2007$. Their present values have been calculated with scenario-consistent discount rates. *See* section IV.M for a full discussion of the derivation of these values.
** Low value corresponds to $447 per ton of NO_X emissions.
*** Medium value corresponds to $2,519 per ton of NO_X emissions.
**** High value corresponds to $4,591 per ton of NO_X emissions.
Parentheses indicate negative (−) values.

7. Other Factors

In determining whether a standard is economically justified, the Secretary of Energy may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) The Secretary has decided that the LCC impacts on identifiable groups of consumers, such as senior citizens and residents of multi-family housing who may be disproportionately affected by any national energy conservation standard level, is a relevant factor. The impacts on the identified consumer subgroups are described in section VI.C.1.b above. DOE also believes that uncertainties associated with the heat pump water heater market (*e.g.,* product availability, servicing, and manufacturability) are relevant to consider as described in section VI.D.2 below. Lastly, DOE believes that another relevant consideration is the potential safety concerns surrounding gas-fired storage water heaters that are atmospherically vented with high recovery efficiencies that potentially may be installed with improper venting in certain installations, which are also discussed in section VI.D.2 below.

D. Conclusion

1. Overview

As discussed above, EPCA contains a number of criteria and other provisions which must be followed when prescribing new or amended energy conservation standards. Specifically, the statute provides that any such standard for any type (or class) of covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must do so after receiving public comments on the proposed standard and by considering, to the greatest extent practicable, the following seven factors:

1. The economic impact of the standard on the manufacturers and consumers of the products subject to such standard;

2. The savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, initial charges for, or maintenance expenses of the covered

products likely to result from imposition of the standard;

3. The total projected amount of energy (or, as applicable, water) savings likely to result directly from imposition of the standard;

4. Any lessening of the utility or performance of the covered products likely to result from imposition of the standard;

5. The impact of any lessening of competition, as determined in writing by the Attorney General, likely to result from imposition of the standard;

6. The need for national energy and water conservation; and

7. Other factors the Secretary considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

A determination of whether a standard level is economically justified is not based on any one factor in isolation. The Secretary must weigh each of these seven factors in total. In addition, the Secretary may not establish any standard if such standard would not result in "significant conservation of energy" or "is not technologically feasible or economically justified." (42 U.S.C. 6295(o)(3)(B)) Furthermore, EPCA's "anti-backsliding" provision prohibits the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1))

In selecting today's energy conservation standards for the three heating products, DOE started by examining whether the maximum technologically feasible levels were economically justified. Upon finding that the maximum technologically feasible levels were not economically justified, DOE analyzed the next lower TSL to determine whether that level was economically justified. DOE follows this procedure until it: (1) Identifies a TSL that is both technologically feasible and economically justified, and saves a significant amount of energy; or (2) determines that no TSL is economically justified.

Tables in each section below for each of the three types of heating products summarize DOE's quantitative analytical results for each TSL it considered for this final rule. These tables will aid the reader in understanding the costs and benefits of each TSL that DOE considered in adopting standards in this final rule.

2. Water Heaters

Table VI.63 summarizes the results of DOE's quantitative analysis for each TSL it considered for this final rule for water heaters.

TABLE VI.63—SUMMARY OF ANALYTICAL RESULTS FOR WATER HEATERS

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6	TSL 7	TSL 8
National Energy Savings (quads)	1.07	1.66	2.05	2.35	2.58	3.06	10.16	16.73
NPV of Consumer Benefits (2009$ billion)								
3% discount rate	4.39	5.62	7.05	7.55	8.67	9.08	23.39	16.87
7% discount rate	0.96	0.88	1.15	1.03	1.39	1.01	(0.22)	(11.57)
Industry Impacts								
Gas-Fired and Electric Storage:								
Industry NPV (2009$ million)	(4.9)–(14.2)	(4.3)–(31.4)	(5.2)–(38.3)	(4.8)–(89.4)	(25.9)–(122.6)	(23.6)–(134.6)	(10.5)–(350.2)	79.2–(647.0)
Industry NPV (% change)	(0.6)–(1.6)	(0.5)–(3.6)	(0.6)–(4.3)	(0.5)–(10.2)	(2.9)–(13.9)	(2.7)–(15.3)	(1.2)–(39.8)	9.0–(73.5)
Oil-Fired Storage:								
Industry NPV (2009$ million)	(0.2)–(0.4)	(0.2)–(0.3)	(0.2)–(0.4)	(0.2)–(0.4)	(0.2)–(0.4)	(0.2)–(0.4)	(0.2)–(0.4)	(1.4)–(3.8)
Industry NPV (% change)	(2.0)–(3.9)	(1.8)–(3.6)	(2.0)–(4.2)	(2.0)–(4.2)	(2.0)–(4.2)	(2.0)–(4.2)	(2.0)–(4.2)	(15.4)–(41.4)
Gas-Fired Instantaneous:								
Industry NPV (2009$ million)	2.3–(1.2)	2.3–(1.2)	2.3–(1.2)	2.3–(1.2)	2.3–(1.2)	2.3–(1.2)	2.3–(1.2)	91.4–(57.6)
Industry NPV (% change)	0.4–(0.2)	0.4–(0.2)	0.4–(0.2)	0.4–(0.2)	0.4–(0.2)	0.4–(0.2)	0.4–(0.2)	14.1–(8.9)
Cumulative Emissions Reduction								
CO_2 (Mt)	74.3	122	131	137	154	209	609	1,001
NO_X (kt)	57.5	94.3	101	106	116	159	456	755
Hg (t)	0.056	0.090	0.103	0.113	0.553	0.704	2.32	3.59
Value of Cumulative Emissions Reduction (2009$ million) ††								
CO_2	266 to 4,122	436 to 6,750	468 to 7,242	492 to 7,614	524 to 8,179	714 to 11,142	2,060 to 32,204	3,399 to 53,098
NO_X—3% discount rate	13.7 to 141	22.5 to 231	24 to 247	25 to 259	25 to 261	35 to 358	99 to 1,019	165 to 1,694
NO_X—7% discount rate	6.6 to 67.9	10.8 to 111	11.6 to 119	12.2 to 125	11.0 to 113	15.2 to 157	42.6 to 438	71.5 to 734
Mean LCC Savings * (2009$)								
Gas-Fired Storage	16	7	7	7	18	9	(218)	(195)
Electric Storage	5	11	18	18	64	64	112	171
Oil-Fired Storage	101	203	295	295	295	295	295	495
Gas-Fired Instantaneous	9	9	9	9	9	9	9	(259)

TABLE VI.63—SUMMARY OF ANALYTICAL RESULTS FOR WATER HEATERS—Continued

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6	TSL 7	TSL 8
Median PBP (years)								
Gas-Fired Storage	2.0	4.5	4.5	4.5	2.3	4.7	21.5	15.6
Electric Storage	4.0	4.0	5.0	6.7	6.8	6.8	9.4	9.0
Oil-Fired Storage	0.9	0.3	0.5	0.5	0.5	0.5	0.5	1.9
Gas-Fired Instantaneous	14.8	14.8	14.8	14.8	14.8	14.8	14.8	38.7
Distribution of Consumer LCC Impacts								
Gas-Fired Storage:								
Net Cost (%)	25	32	32	32	27	34	70	70
No Impact (%)	36	22	22	22	33	21	6	1
Net Benefit (%) ..	39	45	45	45	40	46	23	28
Electric Storage:								
Net Cost (%)	11	12	21	32	33	33	50	50
No Impact (%)	44	39	17	10	9	9	5	1
Net Benefit (%) ..	45	48	62	59	58	58	45	49
Oil-Fired Storage:								
Net Cost (%)	0	0	0	0	0	0	0	0
No Impact (%)	76	54	47	47	47	47	47	17
Net Benefit (%) ..	24	46	53	53	53	53	53	83
Gas-Fired Instantaneous:								
Net Cost (%)	5	5	5	5	5	5	5	77
No Impact (%)	91	91	91	91	91	91	91	12
Net Benefit (%) ..	4	4	4	4	4	4	4	11
Generation Capacity Change (GW in 2045) ..	(0.168)	(0.270)	(0.309)	(0.339)	(0.829)	(1.05)	(3.49)	(5.39)
Employment Impacts								
Total Potential Changes in Domestic Production Workers in 2015:								
Gas-Fired and Electric Storage	(3,610)–55	(3,610)–128	(3,610)–168	(3,610)–256	(3,610)–439	(3,610)–500	(3,610)–3,253	(3,610)–6,313
Oil-Fired storage	(37)–0	(37)–0	(37)–1	(37)–1	(37)–1	(37)–1	(37)–1	(37)–18
Gas-Fired Instantaneous	Not Applicable †††							
Net Change in National Indirect Employment in 2044 thousands) ††††	2.1	2.8	4.6	6.0	10.4	10.6	43.5	56.3

Parentheses indicate negative (−) values.
* For LCCs, a negative value means an increase in LCC by the amount indicated.
†† Range of the economic value of CO_2 reductions is based on estimates of the global benefit of reduced CO_2 emissions.
††† The industry for gas-fired instantaneous water heaters is international.
†††† National Indirect Employment Impacts exclude direct impacts.

DOE first considered TSL 8, which represents the max-tech efficiency levels for all four product classes. TSL 8 includes a national standard effectively requiring the use of condensing technology for gas-fired storage and instantaneous water heaters, a national standard effectively requiring the use of heat pump water heater technology for electric storage water heaters, and a national standard effectively requiring the use of a multi-flue design for oil-fired water heaters. TSL 8 would save 16.7 quads of energy, an amount DOE considers significant. TSL 8 would result in a NPV of consumer cost of $11.6 billion, using a discount rate of 7 percent, and consumer benefit of $16.9 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 8 are 1,001 Mt of CO_2, 755 kt of NO_X, and 3.6 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 8 is $3,399 million to $53,098 million. Total electricity generating capacity in 2045 is estimated to decrease by 5.39 gigawatts (GW) under TSL 8.

At TSL 8, DOE projects that the average LCC impact for consumers is a loss of $195 for gas-fired storage water heaters, a gain of $171 for electric storage water heaters, a gain of $495 for oil-fired storage water heaters, and a loss of $259 for gas-fired instantaneous water heaters. The median payback period is 15.6 years for gas-fired storage water heaters, 9.0 years for electric storage water heaters, 1.9 years for oil-fired storage water heaters, and 38.7 years for gas-fired instantaneous water heaters (which is substantially longer than the mean lifetime of the product). At TSL 8, the fraction of consumers experiencing an LCC benefit is 28 percent for gas-fired storage water heaters, 49 percent for electric storage water heaters, 83 percent for oil-fired storage water heaters, and 11percent for gas-fired instantaneous water heaters. The fraction of consumers experiencing an LCC cost is 70 percent for gas-fired storage water heaters, 50 percent for electric storage water heaters, 0 percent for oil-fired storage water heaters, and

77 percent for gas-fired instantaneous water heaters.

At TSL 8, the average LCC savings are negative for all of the considered consumer subgroups for gas-fired storage water heaters, and a majority of the households in each subgroup experience a net cost. In the case of electric storage water heaters, the average LCC savings are negative for senior-only and multi-family households, but positive for low-income and manufactured home households. In all cases, however, a majority of the households in each subgroup experience a net cost.

At TSL 8, the projected change in the INPV is estimated to decrease up to $647 million for gas-fired and electric storage water heaters, a decrease of up to $3.8 million for residential oil-fired storage water heaters, and a decrease of up to $58 million for gas-fired instantaneous water waters, in 2009$. For gas-fired and electric storage water heaters, the impacts are driven primarily by the assumptions regarding the ability for manufacturers to produce products at these efficiency levels in the volumes necessary to serve the entire market. Manufacturers would need to redesign almost all of their products at TSL 8, which would force manufacturers to incur significant product and capital conversion costs. Some loss in product utility may also occur for units that are presently installed in space-constrained applications because condensing and heat pump technologies would typically cause water heaters to have a larger footprint. At TSL 8, DOE recognizes the risk of very large negative impacts if manufacturers' expectations about reduced profit margins are realized. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 8 could result in a net loss of 73.5 percent in INPV for gas-fired and electric storage water heaters, a net loss of 41.4 percent in INPV for oil-fired storage water heaters, and a net loss of 8.9 percent in INPV for gas-fired instantaneous water heaters.

For gas-fired storage and instantaneous water heaters at TSL 8, condensing operation would be required. As further described in the December 2009 NOPR, DOE outlined several concerns related to the condensing gas-fired storage water heater market. 74 FR 65852, 65963–64 (Dec. 11, 2009). The main concerns included the ability for the industry to produce condensing gas-fired storage water heaters and provide installation and servicing on a scale necessary to serve the entire volume of the market (*i.e.,* approximately, 4.6 million units annually). TSL 8 also includes an efficiency level for electric storage water heaters that would require the use of heat pump technology. The substantial average savings for customers estimated by DOE's analysis for TSL 8 are primarily driven by the results for heat pump water heaters. However, DOE outlined a handful of concerns in the December 2009 NOPR with the current heat pump water heater market that may prevent heat pump technology from being ready for full-scale implementation for all consumers. 74 FR 65852, 65965 (Dec. 11, 2009). These included manufacturability, serviceability, the ability to retrofit existing installations, and potential impacts on the space conditioning loads in the house. All four major storage water heater manufacturers within the industry echoed these concerns regarding the max-tech efficiency level products.

Therefore, the Secretary has concluded that at TSL 8, the benefits of energy savings, positive NPV of consumer benefits (at 3-percent discount rate), generating capacity reductions, and emission reductions are outweighed by the economic burden on a significant fraction of consumers due to the large increases in first costs associated with electric heat pump water heaters and gas-fired condensing water heaters, the disproportionate impacts to consumers in multi-family housing, the large capital conversion costs that could result in a large reduction in INPV for the manufacturers, as well as the uncertainty associated with providing products at the max-tech level on a scale necessary to serve the entire market. Consequently, the Secretary has concluded that TSL 8 is not economically justified.

Next, DOE considered TSL 7. The efficiency levels in TSL 7 include the ENERGY STAR program level for electric storage water heaters, which effectively requires the use of heat pump water heating technologies. However, TSL 7 allows the use of atmospherically-vented gas-fired storage water heaters. TSL 7 would save 10.16 quads of energy, an amount DOE considers significant. TSL 7 would result in a negative consumer NPV of $0.22 billion, using a discount rate of 7 percent, and a consumer NPV benefit of $23.4 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 7 are 609 Mt of CO_2, 456 kt of NO_X, and 2.32 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 7 is $2,060 million to $32,204 million. Total generating capacity in 2045 is estimated to decrease by 3.49 GW under TSL 7.

At TSL 7, DOE projects that the average LCC impact is a loss of $218 for gas-fired storage water heaters, a gain of $112 for electric storage water heaters, a gain of $295 for oil-fired storage water heaters, and a gain of $9 for gas-fired instantaneous water heaters. The median payback period is 21.5 years for gas-fired storage water heaters, 9.4 years for electric storage water heaters, 0.5 years for oil-fired storage water heaters, and 14.8 years for gas-fired instantaneous water heaters. At TSL 7, the fraction of consumers experiencing an LCC benefit is 23 percent for gas-fired storage water heaters, 45 percent for electric storage water heaters, 53 percent for oil-fired storage water heaters, and 4 percent for gas-fired instantaneous water heaters. The fraction of consumers experiencing an LCC cost is 70 percent for gas-fired storage water heaters, 50 percent for electric storage water heaters, 0 percent for oil-fired storage water heaters, and 5 percent for gas-fired instantaneous water heaters.

At TSL 7, the estimated average LCC savings are negative for all of the considered consumer subgroups for gas-fired storage water heaters, and a majority of the households in each subgroup experience a net cost. In the case of electric storage water heaters, the average LCC savings are negative for senior-only and multi-family households, but positive for low-income and manufactured home households. In all cases, however, a majority of the households in each subgroup experience a net cost.

At TSL 7, the projected change in INPV ranges from a decrease of up to $350.2 million for gas-fired and electric storage water heaters, a decrease of up to $0.4 million for oil-fired storage water heaters, and a decrease of up to $1.2 million for gas-fired instantaneous water heaters, in 2009$. The negative impacts on INPV are driven largely by the required efficiencies for electric storage water heaters which effectively require heat pump technology. The oil-fired storage water heater and gas-fired instantaneous water heater efficiencies do not require substantial changes to the existing operations for some manufacturers. The significant changes for electric storage water heaters help to drive the INPVs negative, especially if profitability is impacted after the compliance date of the amended energy conservation standard. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 7 could result in a net loss of 39.8 percent in INPV for gas-fired and electric storage

water heaters, a net loss of 4.2 percent in INPV for oil-fired storage water heaters, and a net loss of 0.2 percent in INPV for gas-fired instantaneous water heaters.

TSL 7 includes efficiency levels for the entire market of electric storage water heaters that are currently only achievable through the use of advanced heat pump technologies. DOE's analysis indicates that dramatic reductions in energy use and substantial economic savings are possible for electric water heaters with the use of these technologies. As with TSL 8, the average savings for electric water heater customers estimated by DOE's analysis for TSL 7 are primarily driven by the results for heat pump water heaters. While DOE finds the potential energy savings resulting from a national heat pump water heater standard very favorable, DOE outlined a number of concerns regarding the manufacturability and the market for heat pump water heaters in the December 2009 NOPR. 74 FR 65852, 65965 (Dec. 11, 2009). These included manufacturability, serviceability, the ability to retrofit existing installations, and potential impacts on the space conditioning loads in the house.

DOE further researched the heat pump water heater market for the final rule. Since the analysis was conducted for the December 2009 NOPR, several heat pump water heater models have been introduced into the market by major manufacturers. DOE's engineering analysis for the final rule confirmed that the use of heat pump water heaters adds dramatically to the MSP estimates, increasing the MSP more than $588 over the baseline electric storage water heater. In part due to this change, the total installed cost to the consumer increases by an average of $915 for heat pump water heaters compared to traditional electric storage water heaters that use electric resistance heating elements.

In the December 2009 NOPR, DOE posed a series of questions for interested parties regarding the manufacturability of heat pump water heaters to meet the demands of the entire market (*i.e.,* approximately 5.8 million units). Even though DOE acknowledged in the December 2009 NOPR that most manufacturers are in the process of developing a heat pump water heater to offer to consumers in response to the ENERGY STAR program or have recently begun to offer a heat pump water heater model for sale, DOE questioned whether it was possible for manufacturers to convert all of their existing product lines over to produce heat pump water heaters within 5 years. 74 FR 65852, 65965 (Dec. 11, 2009). In response to DOE's question in the December 2009 NOPR, A.O. Smith, Rheem, and Bradford White all agreed that producing heat pump water heaters in the volumes necessary to service the market would be quite a transformation and investment for manufacturers. DOE estimates that it would take a total of $76 million in capital conversion costs and an additional $55 million in product conversion costs for the industry to offer exclusively HPWHs. In addition, the significantly higher production costs would require an additional $273 million in working capital to purchase more expensive components, carry more-costly inventory, and handle higher accounts receivable. DOE estimates that the working capital requirement and conversion costs would cause electric storage water heater manufacturers to incur a total one-time investment of at least $404 million in an electric storage market valued at approximately $301 million. Furthermore, manufacturers would find it extremely difficult to create a service structure for over five million electric storage water heaters that use a relatively new technology by the compliance date of the final rule. Finally, DOE believes it is unlikely that manufacturers could earn the same return on these extremely large investments, so profitability would be expected to decrease after the compliance date of the amended energy conservation standards. Even with the ENERGY STAR incentive program, DOE's only projects the market penetration of heat pump water heaters will be 5 percent in 2015.

In the December 2009 NOPR, DOE questioned whether the service industry would be capable of providing the same level of service for heat pump water heaters that consumers are accustomed to receiving from a typical installer or repair person. 74 FR 65852, 65965 (Dec. 11, 2009). DOE sought input from commenters about whether reliable installation and servicing could be achieved on the scale needed by the compliance date of the amended standard. *Id.* As further detailed in section IV.B.2.b, DOE received comments supporting both sides of the arguments. Some manufacturers believe the training of service technicians and infrastructure needed to provide service to the heat pump water heating industry is not adequate and would not be available by the compliance date of the standard to serve the needs of the entire market. Others, including a manufacturer of heat pump water heaters, asserted that a nationwide network for heat pump water heater product service currently exists to service the limited heat pump water heater market today. Also, this manufacturer is currently developing a nationwide installation base to ensure that its consumers can readily purchase, install, and repair their heat pump water heaters. Other commenters pointed out that the skills needed to service heat pump water heaters are similar to the skill set of technicians in the residential refrigerator industry, which has an extensive servicing base.

While DOE believes that heat pump water heaters could require different servicing needs compared to traditional electric resistance storage water heaters, DOE also believes that the service industry will adapt to provide reliable installation, repair, and maintenance for heat pump water heaters by the compliance date of amended energy conservation standards for a subset of the entire market. Heat pump water heaters will require additional servicing needs for the sealed system portion of the unit. This includes handling a working refrigerant in addition to the typical plumbing type issues associated with residential water heaters. Even though DOE believes this additional servicing requirement can be adequately handled by a national servicing network of appliance technicians, DOE questions whether this can be done in the near-term at a level necessary to service the entire market.

In the December 2009 NOPR, DOE also questioned whether heat pump water heaters were capable of being installed in all types of installations currently serviced by the residential electric storage water heating market. 74 FR 65852, 65965 (Dec. 11, 2009). DOE found that in certain situations (especially indoor locations), installations could be very costly for consumers, requiring them to alter their existing space to accommodate a heat pump water heater. In some indoor installations, the consumer needs to address space constraints issues, a requirement for sufficient air volume to maintain adequate operation of the water heater, and the impact of the water heater cooling off the space during the heating season. *Id.* DOE stated in the December 2009 NOPR that according to DOE's estimates, 12 percent of electric storage water heater consumers would experience an increase of more than $500 in their LCC compared to the base case. 74 FR 65852, 65965 (Dec. 11, 2009).

DOE strongly considered TSL 7 as the standard level for residential water heaters. Even though the commenters provided useful insight regarding the

potential manufacturability, serviceability, and capabilities of these units to be installed in similar types of installations where current electric storage water heaters are located, DOE is still concerned about some of the issues identified in the December 2009 NOPR and outlined above regarding a national heat pump water heater standard. Specifically, DOE is still concerned about the ability for manufacturers to ramp up production in time to meet the demand by the compliance date of amended standards, the potentially large increases in total installed cost to certain consumers, the potential impacts on multi-family households, and the potential impacts on the heating and cooling load of the residence. Consequently, for today's final rule, the Secretary has concluded that at TSL 7, the benefits of energy savings, positive consumer NPV (at 3-percent discount rate), generating capacity reductions, and emission reductions would be outweighed by the negative economic impacts on those consumers that would have to make structural changes to accommodate the larger footprint of the heat pump water heaters, the economic burden on a significant fraction of consumers due to the large increases in total installed costs associated with heat pump water heaters, the disproportionate impacts to consumers in multi-family housing and others with comparatively low usage rates, the large capital conversion costs that could result in a large reduction in INPV for the manufacturers, and the uncertainties associated with the heat pump water heater market.

Next, DOE considered TSL 6, in which DOE paired efficiency levels that would effectively require different technologies for large-volume and small-volume gas-fired and electric storage water heaters in an effort to promote advance technology penetration into the market and to potentially save additional energy. Specifically, TSL 6 would effectively require heat pump technology for electric storage water heaters with a rated storage volume greater than 55 gallons and condensing technology for gas-fired storage water heaters with a rated storage volume greater than 55 gallons. For electric storage water heaters at TSL 6, DOE considered efficiency level 6 (*i.e.,* the lowest efficiency level DOE analyzed effectively requiring heat pump technology), instead of the max-tech efficiency level 7 for large water heaters, because at the time of the analysis, only one manufacturer had demonstrated the capability of reaching the efficiencies required by the max-tech energy efficiency equation for electric storage water heaters. Under this slightly lower efficiency level, manufacturers can better maintain design flexibility, and it encourages competition in the heat pump water heater market. DOE believes this level represents an efficiency level that is likely to result in efficient heat pump technologies, yet also maintains maximum flexibility regarding specific heat pump water heater designs. For electric storage water heaters with a rated storage volume of 55 gallons or less, TSL 6 also includes requirements which continue to allow the use of electric resistance elements. TSL 6 also includes requirements allowing atmospherically-vented gas-fired storage water heaters with a rated storage volume at or below 55 gallons. As an example, a gas-fired water heater with a rated storage volume of 40 gallons would be required to meet a 0.63 EF under TSL 6. As described above and further detailed below, this efficiency level, which is pushing the limits of atmospherically-vented gas-fired storage water heaters is where DOE has concerns over consumer safety for units with high recovery efficiencies in certain installations. These concerns are further described below.

TSL 6 would save 3.06 quads of energy, an amount DOE considers significant. Under TSL 6, the NPV of consumer benefit would be $1.01 billion, using a discount rate of 7 percent, and $9.08 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 6 are 209 Mt of CO_2, 159 kt of NO_X, and 0.704 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 6 is $714 million to $11,142 million. Total generating capacity in 2045 is estimated to decrease by 1.05 GW under TSL 6.

At TSL 6, DOE projects that the average LCC impact is a gain (consumer cost savings) of $9 for gas-fired storage water heaters, a gain of $64 for electric storage water heaters, a gain of $295 for oil-fired storage water heaters, and a gain of $9 for gas-fired instantaneous water heaters. The median payback period is 4.7 years for gas-fired storage water heaters, 6.8 years for electric storage water heaters, 0.5 years for oil-fired storage water heaters, and 14.8 years for gas-fired instantaneous water heaters. At TSL 6, the fraction of consumers experiencing an LCC benefit is 46 percent for gas-fired storage water heaters, 58 percent for electric storage water heaters, 53 percent for oil-fired storage water heaters, and 4 percent for gas-fired instantaneous water heaters. The fraction of consumers experiencing an LCC cost is 34 percent for gas-fired storage water heaters, 33 percent for electric storage water heaters, 0 percent for oil-fired storage water heaters, and 5 percent for gas-fired instantaneous water heaters.

At TSL 6, the estimated average LCC savings for gas-fired storage water heaters are negative for multi-family households and manufactured home households, slightly negative for low-income households, and slightly positive for senior-only households. In the case of electric storage water heaters, the average LCC savings are positive for senior-only and low-income households, slightly negative for multi-family households, and negative for manufactured home households. In all cases except manufactured home households, a majority of the households in each subgroup experience a net benefit.

At TSL 6, the projected change in INPV ranges from a decrease of up to $134.6 million for gas-fired and electric storage water heaters, a decrease of up to $0.4 million for oil-fired storage water heaters, and a decrease of up to $1.2 million for gas-fired instantaneous water heaters, in 2009$. The negative impacts on INPV are driven largely by the required efficiencies for gas-fired and electric storage water heaters with rated storage volumes above 55 gallons. TSL 6 would effectively require heat pump technology and condensing technology for the electric and gas-fired storage water heaters at these volume sizes. The efficiency requirements at TSL 6 for electric storage water heater with a rated volume less than 55 also result in negative impacts because such large increases in insulation also require manufacturers to implement changes to their existing equipment. The oil-fired storage water heater and gas-fired instantaneous water heater efficiencies at TSL 6 do not require substantial changes to the existing operations for some manufacturers. The significant changes to gas-fired and electric storage water heaters with rated storage volumes greater than 55 gallons help to drive the INPVs negative, especially if profitability is impacted after the compliance date of the amended energy conservation standard. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 6 could result in a net loss of 15.3 percent in INPV for gas-fired and electric storage water heaters, a net loss of 4.2 percent in INPV for oil-fired storage water heaters, and a net loss of 0.2 percent in INPV for gas-fired instantaneous water heaters.

DOE believes TSL 6 would provide an effective mechanism for increasing the

market penetration for advanced-technology water heaters. Given DOE's concerns with TSL 7 (which includes a national heat pump water heater standard for electric storage water heaters across the entire range of rated storage volumes) as described above, DOE also strongly considered adopting TSL 6. TSL 6 results in positive NPV of consumer benefit for both electric and gas-fired storage water heaters, while also providing considerable energy and carbon savings.

Using DOE's shipments model and market assessment, DOE estimated approximately 4 percent of gas-fired storage water heater shipments and 11 percent of models would fall into the large-volume water heater category using the TSL 6 division (*i.e.,* large water heaters with storage volumes above 55 gallons). Similarly, DOE estimated approximately 9 percent of electric storage water heater shipments and 27 percent of models would fall into the large-volume water heater category using the TSL 6 division. Compared to TSL 7, TSL 6 effectively requires heat pump technology for a relatively small fraction of the electric storage water heater market, reduces the number of installations that would necessitate significant structural modifications due to the size of heat pump water heaters, reduces the number of installations that have space conditioning impacts from cool air produced by the heat pump water heater operation, results in higher average LCC savings and shorter median payback periods, and reduces the negative impacts on consumer subgroups. For gas-fired storage water heaters, compared to a national condensing standard level (TSL 8), TSL 6 requires condensing technology for a relatively small fraction of the gas-fired storage water heater market, reduces the number of installations that require significant building modifications due to the size of condensing gas-fired water heaters, and results in higher average LCC savings and shorter median payback period.

Although DOE has identified a number of benefits associated with TSL 6, DOE is aware that there are multiple issues associated with promulgating an amended energy conservation standard at this level. Potential issues with TSL 6 affecting both heat pump water heaters and condensing gas-fired water heaters include: (1) Consumer acceptance; (2) training; (3) product substitution; (4) engineering resource constraints; (5) product discontinuation; and (6) manufacturing issues. DOE fully discusses each of these in great detail in the December 2009 NOPR. 74 FR 65852, 65966–67 (Dec. 11, 2009). The lack of clarity on many of these issues contributed to DOE's tentative conclusion at the NOPR stage that a determination could not be made that NOPR TSL 5 (which contained different standards based upon the 55-gallon capacity division) is economically justified. However, comments and other information on these issues in response to the NOPR allowed DOE to make a more informed decision for the final rule.

As far as consumer acceptance, DOE questioned whether consumers may elect not to buy the larger-volume water heaters for a number of reasons (*e.g.,* including increases in first costs, unfamiliarity with the product, or space-constraint issues) and instead buy multiple water heaters that are under the capacity limit in the December 2009 NOPR. 74 FR 65852, 65967 (Dec. 11, 2009). In the final rule, DOE has now accounted for the equipment switching to lower rated storage volume water heaters in its analysis. DOE believes it has captured any potential impacts from that fraction of consumers who might elect to install one or two smaller water heaters. DOE derived the fraction of households which could switch from a large water heater to two smaller water heaters by comparing the total installed costs. DOE also considered the feasibility of switching a large water heater to a smaller water heater based on hot water needs of the household. DOE also took into consideration other factors such as whether some households would account for the operating cost advantages, need for emergency replacement, and avoiding costly venting system modifications when also installing a condensing gas furnace. *See* section IV.G.2.d for additional details.

As far as the reliable installation, servicing, and repair network that would be needed to service the market, DOE believes TSL 6 mitigates these problems for the reasons that follow. Because TSL 6 only impacts at most 9 percent of the electric storage water heater market, DOE believes the service industry will be able to provide adequate service to this subset of consumers. In addition, DOE believes that with the ENERGY STAR program and major water heater manufacturers continuing to introduce products into the market, the service industry will also continue to evolve. Given that this standard level does not impact the entire market and with the 5-year lead time, DOE believes the service industry will be able to properly train technicians and provide a nationwide network, which includes plumbers and refrigeration technicians to properly service heat pump water heaters by 2015.

As far as manufacturability, DOE estimates that it would take a total of $14.2 million and $26.1 million in capital conversion costs and product conversion costs for the industry to offer condensing products and heat pump water heaters for units with rated storage volumes above 55-gallons, respectively. While the total required investments (including working capital) to manufacture exclusively HPWHs greatly exceed the total industry value, the total conversion costs for converting only products with rated storage volumes above 55-gallons represent just 2.4 percent and 8.7 percent of the total value of the gas-fired and electric storage markets, respectively. Additionally, TSL 6 requires far less investment in working capital than TSL 7. Specifically, as compared to the $273 million required by TSL 7 for electric storage water heaters, TSL 6 would necessitate an investment of $45 million. Similarly, for gas-fired storage water heaters, TSL 8 requires an increase of $177 million in working capital needs, while TSL 6 requires an increase of $20 million. These much higher investments at TSL 7 and TSL 8, relative to TSL 6, are reflected in the mitigated INPV impacts shown in the MIA results.

DOE also believes that manufacturers would be better able to make the technological changes required at TSL 6 than TSL 7 before the compliance date, due, in part, to the experience of all three major manufacturers in producing large-volume condensing products for the commercial sector. DOE believes manufacturers can rely on this experience to adapt to TSL 6 to an extent they could not at TSL 8, at which smaller-volume products would also have to be converted. Furthermore, two of the three major manufacturers have some experience in manufacturing heat pump water heaters for the residential sector. The efficiency requirements for products only above 55-gallons rated storage volume would not require manufacturers to greatly alter most of their existing production lines. DOE believes that manufactures would create separate production lines for these products, which would be less disruptive to current facilities. In addition, five years should offer enough lead time for the product development and capital changes for these larger-rated-volume products. Lastly, DOE believes that manufacturers would be more likely to maintain an historic level of return on investment on large-volume products, relative to small-volume

products, because that market contains a greater mix of high-end consumers.

DOE strongly considered TSL 6 and believes it would provide additional energy and carbon savings, while mitigating some of the issues associated with a national heat pump water heater standard. However, TSL 6 also includes a level for gas-fired storage water heaters with rated storage volumes at or below 55 gallons that has caused DOE some reservations related to consumer safety. These concerns came to light during the course of DOE's consideration of public comments on the NOPR. Specifically, TSL 6 for smaller-volume gas-fired storage water heaters effectively continues to allow the use of atmospherically-vented technology. DOE reviewed the current market at 40 gallons rated storage volume and two current designs offered at a 0.63 EF: (1) An atmospherically-vented unit and (2) a fan-assisted unit. Over 50 percent of these models have corresponding recovery efficiencies at or above 78 percent.

The efficiency of a gas-fired water heater is characterized by a number of factors, including the energy factor, the first hour rating, and the recovery efficiency. For atmospherically-vented gas-fired storage water heaters, manufacturers primarily modify either the insulation thickness to increase the energy factor or the baffling to increase the recovery efficiency. The recovery efficiency characterizes how efficiently the heat from the energy source is transferred to the water. For each design and energy factor analyzed by DOE, manufacturers offer units in a range of recovery efficiencies. As the recovery efficiency increases, the risk for condensation to occur in the vent increases. Recovery efficiencies at or above 78 percent present a potential safety risk if condensation occurs in certain installations and the proper venting has not been installed in the residence, thereby potentially allowing carbon monoxide to enter and build up in the living space.

As explained in section IV.F.2.a above, DOE's analysis assumed that installations with water heaters with recovery efficiency of 78 percent or higher (which accounted for 57 percent of installations at TSL 6) would use stainless steel vent connectors. Without such vent connectors, there is a potential for corrosion of the vent due to condensation of flue gases. At present, however, the National Fuel Gas Code venting tables that are used as guidelines for installation are based on assumed recovery efficiencies of 76 percent, and they do not mention use of stainless steel vent connectors. Therefore, there is a possibility that some installations could occur without use of stainless steel vent connectors.

DOE found that there are several 40-gallon gas-fired water heater models corresponding to TSL 6 efficiency levels that are currently available to consumers and that do not utilize power venting. These models do not have any venting or installation instructions directing installers to use special venting (other than what is already required by the National Fuel Gas Code and/or local codes) for these products, and it is unclear why the concerns raised have not been an issue for these products currently available on the market.

However, in considering the adoption of a minimum standard for gas-fired water heaters at TSL 6 with rated storage volumes at or below 55 gallons, DOE believes there may be an increased risk of potential safety concerns due to improper installation of units with high recovery efficiencies. While DOE realizes there are units with recovery efficiencies offered in a range of energy factors, DOE also believes this risks increases as the limits of atmospherically-vented technology are reached.

Ideally, DOE believes the National Fuel Gas Code venting tables should be modified to properly address condensation-related issues for the units on the market with recovery efficiencies at or above 76 percent. This would include a recommendation to use stainless steel vent connectors at these recovery efficiencies regardless of energy factor and in order to mitigate most of the safety concerns for atmospherically-vented units. However, DOE cannot be certain whether such changes would occur before the compliance date of amended energy conservation standards for water heaters. Thus, in practice, there remains the possibility that some installations of TSL 6 gas-fired water heaters with recovery efficiencies at or above 78 percent would not use stainless steel vent connectors, which could result in safety problems in a likely small, but uncertain, number of cases.

Therefore, for today's final rule, the Secretary tentatively concludes that at TSL 6, the benefits of energy savings, positive consumer NPV, generating capacity reductions, economic savings for most consumers, and emission reductions would be outweighed the large capital conversion costs that could result in a large reduction in INPV for the manufacturers, the negative impacts on some consumer groups, and the safety concerns due to the corrosive condensate forming in the venting system of specific installations.

Next, DOE considered TSL 5, which is very similar to TSL 6 except that it considers a lower efficiency level for gas-fired storage water heaters with rated storage volumes less than or equal to 55 gallons. TSL 5 still pairs efficiency levels that would effectively require different technologies for large-volume and small-volume gas-fired and electric storage water heaters in an effort to promote advance technology penetration into the market and to potentially save additional energy. Specifically, TSL 5 would effectively require heat pump technology for electric storage water heaters with rated storage volumes greater than 55 gallons and condensing technology for gas-fired storage water heaters with rated storage volumes greater than 55 gallons. For gas-fired water heaters at TSL 5, DOE analyzed energy efficiency level 1 for small-volume units due to the potential safety concerns with corrosive condensate formation.

TSL 5 would save 2.58 quads of energy, an amount DOE considers significant. Under TSL 5, the NPV of consumer benefit would be $1.39 billion, using a discount rate of 7 percent, and $8.67 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 5 are 154 Mt of CO_2, 116 kt of NO_X, and 0.553 t of Hg. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 5 is $524 million to $8,179 million. Total generating capacity in 2045 is estimated to decrease by 0.83 GW under TSL 5.

At TSL 5, DOE projects that the average LCC impact is a gain (consumer cost savings) of $18 for gas-fired storage water heaters, a gain of $64 for electric storage water heaters, a gain of $295 for oil-fired storage water heaters, and a gain of $9 for gas-fired instantaneous water heaters. The median payback period is 2.3 years for gas-fired storage water heaters, 6.8 years for electric storage water heaters, 0.5 years for oil-fired storage water heaters, and 14.8 years for gas-fired instantaneous water heaters. At TSL 5, the fraction of consumers experiencing an LCC benefit is 40 percent for gas-fired storage water heaters, 58 percent for electric storage water heaters, 53 percent for oil-fired storage water heaters, and 4 percent for gas-fired instantaneous water heaters. The fraction of consumers experiencing an LCC cost is 27 percent for gas-fired storage water heaters, 33 percent for electric storage water heaters, 0 percent for oil-fired storage water heaters, and 5 percent for gas-fired instantaneous water heaters.

At TSL 5, the estimated average LCC savings for gas-fired storage water heaters are slightly negative for multi-family households and manufactured home households, and slightly positive for senior-only households and low-income households. For all of the subgroups, a higher share of households have a net benefit than have a net cost. In the case of electric storage water heaters, the average LCC savings are positive for senior-only and low-income households, slightly negative for multi-family households, and negative for manufactured home households. In all cases except manufactured home households, a majority of the households in each subgroup experience a net benefit.

At TSL 5, the projected change in INPV ranges from a decrease of up to $122.6 million for gas-fired and electric storage water heaters, a decrease of up to $0.4 million for oil-fired storage water heaters, and a decrease of up to $1.2 million for gas-fired instantaneous water heaters, in 2009$. The negative impacts on INPV are driven largely by the required efficiencies for gas-fired and electric storage water heaters with rated storage volumes above 55 gallons. TSL 5 would effectively require heat pump technology and condensing technology for the electric and gas-fired storage water heaters at these volume sizes. The efficiency requirements at TSL 5 for electric storage water heater with a rated volume less than 55 gallons also result in negative impacts because such large increases in insulation also require manufacturers to implement changes to their existing equipment. The oil-fired storage water heater and gas-fired instantaneous water heater efficiencies at TSL 5 do not require substantial changes to the existing operations for some manufacturers. The significant changes to gas-fired and electric storage water heaters with rated storage volumes greater than 55 gallons help to drive the INPVs negative, especially if profitability is impacted after the compliance date of the amended energy conservation standard. In particular, if the high end of the range of impacts is reached as DOE expects, TSL 5 could result in a net loss of 13.9 percent in INPV for gas-fired and electric storage water heaters, a net loss of 4.2 percent in INPV for oil-fired storage water heaters, and a net loss of 0.2 percent in INPV for gas-fired instantaneous water heaters.

DOE believes TSL 5 would provide an effective mechanism for increasing the market penetration for advanced-technology water heaters. Given DOE's concerns with TSL 7 (which includes a national heat pump water heater standard for electric storage water heaters across the entire range of rated storage volumes) as described above, DOE also strongly considered adopting TSL 5. TSL 5 results in positive NPV of consumer benefit for both electric and gas-fired storage water heaters, and provides substantial energy and carbon savings, while mitigating some of the issues associated with a national heat pump water heater standard (TSL 7). Moreover, TSL 5 also reduces the risk of safety concerns for small-volume gas-fired storage water heaters by providing manufacturers with additional flexibility in reaching TSL 5 efficiency levels.

Therefore, for today's final rule, the Secretary has concluded that at TSL 5, the benefits of energy savings, positive consumer NPV, generating capacity reductions, economic savings for most consumers, and emission reductions (both in physical quantities and the monetized value of those emissions) outweigh the large capital conversion costs that could result in a large reduction in INPV for the manufacturers and the negative impacts on some consumer subgroups. Further, global benefits from carbon dioxide reductions (at a central value of $21.4 per ton for emissions in 2010) would have a present value of $2.7 billion. These benefits from carbon dioxide emission reductions, when considered in conjunction with the consumer savings NPV and other factors described above, support DOE's conclusion that TSL 5 is economically justified. Consequently, DOE is adopting TSL 5 for residential water heaters. Table VI.64 shows the standard levels DOE is adopting today for residential water heaters.

TABLE VI.64—AMENDED ENERGY CONSERVATION STANDARDS FOR RESIDENTIAL WATER HEATERS

Residential Water Heaters		
Product Class	Standard Level	
Gas-fired Storage	For tanks with a Rated Storage Volume at or below 55 gallons: EF = 0.675 − (0.0015 × Rated Storage Volume in gallons).	For tanks with a Rated Storage Volume above 55 gallons: EF = 0.8012 − (0.00078 × Rated Storage Volume in gallons)
Electric Storage	For tanks with a Rated Storage Volume at or below 55 gallons: EF = 0.960 − (0.0003 × Rated Storage Volume in gallons).	For tanks with a Rated Storage Volume above 55 gallons: EF = 2.057 − (0.00113 × Rated Storage Volume in gallons)
Oil-fired Storage	EF = 0.68 − (0.0019 × Rated Storage Volume in gallons)	
Gas-fired Instantaneous	EF = 0.82 − (0.0019 × Rated Storage Volume in gallons)	

3. Direct Heating Equipment

Table VI.65 summarizes the results of DOE's quantitative analysis for each TSL it considered for this final rule for direct heating equipment.

TABLE VI.65—SUMMARY OF ANALYTICAL RESULTS FOR DIRECT HEATING EQUIPMENT

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
National Energy Savings (quads)	0.20	0.21	0.23	0.43	0.48	1.26
NPV of Consumer Benefits (2009$ billion)						
3% discount rate	1.32	1.34	1.39	(1.26)	(1.22)	(4.97)

TABLE VI.65—SUMMARY OF ANALYTICAL RESULTS FOR DIRECT HEATING EQUIPMENT—Continued

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
7% discount rate	0.54	0.55	0.56	(1.19)	(1.24)	(4.38)
Industry Impacts:						
Traditional Direct Heating Equipment:.						
Industry NPV (2009$ million)	(0.9)–(2.5)	(1.2)–(3.9)	(1.9)–(7.0)	(1.9)–(8.8)	(3.8)–(10.4)	(3.9)–(13.4)
Industry NPV (% change)	(5.2)–(14.9)	(7.2)–(23.6)	(11.3)–(42.4)	(11.6)–(53.1)	(22.7)–(64.2)	(23.6)–(80.8)
Gas Hearth Direct Heating Equipment:.						
Industry NPV (2009$ million)	(0.2)–(0.9)	(0.2)–(0.9)	(0.2)–(0.9)	1.6–(13.2)	1.6–(13.2)	8.6–(53.6)
Industry NPV (% change)	(0.3)–(1.2)	(0.3)–(1.2)	(0.3)–(1.2)	2.0–(17.1)	2.0–(17.1)	11.1–(69.5)
Cumulative Emissions Reduction*:						
CO_2 (Mt)	8.2	8.8	9.3	17.9	20.2	49.9
NO_X (kt)	7.5	8.1	8.5	16.4	18.6	46.0
Value of Cumulative Emissions Reduction (2009$ million) †† :						
CO_2	31–470	33–503	35–530	67–1,023	76–1,154	187–2,849
NO_X–3% discount rate	1.9–19.6	2.0–21.0	2.1–22.1	4.2–42.9	4.7–48.7	11.7–120
NO_X–7% discount rate	0.99–10.2	1.06–10.9	1.1–11.4	2.2–22.3	2.5–25.3	6.1–62.5
Mean LCC Savings ** (2009$):						
Gas Wall Fan	83	102	114	43	83	43
Gas Wall Gravity	21	21	64	64	(56)	(56)
Gas Floor	13	13	13	13	13	13
Gas Room	42	96	143	143	646	646
Gas Hearth	96	96	96	(70)	(70)	(253)
Median PBP (years):						
Gas Wall Fan	2.7	3.2	5.0	12.2	2.7	12.2
Gas Wall Gravity	7.5	7.5	11.0	11.0	16.5	16.5
Gas Floor	10.7	10.7	10.7	10.7	10.7	10.7
Gas Room	6.7	4.5	4.8	4.8	6.9	6.9
Gas Hearth	0	0	0	17.1	17.1	26.8
Distribution of Consumer LCC Impacts:						
Gas Wall Fan:.						
Net Cost (%)	0	3	19	53	0	53
No Impact (%)	60	53	26	7	60	7
Net Benefit (%)	40	44	55	40	40	40
Gas Wall Gravity:						
Net Cost (%)	10	10	33	33	70	70
No Impact (%)	75	75	37	37	0	0
Net Benefit (%)	15	15	30	30	30	30
Gas Floor:						
Net Cost (%)	25	25	25	25	25	25
No Impact (%)	18	18	18	18	18	18
Net Benefit (%)	57	57	57	57	57	57
Gas Room:						
Net Cost (%)	19	19	20	20	26	26
No Impact (%)	31	56	55	55	49	49
Net Benefit (%)	50	25	25	25	25	25
Gas Hearth:						
Net Cost (%)	9	9	9	69	69	81
No Impact (%)	40	40	40	17	17	19
Net Benefit (%)	51	51	51	13	13	0
Generation Capacity Change (GW in 2042)	0.024	0.026	0.028	0.036	0.041	0.103
Employment Impacts:						
Total Potential Changes in Domestic Production Workers in 2013:.						
Traditional Direct Heating Equipment	(275)–4	(275)–6	(275)–33	(275)–37	(275)–35	(275)–44
Gas Hearth Direct Heating Equipment	(1,280)–6	(1,280)–6	(1,280)–6	(1,280)–448	(1,280)–448	(1,280)–770
Net Change in National Indirect Employment in 2042 (thousands) †††	0.21	0.22	0.23	0.16	0.19	0.51

Parentheses indicate negative (−) values.

* The impacts for Hg emissions are negligible (less than 0.01 ton).
** For LCCs, a negative value means an increase in LCC by the amount indicated.
†† Range of the economic value of CO_2 reductions is based on estimates of the global benefit of reduced CO_2 emissions.
††† National Indirect Employment Impacts exclude direct impacts.

DOE first considered TSL 6, the max-tech level. TSL 6 would save 1.26 quads of energy, an amount DOE considers significant. TSL 6 would decrease consumer NPV by $4.38 billion, using a discount rate of 7 percent, and by $4.97 billion, using a discount rate of 3 percent.

The emissions reductions at TSL 6 are 49.9 Mt of CO_2 and 46.0 kt of NO_X. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 6 is $187 million to $2,849 million. Total generating capacity in 2042 is estimated to increase slightly under TSL 6.

At TSL 6, DOE projects that the average LCC impact for consumers is a gain of $43 for gas wall fan DHE, a loss of $56 for gas wall gravity DHE, a gain of $13 for gas floor DHE, a gain of $646 for gas room DHE, and a loss of $253 for gas hearth DHE. The median payback period is 12.2 years for gas wall fan DHE, 16.5 years for gas wall gravity DHE, 10.7 years for gas floor DHE, 6.9 years for gas room DHE, and 26.8 years for gas hearth DHE (which is significantly longer than the mean lifetime of the product). At TSL 6, the fraction of consumers experiencing an LCC benefit is 40 percent for gas wall fan DHE, 30 percent for gas wall gravity DHE, 57 percent for gas floor DHE, 25 percent for gas room DHE, and 0 percent for gas hearth DHE. The fraction of consumers experiencing an LCC cost is 53 percent for gas wall fan DHE, 70 percent for gas wall gravity DHE, 25 percent for gas floor DHE, 26 percent for gas room DHE, and 81 percent for gas hearth DHE.

With respect to consumer subgroups, DOE estimated that the impacts of TSL 6 would be approximately the same for the senior-only and low-income subgroups as they are for the full household sample.

At TSL 6, the projected change in INPV ranges from a decrease of up to $13.4 million for traditional DHE and a decrease of up to $53.6 million for gas hearth DHE, in 2009$. Very few manufacturers offer products at the max-tech level for both traditional and gas hearth DHE. At TSL 6, almost every manufacturer would face substantial product and capital conversion costs to completely redesign most of their current products and existing production facilities. In addition, higher component costs could significantly harm profitability. If the high end of the range of impacts is reached as DOE expects, TSL 6 could result in a net loss of 80.8 percent in INPV for traditional DHE and a net loss of 69.5 percent in INPV for gas hearth DHE. In addition to the large, negative impacts on INPV at TSL 6, the required capital and product conversion costs could cause material harm to a significant number of small business manufacturers in both the traditional and gas hearth DHE market. The conversion costs could cause many of these small business manufacturers to exit the market.

Therefore, the Secretary concludes that at TSL 6, the benefits of energy savings and emission reductions would be outweighed by the negative impacts on consumer NPV, the economic burden on some consumers, the large capital conversion costs that could result in a large reduction in INPV for the manufacturers, and the potential impacts on a significant number of small business manufacturers. Consequently, the Secretary has concluded that TSL 6 is not economically justified.

Next, DOE considered TSL 5. TSL 5 would save 0.48 quads of energy, an amount DOE considers significant. TSL 5 would decrease consumer NPV by $1.24 billion, using a discount rate of 7 percent, and by $1.22 billion, using a discount rate of 3 percent.

The emissions reductions at TSL 5 are 20.2 Mt of CO_2 and 18.6 kt of NO_X. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 5 is $76 million to $1,154 million. Total generating capacity in 2042 is estimated to increase slightly under TSL 5.

At TSL 5, DOE projects that the average LCC impact for consumers is a gain of $83 for gas wall fan DHE, a loss of $56 for gas wall gravity DHE, a gain of $13 for gas floor DHE, a gain of $646 for gas room DHE, and a loss of $70 for gas hearth DHE. The median payback period is 2.7 years for gas wall fan DHE, 16.5 years for gas wall gravity DHE, 10.7 years for gas floor DHE, 6.9 years for gas room DHE, and 17.1 years for gas hearth DHE. At TSL 5, the fraction of consumers experiencing an LCC benefit is 40 percent for gas wall fan DHE, 30 percent for gas wall gravity DHE, 57 percent for gas floor DHE, 25 percent for gas room DHE, and 13 percent for gas hearth DHE. The fraction of consumers experiencing an LCC cost is 0 percent for gas wall fan DHE, 70 percent for gas wall gravity DHE, 25 percent for gas floor DHE, 26 percent for gas room DHE, and 69 percent for gas hearth DHE.

With respect to consumer subgroups, DOE estimated that the impacts of TSL 5 would be approximately the same for the senior-only and low-income subgroups as they are for the full household sample.

At TSL 5, the projected change in INPV ranges from a decrease of up to $10.4 million for traditional DHE and a decrease of up to $13.2 million for gas hearth DHE, in 2009$. While some manufacturers offer a limited number of products at TSL 5, most of the current products would have to be redesigned to meet the required efficiencies at TSL 5. In addition, higher component costs for both traditional and gas hearth DHE could significantly harm profitability. If the high end of the range of impacts is reached as DOE expects, TSL 5 could result in a net loss of 62.4 percent in INPV for traditional DHE and a net loss of 17.1 percent in INPV for gas hearth DHE. In addition to the large, negative impacts on INPV at TSL 5, the required capital and product conversion costs could cause material harm to a significant number of small business manufacturers in both the traditional and gas hearth DHE market. These manufacturers could be forced to discontinue many of their existing product lines and, possibly, exit the market altogether.

Therefore, the Secretary concludes that at trial standard level 5, the benefits of energy savings and emission reductions would be outweighed by the negative impacts on consumer NPV, the economic burden on some consumers, the large capital conversion costs that could result in a large reduction in INPV for the manufacturers, and the potential for small business manufacturers to have to reduce or discontinue a significant number of their product lines. Consequently, the Secretary has concluded that trial standard level 5 is not economically justified.

Next, DOE considered TSL 4. TSL 4 would save 0.43 quads of energy, an amount DOE considers significant. TSL 4 would decrease consumer NPV by $1.19 billion, using a discount rate of 7 percent, and $1.26 billion, using a discount rate of 3 percent.

The emissions reductions at TSL 4 are 17.9 Mt of CO_2 and 16.4 kt of NO_X. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 4 is $67 million to $1,023 million. Total generating capacity in 2042 is

estimated to increase slightly under TSL 4.

At TSL 4, DOE projects that the average LCC impact for consumers is a gain of $43 for gas wall fan DHE, a gain of $64 for gas wall gravity DHE, a gain of $13 for gas floor DHE, a gain of $143 for gas room DHE, and a loss of $70 for gas hearth DHE. The median payback period is 12.2 years for gas wall fan DHE, 11.0 years for gas wall gravity DHE, 10.7 years for gas floor DHE, 4.8 years for gas room DHE, and 17.1 years for gas hearth DHE. At TSL 4, the fraction of consumers experiencing an LCC benefit is 40 percent for gas wall fan DHE, 30 percent for gas wall gravity DHE, 57 percent for gas floor DHE, 57 percent for gas room DHE, and 13 percent for gas hearth DHE. The fraction of consumers experiencing an LCC cost is 53 percent for gas wall fan DHE, 33 percent for gas wall gravity DHE, 25 percent for gas floor DHE, 20 percent for gas room DHE, and 69 percent for gas hearth DHE.

With respect to consumer subgroups, DOE estimated that the impacts of TSL 4 would be approximately the same for the senior-only and low-income subgroups as they are for the full household sample.

At TSL 4, the projected change in INPV ranges from a decrease of up to $8.8 million for traditional DHE and decrease of up to $13.2 million for gas hearth DHE. While some manufacturers offer a limited number of products at TSL 4, most of the current products would have to be redesigned to meet the required efficiencies at TSL 4. In addition, higher component costs for both traditional and gas hearth DHE could significantly harm profitability. If the high end of the range of impacts is reached as DOE expects, TSL 4 could result in a net loss of 53.1 percent in INPV for traditional DHE and a net loss of 17.1 percent in INPV for gas hearth DHE. In addition to the large, negative impacts on INPV at TSL 4, the required capital and product conversion costs could cause material harm to a significant number of small business manufacturers in both the traditional and gas hearth DHE market. These manufacturers could be forced to reduce their product offerings to remain competitive.

Therefore, the Secretary concludes that at trial standard level 4, the benefits of energy savings and emission reductions would be outweighed by the negative impacts on consumer NPV, the economic burden on some consumers, the large capital conversion costs that could result in a large reduction in INPV for the manufacturers, and the potential for small business manufacturers of DHE to have to reduce their product offerings. Consequently, the Secretary has concluded that trial standard level 4 is not economically justified.

Next, DOE considered TSL 3. TSL 3 would save 0.23 quads of energy, an amount DOE considers significant. TSL 3 would provide an NPV of consumer benefit of $0.56 billion, using a discount rate of 7 percent, and $1.39 billion, using a discount rate of 3 percent.

The emissions reductions at TSL 3 are 9.3 Mt of CO_2 and 8.5 kt of NO_X. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 3 is $35 million to $530 million. Total electric generating capacity in 2042 is estimated to increase slightly under TSL 3.

At TSL 3, DOE projects that the average LCC impact for consumers is a gain of $114 for gas wall fan DHE, a gain of $64 for gas wall gravity DHE, a gain of $13 for gas floor DHE, a gain of $143 for gas room DHE, and a gain of $96 for gas hearth DHE. The median payback period is 5.0 years for gas wall fan DHE, 11.0 years for gas wall gravity DHE, 10.7 years for gas floor DHE, 4.8 years for gas room DHE, and 0.0 years for gas hearth DHE. At TSL 3, the fraction of consumers experiencing an LCC benefit is 55 percent for gas wall fan DHE, 30 percent for gas wall gravity DHE, 57 percent for gas floor DHE, 25 percent for gas room DHE, and 51 percent for gas hearth DHE. The fraction of consumers experiencing an LCC cost is 19 percent for gas wall fan DHE, 33 percent for gas wall gravity DHE, 25 percent for gas floor DHE, 20 percent for gas room DHE, and 9 percent for gas hearth DHE.

With respect to consumer subgroups, DOE estimated that the impacts of TSL 3 would be approximately the same for the senior-only and low-income subgroups as they are for the full household sample.

At TSL 3, the projected change in INPV ranges from a decrease of up to $7 million for traditional DHE and decrease of up to $0.9 million for gas hearth DHE. If the high end of the range of impacts is reached, TSL 3 could result in a net loss of 42.4 percent in INPV for traditional DHE and a net loss of 1.2 percent in INPV for gas hearth DHE. The impacts on gas hearth DHE manufacturers are less significant at TSL 3 because manufacturers offer a wide range of product lines that meet the required efficiencies at TSL 3 and most products that do not meet TSL 3 could be upgraded with inexpensive purchased parts and fairly small conversion costs.

For traditional direct heating equipment, however, not all manufacturers have a substantial number of existing products that meet the efficiencies required at TSL 3. The industry has consolidated significantly over the last decade due to a steady decline in shipments. The three competitors that account for nearly 100 percent of the market have survived by consolidating a variety of legacy brands and products and providing them in replacement situations. Thus, each of the three competitors, two of which are small business manufacturers, would face the prospect of significantly upgrading several low-volume product lines. For the most part, manufacturers do not have significant volume over which to spread the capital conversion costs required by TSL 3, meaning that margins will likely be pressured unless consumers accept large increases in product price. As a whole, DOE expects the industry would be required to invest $8.0 million to convert its product lines to meet TSL 3, or roughly half of the industry value. Because shipments are expected to remain flat or continue to decline, there may be limited opportunity for all manufacturers to recoup the investment necessary at TSL 3 to upgrade their product lines.

At TSL 3, the impacts on small business manufacturers are even more harmful than to the industry as a whole. For example, the typical small business manufacturer in the industry would require investment equal to 426 percent of its annual earnings before interest and taxes. With these prospects, it is likely manufacturers would drop a number of product lines or exit the market entirely. The small business manufacturers would likely be disproportionately affected by TSL 3 because they would need to spread the product development costs, including R&D, over lower volumes. Finally, in the important gas wall gravity category, small business manufacturers have a limited number of products that meet the required efficiencies. The two small business manufacturers with significant market shares have a total of 6 models that meet the required efficiencies out of a total of 29 models for gas wall gravity DHE. Based on the public comments of these small manufacturers, these products also represent a small percentage of total sales. To offer a full range of the most popular replacements, a typical small manufacturer would have to convert over 70 percent of its gas wall gravity product lines, including multiple modifications to their most popular products.

Therefore, the Secretary concludes that at TSL 3, the benefits of energy savings, emission reductions, and consumer NPV benefits would be outweighed by the economic burden on

some consumers, the large capital conversion costs that could result in a large reduction in INPV for the manufacturers of traditional DHE, and the potential for small business manufacturers of DHE to reduce their product offerings or to be forced to exit the market completely, thereby reducing competition in the traditional DHE market. Consequently, the Secretary has concluded that TSL 3 is not economically justified.

Next, DOE considered TSL 2. TSL 2 would save 0.21 quads of energy, an amount DOE considers significant. TSL 2 would provide a NPV of consumer benefit of $0.55 billion, using a discount rate of 7 percent, and $1.34 billion, using a discount rate of 3 percent.

The emissions reductions at TSL 2 are 8.8 Mt of CO_2 and 8.1 kt of NO_X. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 2 is $33 million to $503 million. Total electric generating capacity in 2042 is estimated to increase slightly under TSL 2.

At TSL 2, DOE projects that the average LCC impact for consumers is a gain of $102 for gas wall fan DHE, a gain of $21 for gas wall gravity DHE, a gain of $13 for gas floor DHE, a gain of $96 for gas room DHE, and a gain of $96 for gas hearth DHE. The median payback period is 3.2 years for gas wall fan DHE, 7.5 years for gas wall gravity DHE, 10.7 years for gas floor DHE, 4.5 years for gas room DHE, and 0.0 years for gas hearth DHE. At TSL 2, the fraction of consumers experiencing an LCC benefit is 44 percent for gas wall fan DHE, 15 percent for gas wall gravity DHE, 57 percent for gas floor DHE, 25 percent for gas room DHE, and 51 percent for gas hearth DHE. The fraction of consumers experiencing an LCC cost is 3 percent for gas wall fan DHE, 10 percent for gas wall gravity DHE, 25 percent for gas floor DHE, 19 percent for gas room DHE, and 9 percent for gas hearth DHE.

With respect to consumer subgroups, DOE estimated that the impacts of TSL 2 would be approximately the same for the senior-only and low-income subgroups as they are for the full household sample.

At TSL 2, the projected change in INPV ranges from a decrease of up to $3.9 million for traditional DHE and decrease of up to $0.9 million for gas hearth DHE. The impacts on gas hearth DHE manufacturers are less significant at TSL 2 because manufacturers offer a wide range of product lines that meet the required efficiencies at TSL 2, and most products that do not meet TSL 2 could be upgraded with inexpensive purchased parts at fairly small conversion costs. If the high end of the range of impacts is reached, TSL 2 could result in a net loss of 23.6 percent in INPV for traditional DHE and a net loss of 1.2 percent in INPV for gas hearth DHE. In addition, the required capital and product conversion costs faced by small business manufacturers at this level decrease substantially, thereby mitigating the potential harm to a significant number of small business manufacturers.

In total, DOE estimates that it will take approximately $4.6 million for the industry to upgrade all of it products to meet the amended energy conservation standards. Despite including the conversion costs for the additional product lines that were released since the NOPR analysis was completed, the total conversion costs estimated by the industry to upgrade all products that do not meet the amended energy conservation standards is down $1.8 million from the $6.4 million total estimated for the proposed standards in the December 2009 NOPR, given the change in the standard level DOE has ultimately decided to adopt. For the amended energy conservation standards, one major manufacturer has a total of 3 product lines (7 models) that do not meet the amended energy conservation standards in the two smallest categories (gas floor and gas room DHE) but has a majority of product lines and models that meet the amended standards in the two largest product categories (gas wall fan and gas wall gravity). The other two major manufacturers have existing product lines that meet the amended energy conservation standards in all 4 product categories. Therefore, without spending any conversion costs, at least two manufacturers already have existing products in all four product categories. In the most important gas wall gravity category, 57 percent of the existing models and 71 percent of the existing product lines identified by DOE meet the amended energy conservation standards. One manufacturer indicated in written comments that the important gas wall gravity products that meet the amended energy conversation standard represent a small portion of total sales. However, DOE believes it has addressed the concerns of this manufacturer by setting an amended energy conservation standard that would require much less substantial changes than those proposed in the NOPR (a two percentage point improvement in AFUE versus the six percentage point improvement proposed in the NOPR). While the $4.6 million in total conversion costs to upgrade all product lines that do not meet the amended energy conservation standards is substantial, DOE believes that a combination of products that meet the amended energy conservation standards and selectively upgrading popular product lines that fall below the standards will allow all three traditional DHE manufacturers to maintain a viable production volume.

After considering the analysis, comments on the December 2009 NOPR, and the benefits and burdens of TSL 2, the Secretary concludes that this trial standard level will offer the maximum improvement in efficiency that is technologically feasible and economically justified, and will result in significant conservation of energy. Further, global benefits from carbon dioxide reductions (at a central value of $21.4 for emissions in 2010) would have a present value of $165 million. These benefits from carbon dioxide emission reductions (both in physical reductions and the monetized value of those reductions), when considered in conjunction with the consumer savings NPV and other factors described above, outweigh the potential reduction in INPV for manufacturers and support DOE's conclusion that trial standard level 2 is economically justified. Therefore, the Department today adopts the energy conservation standards for direct heating equipment at TSL 2, as shown in Table VI.66.

TABLE VI.66—AMENDED ENERGY CONSERVATION STANDARDS FOR DIRECT HEATING EQUIPMENT

Direct heating equipment	
Product class	Standard level
Gas wall fan type up to 42,000 Btu/h	AFUE = 75%.
Gas wall fan type over 42,000 Btu/h	AFUE = 76%.
Gas wall gravity type up to 27,000 Btu/h	AFUE = 65%.
Gas wall gravity type over 27,000 Btu/h up to 46,000 Btu/h	AFUE = 66%.
Gas wall gravity type over 46,000 Btu/h	AFUE = 67%.

TABLE VI.66—AMENDED ENERGY CONSERVATION STANDARDS FOR DIRECT HEATING EQUIPMENT—Continued

Direct heating equipment	
Product class	Standard level
Gas floor up to 37,000 Btu/h	AFUE = 57%.
Gas floor over 37,000 Btu/h	AFUE = 58%.
Gas room up to 20,000 Btu/h	AFUE = 61%.
Gas room over 20,000 Btu/h up to 27,000 Btu/h	AFUE = 66%.
Gas room over 27,000 Btu/h up to 46,000 Btu/h	AFUE = 67%.
Gas room over 46,000 Btu/h	AFUE = 68%.
Gas hearth up to 20,000 Btu/h	AFUE = 61%.
Gas hearth over 20,000 Btu/h and up to 27,000 Btu/h	AFUE = 66%.
Gas hearth over 27,000 Btu/h and up to 46,000 Btu/h	AFUE = 67%.
Gas hearth over 46,000 Btu/h	AFUE = 68%.

4. Pool Heaters

Table VI.67 summarizes the results of DOE's quantitative analysis for each TSL it considered for this final rule for pool heaters.

TABLE VI.67—SUMMARY OF ANALYTICAL RESULTS FOR POOL HEATERS

Category	TSL 1	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
National Energy Savings (quads)	0.01	0.02	0.04	0.06	0.09	0.22
NPV of Consumer Benefits (2009$ billion)						
3% discount rate	0.10	0.10	(0.01)	(0.15)	(2.32)	(4.56)
7% discount rate	0.04	0.04	(0.06)	(0.16)	(1.39)	(2.87)
Industry Impacts						
Industry NPV (2009$ million)	0.0–(0.1)	0.3–(0.8)	(0.8)–(5.0)	(0.3)–(6.6)	0.8–(17.2)	7.3–(38.3)
Industry NPV (% change)	0.1–(0.2)	0.5–(1.7)	(1.7)–(10.2)	(0.6)–(13.5)	1.6–(35.0)	14.9–(78.0)
Cumulative Emissions Reduction*						
CO_2 (Mt)	0.41	0.75	1.72	2.38	3.61	8.89
NO_X (kt)	0.37	0.67	1.53	2.10	3.18	7.84
Value of Cumulative Emissions Reduction (2009$ million)††						
CO_2	2 to 24	3 to 43	6 to 99	9 to 136	14 to 206	33 to 509
NO_X—3% discount rate	0.1 to 1.0	0. 2 to 1.8	0.4 to 4.1	0.5 to 5.6	0.8 to 8.4	2.0 to 20.77
NO_X—7% discount rate	0.1 to 0.5	0.1 to 0.9	0.2 to 2.2	0.29 to 2.9	0.4 to 4.5	1.1 to 11.0
Mean LCC Savings** (2009$).	25	22	(6)	(52)	(632)	(1,361)
Median PBP (years)	2.7	8.6	18.2	19.2	38.1	33.2
Distribution of Consumer LCC Impacts						
Net Cost (%)	5	27	60	64	88	95
No Impact (%)	72	51	23	21	9	1
Net Benefit (%)	23	22	17	15	3	4
Generation Capacity Change (GW in 2042).	0.00	0.00	0.00	+0.01	+0.01	+0.03
Employment Impacts						
Total Potential Changes in Domestic Production Workers in 2013.	(512)–7	(512)–19	(512)–58	(512)–81	(512)–135	(512)–268
Net Change in National Indirect Employment in 2042 (thousands)†††.	0.01	0.02	0.02	0.02	0.04	(0.07)

Parentheses indicate negative (−) values.
* The impacts for Hg emissions are negligible.
** For LCCs, a negative value means an increase in LCC by the amount indicated.
†† Range of the economic value of CO_2 reductions is based on estimates of the global benefit of reduced CO_2 emissions.
††† National Indirect Employment Impacts exclude direct impacts.

DOE first considered TSL 6, the max-tech level. TSL 6 would save 0.22 quads of energy, an amount DOE considers significant. TSL 6 would decrease consumer NPV by $2.87 billion, using a discount rate of 7 percent, and by $4.56 billion, using a discount rate of 3 percent.

The emissions reductions at TSL 6 are 8.89 Mt of CO_2 and 7.84 kt of NO_X. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 6 is $33 million to $509 million, using a discount rate of 7 percent. Total generating capacity in 2042 is estimated to increase slightly under TSL 6.

At TSL 6, DOE projects that the average LCC impact for consumers is a loss of $1,361. The median payback period is 33.2 years (which is substantially longer than the mean lifetime of the product). At TSL 6, the fraction of consumers experiencing an LCC benefit is 4 percent. The fraction of consumers experiencing an LCC cost is 95 percent.

At TSL 6, the INPV is projected to decrease by up to $38.3 million for gas-fired pool heaters. Currently, gas-fired pool heaters that meet the efficiencies required by TSL 6 are manufactured in extremely low volumes by a limited number of manufacturers. The significant impacts on manufacturers arise from the large costs to develop or increase the production of fully condensing products. In addition, manufacturers are significantly harmed if profitability is negatively impacted to keep consumers in the market for a luxury item that is significantly more expensive than most products currently sold. If the high end of the range of impacts is reached as DOE expects, TSL 6 could result in a net loss of 78 percent in INPV for gas-fired pool heaters.

Therefore, the Secretary has concluded that at TSL 6, the benefits of energy savings and emission reductions would be outweighed by the negative impacts on consumer NPV, the economic burden on some consumers (as indicated by the large increase in total installed cost), and the large capital conversion costs that could result in a large reduction in INPV for the manufacturers. Consequently, the Secretary has concluded that TSL 6 is not economically justified.

Next, DOE considered TSL 5. TSL 5 would save 0.09 quads of energy, an amount DOE considers significant. TSL 5 would decrease consumer NPV by $1.39 billion, using a discount rate of 7 percent, and by $2.32 billion, using a discount rate of 3 percent.

The emissions reductions at TSL 5 are 3.6 Mt of CO_2 and 3.2 kt of NO_X. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 5 is $14 million to $206 million. Total generating capacity in 2042 is estimated to increase slightly under TSL 5.

At TSL 5, DOE projects that the average LCC impact for consumers is a loss of $632. The median payback period is 38.1 years (which is substantially longer than the mean lifetime of the product). At TSL 5, the fraction of consumers experiencing an LCC benefit is 3 percent. The fraction of consumers experiencing an LCC cost is 88 percent.

At TSL 5, the projected change in INPV is a decrease of up to $17.2 million for gas-fired pool heaters. Currently, gas-fired pool heaters that meet the efficiencies required by TSL 5 are manufactured in extremely low volumes by a limited number of manufacturers, as with TSL 6. The significant adverse impacts on manufacturers arise from the large costs to develop or increase the production of products with multiple efficiency improvements. In addition, the potential for manufacturers to be significantly harmed increases if consumers' purchasing decisions are impacted and shipments decline due to the large increases in first cost for a luxury item. If the high end of the range of impacts is reached as DOE expects, TSL 5 could result in a net loss of 35 percent in INPV for gas-fired pool heaters.

Therefore, the Secretary has concluded that at TSL 5, the benefits of energy savings and emission reductions would be outweighed by the negative impacts on consumer NPV, the economic burden on some consumers, and the large capital conversion costs that could result in a large reduction in INPV for the manufacturers. Consequently, the Secretary has concluded that TSL 5 is not economically justified.

Next, DOE considered TSL 4. TSL 4 would save 0.06 quads of energy, an amount DOE considers significant. TSL 4 would decrease consumer NPV by $0.16 billion, using a discount rate of 7 percent, and by $0.15 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 2.38 Mt of CO_2 and 2.10 kt of NO_X. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 4 is $9 million to $136 million. Total generating capacity in 2042 is estimated to increase slightly under TSL 4.

At TSL 4, DOE projects that the average LCC impact for consumers is a loss of $52. The median payback period is 19.2 years (which is substantially longer than the mean lifetime of the product). At TSL 4, the fraction of consumers experiencing an LCC benefit is 15 percent. The fraction of consumers experiencing an LCC cost is 64 percent.

At TSL 4, DOE projects that INPV decreases by up to $6.6 million for gas-fired pool heaters. At TSL 4, manufacturers believe that profitability could be harmed in order to keep consumers in the market for a luxury item that is more expensive than the most common products currently sold. If the high end of the range of impacts is reached as DOE expects, TSL 4 could result in a net loss of 13.5 percent in INPV for gas-fired pool heaters.

Therefore, the Secretary has concluded that at TSL 4, the benefits of energy savings and emission reductions would be outweighed by the negative impacts on consumer NPV, the economic burden on some consumers, and the large capital conversion costs that could result in a large reduction in INPV for the manufacturers. Consequently, the Secretary has concluded that TSL 4 is not economically justified.

Next, DOE considered TSL 3. TSL 3 would save 0.04 quads of energy, an amount DOE considers significant. TSL 3 would decrease consumer NPV by $0.06 billion, using a discount rate of 7 percent, and by $0.01 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 1.72 Mt of CO_2 and 1.53 kt of NO_X. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 3 is $6 million to $99 million. Total generating capacity in 2042 is estimated to stay the same under TSL 3.

At TSL 3, DOE projects that the average LCC impact for consumers is a loss of $6. The median payback period is 18.2 years (which is substantially longer than the mean lifetime of the product). At TSL 3, the fraction of consumers experiencing an LCC benefit is 17 percent. The fraction of consumers experiencing an LCC cost is 60 percent.

At TSL 3, DOE projects that INPV decreases by up to $5 million for gas-fired pool heaters. At TSL 3, manufacturers believe that profitability could be harmed in order to keep consumers in the market for a luxury item that is more expensive than the most common products currently sold, as with TSL 4. If the high end of the range of impacts is reached as DOE expects, TSL 3 could result in a net loss of 10 percent in INPV for gas-fired pool heaters.

Therefore, the Secretary has concluded that at TSL 3, the benefits of energy savings and emission reductions would be outweighed by the negative

impacts on consumer NPV, the economic burden on some consumers, and the large capital conversion costs that could result in a large reduction in INPV for the manufacturers. Consequently, the Secretary has concluded that TSL 3 is not economically justified.

Next, DOE considered TSL 2. TSL 2 would save 0.02 quads of energy, an amount DOE considers significant. TSL 2 would increase consumer NPV by $0.04 billion, using a discount rate of 7 percent, and by $0.10 billion, using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 2 are 0.75 Mt of CO_2 and 0.67 kt of NO_X. The estimated monetary value of the cumulative CO_2 emissions reductions at TSL 2 is $3 million to $43 million. Total generating capacity in 2042 is estimated to stay the same under TSL 2.

At TSL 2, DOE projects that the average LCC impact for consumers is a savings of $22. The median payback period is 8.6 years. At TSL 2, the fraction of consumers experiencing an LCC benefit is 22 percent. The fraction of consumers experiencing an LCC cost is 27 percent.

At TSL 2, DOE projects that INPV decreases by up to $0.8 million for gas-fired pool heaters. At TSL 2, manufacturers believe that profitability could be harmed in order to keep consumers in the market for a luxury item that is more expensive than the most common products currently sold, as with TSL 3 and 4. If the high end of the range of impacts is reached as DOE expects, TSL 2 could result in a net loss of 2 percent in INPV for gas-fired pool heaters.

After considering the analysis and the benefits and burdens of TSL 2, the Secretary has concluded that this trial standard level will offer the maximum improvement in efficiency that is technologically feasible and economically justified, and will result in significant conservation of energy. Further, global benefits from carbon dioxide reductions (at a central value of $21.4 for emissions in 2010) have a present value of $14 million. These benefits from carbon dioxide emission reductions (in both physical reductions and the monetized value of those reductions), when considered in conjunction with the consumer savings NPV and other factors described above, outweigh the potential reduction in INPV for manufacturers and support DOE's conclusion that trial standard level 2 is economically justified. Therefore, the Department today adopts the energy conservation standards for pool heaters at TSL 2, which requires a thermal efficiency of 82 percent for gas-fired pool heaters as shown in Table VI.68.

TABLE VI.68—AMENDED ENERGY CONSERVATION STANDARD FOR POOL HEATERS

Product class	Minimum thermal efficiency %
Gas-fired Pool Heaters	82

VII. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

Section 1(b)(1) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993), requires each agency to identify in writing the market failure or other problem that it intends to address, and that warrants agency action (including where applicable, the failure of private markets or public institutions), as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted. The problems that today's standards address are as follows:

(1) There is a lack of consumer information and/or information processing capability about energy efficiency opportunities in the home appliance market.

(2) There is asymmetric information (one party to a transaction has more and better information than the other) and/or high transactions costs (costs of gathering information and effecting exchanges of goods and services).

(3) There are external benefits resulting from improved energy efficiency of heating products that are not captured by the users of such equipment. These benefits include externalities related to environmental protection and energy security that are not reflected in energy prices, such as reduced emissions of greenhouse gases.

In addition, DOE has determined that today's regulatory action is a "significant regulatory action" under section 3(f)(1) of Executive Order 12866. Accordingly, section 6(a)(3) of the Executive Order requires that DOE prepare a regulatory impact analysis (RIA) on today's rule and that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) review this rule. DOE presented to OIRA for review the draft rule and other documents prepared for this rulemaking, including the RIA, and has included these documents in the rulemaking record. They are available for public review in the Resource Room of DOE's Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

The RIA is contained in the TSD prepared for the rulemaking. The RIA consists of: (1) A statement of the problem addressed by this regulation, and the mandate for government action; (2) a description and analysis of the feasible policy alternatives to this regulation; (3) a quantitative comparison of the impacts of the alternatives; and (4) specific national impacts of the standards.

The RIA calculates the effects of feasible policy alternatives to mandatory standards for heating products, and provides a quantitative comparison of the impacts of the alternatives. DOE evaluated each alternative in terms of its ability to achieve significant energy savings at reasonable costs, and compared it to the effectiveness of the standards in today's rule. DOE analyzed these alternatives using a series of regulatory scenarios for the three types of heating products. It modified the heating product NIA models to allow inputs for these policy alternatives. Of the four product classes of residential water heaters subject to standards, this RIA concerns only gas-fired storage and electric storage water heaters, which together represent the majority of shipments. Of the five product classes of DHE, this RIA concerns only gas wall fan DHE and gas hearth DHE, which together represent the majority of DHE shipments.

DOE identified the following major policy alternatives for achieving increased energy efficiency in the three types of heating products:

- No new regulatory action;
- Consumer rebates;
- Consumer tax credits;
- Manufacturer tax credits;
- Voluntary energy efficiency targets;
- Bulk government purchases;
- Early replacement programs; and
- The regulatory action (energy conservation standards).

DOE evaluated each alternative in terms of its ability to achieve significant energy savings at reasonable costs and compared it to the effectiveness of today's rule. Table VII.1 through Table VII.5 show the results for energy savings and consumer NPV.

TABLE VII.1—IMPACTS OF NON-REGULATORY ALTERNATIVES FOR GAS-FIRED STORAGE WATER HEATERS THAT MEET THE STANDARD (TSL 5)

Policy alternative	Primary energy savings quads	Net present value* billion 2009$	
		7% discount rate	3% discount rate
No New Regulatory Action	0.00	0.00	0.00
Consumer Rebates	0.21	0.05	0.55
Consumer Tax Credits	0.12	0.03	0.33
Manufacturer Tax Credits	0.06	0.01	0.17
Voluntary Energy Efficiency Targets	0.12	0.05	0.38
Early Replacement	0.001	−0.03	−0.05
Bulk Government Purchases	0.003	0.004	0.01
Energy Conservation Standard	0.81	0.27	2.37

*DOE determined the NPV of consumer benefit for product shipments from 2015 to 2045.

TABLE VII.2—IMPACTS OF NON-REGULATORY ALTERNATIVES FOR ELECTRIC STORAGE WATER HEATERS THAT MEET THE STANDARD (TSL 5)

Policy alternative	Primary energy savings quads	Net present value* billion 2009$	
		7% discount rate	3% discount rate
No New Regulatory Action	0.00	0.00	0.00
Consumer Rebates	0.53	0.19	1.50
Consumer Tax Credits	0.32	0.12	0.90
Manufacturer Tax Credits	0.16	0.06	0.45
Voluntary Energy Efficiency Targets	0.17	0.29	0.99
Early Replacement	0.003	−0.05	−0.08
Bulk Government Purchases	0.003	0.004	0.01
Energy Conservation Standard	1.67	1.03	5.84

*DOE determined the NPV of consumer benefit for product shipments from 2015 to 2045.

TABLE VII.3—IMPACTS OF NON-REGULATORY ALTERNATIVES FOR GAS WALL FAN DHE THAT MEET THE STANDARD (TSL 2)

Policy alternative	Primary energy savings quads	Net present value* billion 2009$	
		7% discount rate	3% discount rate
No New Regulatory Action	0.00	0.00	0.00
Consumer Rebates	0.004	0.007	0.018
Consumer Tax Credits	0.002	0.004	0.011
Manufacturer Tax Credits	0.001	0.002	0.005
Voluntary Energy Efficiency Targets	0.001	0.003	0.007
Early Replacement	<0.0001	0.000	0.000
Bulk Government Purchases†	NA	NA	NA
Energy Conservation Standard	0.01	0.03	0.07

*DOE determined the NPV of consumer benefit for product shipments from 2013 to 2043.
†DOE did not evaluate the bulk government purchase alternative for gas wall fan DHE because the market share associated with publicly-owned housing is minimal.

TABLE VII.4—IMPACTS OF NON-REGULATORY ALTERNATIVES FOR GAS HEARTH DHE THAT MEET THE STANDARD (TSL 2)

Policy alternative	Primary energy savings quads	Net present value* billion 2009$	
		7% discount rate	3% discount rate
No New Regulatory Action	0.00	0.00	0.00
Consumer Rebates	0.04	0.10	0.23
Consumer Tax Credits	0.02	0.06	0.14
Manufacturer Tax Credits	0.01	0.03	0.07
Voluntary Energy Efficiency Targets	0.02	0.05	0.14
Early Replacement	<0.001	0.000	0.000
Bulk Government Purchases†	NA	NA	NA
Energy Conservation Standard	0.19	0.50	1.21

*DOE determined the NPV of consumer benefit for product shipments from 2013 to 2043.
†DOE did not evaluate the bulk government purchase alternative for gas hearth DHE because the market share associated with publicly-owned housing is minimal.

TABLE VII.5—IMPACTS OF NON-REGULATORY ALTERNATIVES FOR POOL HEATERS THAT MEET THE STANDARD (TSL 2)

Policy alternative	Primary energy savings quads	Net present value* billion 2009$	
		7% discount rate	3% discount rate
No New Regulatory Action	0.00	0.00	0.00
Consumer Rebates	0.006	0.01	0.03
Consumer Tax Credits	0.003	0.006	0.02
Manufacturer Tax Credits	0.002	0.003	0.01
Voluntary Energy Efficiency Targets	0.002	0.004	0.01
Early Replacement	<0.001	0.000	0.000
Bulk Government Purchases †	NA	NA	NA
Energy Conservation Standard	0.02	0.04	0.11

* DOE determined the NPV of consumer benefit for product shipments from 2013 to 2043.
† DOE did not evaluate the bulk government purchase alternative for pool heaters because there is no market share associated with publicly-owned housing.

The NPV amounts shown in Table VII.1 through Table VII.5 refer to the NPV of consumer benefits. The costs to the government of each policy (such as rebates or tax credits) are not included in the costs for the NPV since, on balance, consumers in the aggregate both pay for rebates and tax credits through taxes and receive their benefits. The following paragraphs discuss the cumulative effect of each policy alternative listed in Table VII.1 through Table VII.5. (*See* the regulatory impact analysis in the final rule TSD for details.) For comparison with the results reported below for the non-regulatory policies, the combined impacts of the standards for all product classes considered in this rulemaking are projected to result in 2.81 quads of national energy savings and an NPV of consumer benefit of $1.98 billion (at a 7-percent discount rate).

No new regulatory action. The case in which no regulatory action is taken constitutes the "base case" (or "no action") scenario. Since this is the base case, energy savings and NPV are zero by definition.

Consumer Rebates. If consumers were offered a rebate that covered a portion of the incremental price difference between products meeting baseline efficiency levels and those meeting the energy efficiency levels in the standards, the number of consumers buying a more-efficient water heater, pool heater, or DHE would increase relative to the base case. For example, as a result of the consumer rebates, DOE's analysis suggests that the market share of water heaters meeting the standard level would increase from 35 percent (in the base case) to 62 percent for gas-fired storage products, and from 9 percent (in the base case) to 48 percent for electric storage products. DOE assumed this policy would permanently transform the market so that the increased percentage of consumers purchasing more-efficient products seen in the first year of the program would be maintained throughout the forecast period. At the estimated participation rates, the rebates would provide 0.79 quads of national energy savings and an NPV of consumer benefit of $0.36 billion (at a 7-percent discount rate) for the five considered product classes. Although DOE estimated that rebates would provide national benefits, they would be much smaller than the benefits resulting from the national standards.

Consumer Tax Credits. If consumers were offered a tax credit that covered a portion of the incremental price difference between products meeting baseline efficiency levels and those meeting the energy efficiency levels in the standards, DOE's analysis suggests that the number of consumers buying a water heater, pool heater, or DHE that would take advantage of the tax credit would be approximately 60 percent of the number that would take advantage of rebates. For example, as a result of the consumer tax credit, the market share of water heaters meeting the standard level would increase from 35 percent (in the base case) to 51 percent for gas-fired storage products and from 9 percent (in the base case) to 31 percent for electric storage products. DOE assumed this policy would permanently transform the market so that the increased percentage of consumers purchasing more-efficient products seen in the first year of the program would be maintained throughout the forecast period. At the estimated participation rates, consumer tax credits would provide 0.47 quads of national energy savings and an NPV of consumer benefit of $0.22 billion (at a seven-percent discount rate) for the five considered products. Hence, DOE estimated that consumer tax credits would yield a fraction of the benefits that consumer rebates would provide.

Manufacturer Tax Credits. DOE estimates that even smaller benefits would result from a manufacturer tax credit program that would effectively result in a lower price to the consumer by an amount that covers part of the incremental price difference between products meeting baseline efficiency levels and those meeting the standards. Because these tax credits would go to manufacturers instead of consumers, DOE assumed that fewer consumers would be aware of this program than would be aware of a consumer tax credit program. DOE assumes that 50 percent of the consumers who would take advantage of consumer tax credits would buy more-efficient products offered through a manufacturer tax credit program. For example, as a result of the manufacturer tax credit, the market share of water heaters meeting the standard would increase from 35 percent (in the base case) to 43 percent for gas-fired storage products and from 9 percent (in the base case) to 20 percent for electric storage products. DOE assumed this policy would permanently transform the market so that the increased percentage of consumers purchasing more-efficient products seen in the first year of the program would be maintained throughout the forecast period. At the estimated participation rates, the rebates would provide 0.23 quads of national energy savings and an NPV of consumer benefit of $0.1 billion (at a seven-percent discount rate) for the five considered products. Thus, DOE estimated that manufacturer tax credits would yield a fraction of the benefits that consumer tax credits and rebates would provide.

Voluntary Energy Efficiency Targets. The Federal government's ENERGY STAR program has voluntary energy efficiency targets for gas-fired and electric storage water heaters. Some equipment purchases that result from the ENERGY STAR program already are reflected in DOE's base-case scenario for gas-fired and electric storage water heaters. DOE evaluated the potential

impacts of increased marketing efforts by ENERGY STAR that would encourage the purchase of water heaters meeting the standard. For direct heating equipment and pool heaters, DOE evaluated a hypothetical ENERGY STAR program for these products with market impacts comparable to the impacts of existing ENERGY STAR programs for similar products. DOE modeled the voluntary efficiency program based on these scenarios. DOE estimated that the enhanced effectiveness of voluntary energy efficiency targets would provide 0.31 quads of national energy savings and an NPV of consumer benefit of $0.40 billion (at a 7-percent discount rate) for the five considered products. Although this would provide national benefits, they would be much smaller than the benefits resulting from the national standards.

Early Replacement Incentives. This policy alternative envisions a program to replace old, inefficient water heaters, DHE, and pool heaters with models meeting the efficiency levels in the standards. DOE projected a 4-percent increase in the annual retirement rate of the existing stock in the first year of the program. It assumed the program would last as long as it took to completely replace all of the eligible existing stock in the year that the program begins (2013 or 2015). DOE estimated that for such an early replacement program, the national energy savings benefits would be negligible in comparison with the benefits resulting from the national standards, and the NPV would actually be negative.

Bulk Government Purchases. Under this policy alternative, the government would be encouraged to purchase increased amounts of equipment that meet the efficiency levels in the standards. Federal, State, and local government agencies could administer such a program. At the Federal level, this would be an enhancement to the existing Federal Energy Management Program (FEMP). DOE modeled this program by assuming an increase in installation of water heaters meeting the efficiency levels of the standards among those households for whom government agencies purchase or influence the purchase of water heaters. (Because the market share of DHE units in publicly-owned housing is minimal and the market share of pool heaters in publicly-owned housing is zero, the Department did not consider bulk government purchases for those products.) DOE estimated that bulk government purchases would provide negligible national energy savings and NPV for the considered products, benefits that would be much smaller than those estimated for the national standards.

Energy Conservation Standards. DOE is adopting the energy conservation standards listed in section VI.D. As indicated in the paragraphs above, none of the alternatives DOE examined would save as much energy as today's standards. Also, several of the alternatives would require new enabling legislation because authority to carry out those alternatives may not exist.

Additional Policy Evaluation. In addition to the above non-regulatory policy alternatives, DOE evaluated the potential impacts of a policy that would allow States to require that some water heaters installed in new homes have an efficiency level higher than the Federal standard. At present, States are prohibited from requiring efficiency levels higher than the Federal standard; the considered policy would remove this prohibition in the case of residential water heaters. DOE notes that removing the prohibition would require either legislative authority or DOE approval, after a case-by-case basis consideration on the merits, of waivers submitted by States. For the present rulemaking, DOE evaluated the impacts that such a policy would have for electric storage water heaters.

Specifically, DOE estimated the impacts for a policy case in which several States adopted provisions in their building codes that would require electric storage water heaters to meet efficiency level 6 (2.0 EF, heat pump with two-inch insulation). DOE assumed that such codes would affect 25 percent of water heaters in all new homes built in the United States in 2015 and that the percentage would increase linearly to 75 percent by 2045. (DOE did not attempt to define the specific geographic areas that would be affected.) In this policy case, all other water heaters (those bought for replacement in existing homes) would meet the proposed standard level of 0.95 (efficiency level 5). DOE's analysis accounts for the estimate that some new homes would have a water heater with EF greater than or equal to 2.0 (*e.g.,* heat pump technology) in the absence of any amended standards (the base case).

DOE estimated that a policy that would allow States to require that some electric storage water heaters installed in new homes have an efficiency level higher than the Federal standard would provide 2.18 quads of national energy savings and an NPV of consumer benefit of $1.23 billion (at a 7-percent discount rate). The energy savings from this State building code requirement for new homes would be greater than the savings from today's energy conservation standard for electric storage water heaters. This contrasts with the non-regulatory policy alternatives discussed above, whose savings are lower than those of the considered standards.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking" 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site (*http://www.gc.energy.gov/*). DOE reviewed the December 2009 NOPR and today's final rule under the provisions of the Regulatory Flexibility Act and the procedure and policies published on February 19, 2003.

For the manufacturers of the three types of heating products, the Small Business Administration (SBA) has set a size threshold, which defines those entities classified as "small businesses" for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. 65 FR 30836, 30850 (May 15, 2000), as amended at 65 FR 53533, 53545 (Sept. 5, 2000) and codified at 13 CFR part 121.The size standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.* Residential water heater manufacturing is classified under NAICS 335228—"Other Major Household Appliance Manufacturing." DHE and pool heater manufacturing are classified under NAICS 333414—"Heating Equipment (Except Warm Air Furnaces) Manufacturing." The SBA sets a threshold of 500 employees or less for an entity to be considered as a small business for both of these categories as shown in Table VII.6.

TABLE VII.6—SBA AND NAICS CLASSIFICATION OF SMALL BUSINESS MANUFACTURERS POTENTIALLY AFFECTED BY THIS RULE [26]

Industry description	Revenue limit	Employee limit	NAICS
Residential Water Heater Manufacturing	N/A	500	335228
Direct Heating Manufacturing	N/A	500	333414
Pool Heater Manufacturing	N/A	500	333414

In the December 2009 NOPR, DOE looked at each type of heating product (water heaters, pool heaters, and direct heating) separately for purposes of determining whether certification was appropriate or an initial regulatory flexibility analysis was needed. DOE identified five small residential water heater manufacturers, 12 small DHE manufacturers, and one small pool heater manufacturer that produce covered products and can be considered small businesses manufacturers. 74 FR 65852, 65984–86 (Dec. 11, 2009). DOE concluded that the proposed standards for residential water heaters and gas-fired pool heaters set forth in the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. DOE also sought comment on the impacts of the proposed amended energy conservation standards on small business manufacturers of residential water heaters and the impacts of the proposed amended energy conservation standards on small business manufacturers of gas-fired residential pool heaters. DOE received no comments on the certification or its additional requests for comment on small business impacts in response to the December 2009 NOPR for residential water heaters and gas-fired pool heaters. Comments related to the economic impacts of the proposed rule generally are discussed elsewhere in the preamble, and no changes were made to the certification as a result of these comments. Thus, DOE reaffirms the certification and has not prepared a FRFA for this final rule for those products.

DOE determined, however, that it could not certify that the proposed standards, if promulgated, would not have significant impact on a substantial number of small entities in the direct heating equipment industry. DOE made the determination that small business manufacturers of both traditional and gas hearth DHE could be negatively impacted by the standards proposed in the December 2009 NOPR. 74 FR 65852, 65985–86 (Dec. 11, 2009). Because of the potential impacts on small DHE manufacturers, DOE prepared an IRFA for DHE during the NOPR stage of this rulemaking. DOE provided the IRFA in its entirety in the December 2009 NOPR. 74 FR 65852, 65984–92 (Dec. 11, 2009). Chapter 12 of the TSD contains more information about the impact of this rulemaking on manufacturers. DOE presents the FRFA conducted for this rulemaking in the following discussion. Comments received in response to the IRFA are also presented below.

DOE's determination that the rule may have a significant economic impact on a substantial number of small entities results from the large number of small DHE manufacturers and the expected impact of the standards on these small businesses. As presented and discussed below, the FRFA describes potential impacts on small business DHE manufacturers associated with the required capital and product conversion costs at each TSL and discusses alternatives that could minimize these impacts.

Succinct Statement of the Need for, and Objectives of, the Rule

The statement of the need for and objectives of the rule is set forth elsewhere in the preamble and is not repeated here.

Description and Estimated Number of Small Entities Regulated

After examining structure of the DHE industry, DOE determined it was necessary to divide potential impacts on small DHE manufacturers into two broad categories: (1) Impacts on small manufacturers of traditional DHE (*i.e.,* manufacturers of gas wall fan, gas wall gravity, gas floor, and gas room DHE); and (2) impacts on small manufacturers of gas hearth products. The FRFA presents the results for traditional DHE and gas hearth DHE separately to be consistent with the MIA results in section VI.C.2 which also separate DHE in this manner. Traditional DHE and gas hearth DHE are made by different manufacturers (*i.e.,* all manufacturers of gas hearth products do not manufacture traditional DHE, and vice versa, with one exception).

Traditional Direct Heating Equipment

Three major manufacturers control almost 100 percent of the traditional DHE market. Two of the three major manufacturers of traditional DHE are small business manufacturers. One of the small business manufacturers produces only traditional DHE and has products in all four traditional DHE product classes (*i.e.,* gas wall fan, gas wall gravity, gas floor, and gas room DHE). The second small business manufacturer produces all five products classes of DHE, including gas hearth DHE. DOE identified a third small business manufacturer with less than a one-percent share of the traditional DHE market. This company offers two gas wall gravity models, but is mainly focused on specialty hearth products not covered by this rulemaking.

Gas Hearth Direct Heating Equipment

DOE identified 10 small business manufacturers of gas hearth DHE. Both small business manufacturers and large manufacturers indicated that the number of competitors in the market has been declining in recent years due to industry consolidation and smaller companies exiting the market. Three major domestic manufacturers now supply a majority of the marketplace. None of the three major manufacturers is considered a small business. The remainder of the market is either imported (mostly by Canadian companies) or produced by one of 12 domestic manufacturers that hold varying market shares.

Significant Issues Raised by Public Comments

A number of interested parties commented on the appropriateness of the proposed standard level for traditional DHE, given the impacts DOE calculated in the MIA, and urged DOE to reconsider the traditional DHE standards for the final rule. See section V.A.2 for a summary of these comments, and see section VI.D.3 for a discussion of DOE's conclusion about the final amended energy conservation standard for traditional DHE in light of these and other comments.

DOE also received a number of comments from industry groups and

[26] In the December 2009 NOPR, DOE mistakenly listed gas-fired pool heater manufacturing under NAICS code 335228. 74 FR 65852, 65984 (Dec. 11, 2009). The correct classification for pool heater manufacturing is 333414. Both NAICS categories have the same 500 employee limit.

manufacturers, including two small business manufacturers, about the potential of the proposed standards to have a tremendous impact on direct employment in the traditional DHE market. *See* section IV.I.4 for a discussion of these comments. Interested parties also commented on the MIA scenarios and profitability in the traditional DHE market after the compliance date of the amended energy conservation standards (section IV.I.2). Another issue raised by interested parties that could impact small business manufacturers and the industry in general is securing the funding for the conversion costs estimated by DOE (*see* section IV.I.5).

Several comments argued that TSL 3, as presented in the December 2009 NOPR, presented a very negative business case for traditional DHE manufacturers, especially small business manufacturers. In general, AHRI and the small business manufacturers argued that the market for traditional DHE would not support the sales volume necessary to recoup the investments in R&D and capital equipment required by TSL 3. Essentially, two factors drive this argument: (1) The costs required by amended standards; and (2) revenues that follow the standards. On the cost side, AHRI stated that manufacturers cannot afford the necessary investment for product development and redesign for nearly all of their models; the retooling and changing of their production lines; and the testing of those redesigned models to certify compliance with the applicable safety standards. On the revenue side, AHRI and manufacturers attributed the lack of volume necessary to recoup these costs to three factors: (1) The market has already been in steady decline in the base case; (2) there would be fewer retrofits—the products' primary market—because of space constraints and the increased size associated with higher-efficiency products; and (3) higher first costs, including higher installation costs, would further reduce demand. (Williams, No. 96 at p. 1; Empire, Public Meeting Transcript, No. 57.4 at pp. 298–300; AHRI, No. 91 at p. 10) AHRI and the manufacturers argued that the prospect of declining sales and the aforementioned costs would force those manufacturers to either drop product lines or exit the market entirely. (AHRI, No. 91 at p. 10; LTS, Public Meeting Transcript, No. 57.4 at p. 25) As a result, some segments of the traditional DHE market may shrink to only one or two manufacturers. (AHRI, No. 91 at p. 10) As mentioned in section VI.C.5, DOJ expressed concern that the proposed standards could adversely affect competition in the traditional DHE product categories. (DOJ, No. 99 at p. 2)

DOE also received comments specific to the small business analysis presented in the IRFA section of the December 2009 NOPR. LTS agreed that most manufacturers have existing products that meet the required efficiencies in three out of the four product types of traditional DHE, but said that that statement is misleading because only 15 percent of LTS' total sales come from products that meet the proposed standards. LTS stated its belief that its competitors similarly derive only a small portion of total revenue from products that would meet the proposed standards. (LTS, No. 56.7 at p. 2; Public Meeting Transcript, No. 57.4 at p. 22) LTS also disagreed with DOE's statement in the December 2009 NOPR that small business manufacturers would be left with a viable number of product lines that meet the new standards, particularly for the gravity wall category which represents 60 percent of their business. Because only one manufacturer has two gas wall gravity models that would meet the proposed standard (which represent 5 percent of sales and only have lower input ratings less than 25,000 BTU), LTS stated that these few products do not lead to maintaining a viable number of product offerings. (LTS, No. 56.7 at p. 3; LTS, Public Meeting Transcript, No. 57.4 at pp. 23–24; 286–287) Therefore, LTS did not agree with DOE's conclusion that manufacturers would have a viable number of product lines at TSL 3 to maintain a sufficient production volume and remain in the market. (LTS, No. 56.7 at p. 2)

DOE acknowledges that, according to the AHRI database, LTS produces only a few gas wall gravity DHE models that would meet the standards being adopted in this final rule. According to the AHRI directory, LTS has certified four models that meet the proposed gas wall gravity standard in the 2009 NOPR. These four models are two basic products that are listed twice in the directory (once for using natural gas as a fuel source and once for using propane gas as a fuel source). DOE also understands that these products currently reflect a small share of the market and that few of LTS's current products in other categories would meet the standards proposed in the December 2009 NOPR. To clarify, in the December 2009 NOPR, DOE concluded that a combination of existing product lines that currently meet the standard and other select product lines—which would have to be upgraded—would allow manufacturers to offer a viable number of product lines after the compliance date of the amended energy conservation standard. DOE did and does not assume that only products that meet the current standard will be sufficient to support manufacturers after compliance with the amended standards is required.

For these reasons, in the IRFA, DOE accounted for the costs the industry would incur to upgrade all of its other gas wall gravity product lines at the proposed standard. For the final rule, DOE used the AHRI database to update the number of product lines manufacturers currently have, and continued to use this methodology to estimate its capital conversion costs. DOE recognizes that its conversion costs may, therefore, be conservative because manufacturers may choose not to upgrade all of their current product lines. However, DOE assumed manufacturers would have to invest to maintain the shipment volumes forecasted in the NIA. See chapter 12 of the TSD for more details on DOE's product line analysis.

AHRI stated that because manufacturers in the traditional DHE market provide products of every type, the total shipments of traditional DHE must be considered since that is the true base of manufacturers' business. According to the commenter, DOE must reconsider its analysis for traditional DHE, both relative to the impacts on manufacturers and on national energy savings, given that total future shipments are expected to continue to decrease. (AHRI, No. 91 at p. 11) AHRI stated that, to date, the traditional DHE manufacturers have survived by offering replacements. Dropping product lines or dropping categories would hurt manufacturers because they would no longer be able to offer all replacements for all products, which could cause a complete exit from the market rather than upgrading some product lines. (AHRI, Public Meeting Transcript, No. 57.4 at pp. 297–298) Williams stated that offering a range of products is critical to traditional DHE manufacturers, arguing that in a small, niche category, part of viability is being able to offer a breadth of products. Williams commented that it needs to be able to be able to offer like replacements, including units without electricity. (Williams, Public Meeting Transcript, No. 57.4 at pp. 301–302)

DOE agrees with AHRI and Williams that total sales and offering a broad range of products are critical to traditional DHE manufacturers. In the December 2009 NOPR, DOE noted that the wide range of product offerings by

manufacturers is a legacy of a once higher-volume market that now typically supplies replacement units. The remaining manufacturers have stayed in business by consolidating brands and the legacy products of companies that are no longer in business to take increasing shares of a smaller total market. Because maintaining a sufficiently broad product line is so critical to traditional DHE manufacturers, DOE conducted its small business impact analysis by examining how the conversion costs to convert all product lines would impact small business manufacturers. Because each product line is manufactured in relatively low volumes, the discrepancy between unit shipments and the number of product lines requiring significant product and capital conversion costs results in negative impacts for all manufacturers. 74 FR 65852, 65986 (Dec. 11, 2009).

DOE notes that the comments it received on the IRFA pertain to the conclusion DOE drew from the results, rather than the methodology or results themselves. As such, DOE has maintained its methodology from the December 2009 NOPR (discussed in more detail in section IV.I) and believes it has appropriately captured the costs to traditional DHE manufacturers of upgrading all of their product lines to the TSLs. The cash flow impacts presented in section VI.C.2.b are reflective of this assumption. However, DOE recognizes the significant costs small business manufacturers could face in converting product lines. In light of these costs and the need to maintain a viable number of products to offer in the marketplace, DOE is adopting a different TSL for traditional DHE in today's final rule. Particularly in light of this change, DOE continues to believe that manufacturers, including the small business manufacturers, will be able to maintain a viable number of products after the compliance date of the amended energy conservation standards.

DOE did not receive any specific comments on the MIA for gas hearth DHE manufacturers. DOE also did not receive any comments on its request for comment on the characterization of a typical large and small business manufacturer of gas hearth DHE nor its request for comment on the potential impacts on small business manufacturers of gas hearth DHE.

Description and Estimate of Compliance Requirements

Traditional DHE

While DOE explicitly analyzed one representative input capacity range for the gas wall gravity, gas wall fan, gas floor, and gas room types of DHE, manufacturers offer product lines that typically span multiple BTU ranges with many different features. This can result in many individual models offered by each manufacturer per product line. Again, the wide range of product offerings by manufacturers is a legacy of a once higher-volume market that now typically supplies replacement units. The remaining manufacturers have stayed in business by consolidating brands and the legacy products of companies that are no longer in business to take increasing shares of a smaller total market. Because each product line is manufactured in low volumes, the discrepancy between unit shipments and the number of product lines requiring significant product and capital conversion costs results in negative impacts for all manufacturers. Many product development costs (*e.g.,* testing, certification, and marketing) are somewhat fixed, so achieving manufacturing scale is an important consideration in determining whether the product conversion costs are economically justified. Similarly, even though any capital conversion costs can be capitalized over a number of years, these costs must be paid up front, and there must be a large enough volume to justify an added per-unit cost.

DOE calculated capital and product conversion costs for traditional DHE by estimating a per-product-line cost and assuming that every manufacturer would face the same per-product-line cost within each product class. DOE also assumed that any product line that does not meet the efficiency level being analyzed would be upgraded, thereby requiring product conversion and capital conversion costs. DOE used public data to calculate the number of product lines that would need to be upgraded at each TSL for each product class. To show how the small business manufacturers could be differentially harmed, DOE compared the conversion costs for a typical large manufacturer and a typical small business manufacturer within the industry. To calculate the conversion costs for a typical small business manufacturer and a typical large manufacturer, DOE used publicly-available information to determine the average number of product lines that meet each efficiency level in each product category for a typical small business manufacturer and a typical large manufacturer of traditional DHE. DOE updated this information for the final rule, adding products that had been released since the December 2009 NOPR analysis. For both small business and large manufacturers, DOE multiplied the number of product lines that fell below the required efficiency level by its estimate of the per-line capital and product conversion cost. Table VII.7 and Table VII.8 show DOE's estimates of the average number of product lines requiring conversion at each TSL for a typical small business manufacturer and a typical large manufacturer of traditional DHE, respectively.

TABLE VII.7—NUMBER OF PRODUCT LINES REQUIRING CONVERSION FOR A TYPICAL SMALL BUSINESS MANUFACTURER OF TRADITIONAL DIRECT HEATING EQUIPMENT*

	Number of gas wall fan product lines requiring conversion	Number of gas wall gravity product lines requiring conversion	Number of gas floor product lines requiring conversion	Number of gas room product lines requiring conversion	Total number of product lines requiring conversion	Total product lines that meet each or exceed each TSL
Baseline	0	0	0	0	0	13
TSL 1	2	2.5	0.5	1	6	7
TSL 2	2	2.5	0.5	1.5	6.5	6.5
TSL 3	3	4	0.5	2	9.5	3.5
TSL 4	3.5	4	0.5	2	10	3
TSL 5	2	4	0.5	2	8.5	4.5
TSL 6	3.5	4	0.5	2	10	3

* Fractions of product lines result from taking the average number of product lines from publicly-available information.

TABLE VII.8—NUMBER OF PRODUCT LINES REQUIRING CONVERSION FOR A TYPICAL LARGE MANUFACTURER OF TRADITIONAL DIRECT HEATING EQUIPMENT

	Number of gas wall fan product lines requiring conversion	Number of gas wall gravity product lines requiring conversion	Number of gas floor product lines requiring conversion	Number of gas room product lines requiring conversion	Total number of product lines requiring conversion	Total product lines that meet each or exceed each TSL
Baseline	0	0	0	0	0	18
TSL 1	1	0	1	1	3	15
TSL 2	2	0	1	1	4	14
TSL 3	4	3	1	2	10	8
TSL 4	7	3	1	2	13	5
TSL 5	1	6	1	3	11	7
TSL 6	7	6	1	3	17	1

Amended energy conservation standards have the potential to differentially affect the small business manufacturers, because they generally lack the large-scale resources to alter their existing products and production facilities for those TSLs requiring major redesigns. While all manufacturers would be expected to be negatively impacted by amended energy conservation standards to varying degrees, the small business manufacturers would face higher product conversion costs at lower TSLs than their large competitor. Both large and small business manufacturers have several product offerings in each product class, sometimes at varying efficiency levels, but the larger manufacturer produces products with higher efficiencies in larger volumes. As a result, to produce a sufficiently large volume, the small business manufacturers would have to upgrade more product lines at lower TSLs than the large manufacturer at lower TSLs. As shown in Table VII.9 and Table VII.10, modifying facilities and developing new, more-efficient products would cause a typical small business manufacturer to incur higher conversion costs than a typical larger manufacturer for TSL 1 through TSL 3.

TABLE VII.9—TOTAL CONVERSION COSTS FOR A TYPICAL SMALL BUSINESS MANUFACTURER OF TRADITIONAL DIRECT HEATING EQUIPMENT

	Capital conversion costs for a typical small business manufacturer (2009$ millions)	Product conversion costs for a typical small business manufacturer (2009$ millions)	Total conversion costs for a typical small business manufacturer (2009$ millions)
Baseline	.....	.....	.....
TSL 1	0.86	0.41	1.27
TSL 2	1.35	0.57	1.92
TSL 3	1.89	0.81	2.70
TSL 4	2.18	0.92	3.10
TSL 5	1.93	1.44	3.37
TSL 6	2.52	1.65	4.17

TABLE VII.10—TOTAL CONVERSION COSTS FOR A TYPICAL LARGE MANUFACTURER OF TRADITIONAL DIRECT HEATING EQUIPMENT

	Capital conversion costs for a typical large manufacturer (2009$ millions)	Product conversion costs for a typical large manufacturer (2009$ millions)	Total conversion costs for a typical large manufacturer (2009$ millions)
Baseline	.....	.....	.....
TSL 1	0.23	0.14	0.38
TSL 2	0.54	0.25	0.79
TSL 3	1.81	0.79	2.60
TSL 4	2.59	1.11	3.70
TSL 5	2.90	2.13	5.03
TSL 6	4.08	2.61	6.69

Because the larger manufacturer offers more products at higher efficiencies, a typical small business manufacturer faces disproportionate costs at the lower TSLs in absolute terms at TSL 1 through TSL 3. Despite being similar in absolute terms, at these TSLs, the small business manufacturers would be more likely to be disproportionately harmed at any TSL because they have a much lower volume across which to spread similar costs. To show how a smaller scale would harm a typical small business manufacturer, DOE used estimates of the market shares within the industry

for each product class to estimate the typical annual revenue, operating profit, research and development expense, and capital expenditures for a typical large manufacturer and a typical small business manufacturer using the financial parameters in the DHE GRIM. Comparing the conversion costs of a typical small business manufacturer to a typical large manufacturer with operating profit provides a rough estimate of how quickly the investments could be recouped. Table VII.11 and Table VII.12 show these comparisons.

TABLE VII.11—COMPARISON OF A TYPICAL SMALL BUSINESS MANUFACTURER'S CONVERSION COSTS TO ANNUAL EXPENSES, REVENUE, AND OPERATING PROFIT

	Capital conversion cost as a percentage of annual capital expenditures	Product conversion cost as a percentage of annual R&D expense	Total conversion cost as a percentage of annual revenue	Total conversion cost as a percentage of annual EBIT
Baseline	.....	.....	.....	.....
TSL 1	267	190	9	252
TSL 2	332	210	11	302
TSL 3	466	299	15	426
TSL 4	537	341	17	489
TSL 5	474	535	19	531
TSL 6	619	612	23	657

TABLE VII.12—COMPARISON OF A TYPICAL LARGE MANUFACTURER'S CONVERSION COSTS TO ANNUAL EXPENSES, REVENUE, AND OPERATING PROFIT

	Capital conversion cost as a percentage of annual capital expenditures	Product conversion cost as a percentage of annual R&D expense	Total conversion cost as a percentage of annual revenue	Total conversion cost as a percentage of annual EBIT
Baseline	.....	.....	.....	.....
TSL 1	33	30	1	34
TSL 2	77	53	3	72
TSL 3	257	169	8	237
TSL 4	368	237	12	337
TSL 5	412	456	16	458
TSL 6	580	559	22	610

Table VII.11 and Table VII.12 illustrate that, although the investments required at each TSL can be considered substantial for all companies, the impacts could be relatively greater for a typical small business manufacturer, because of much lower production volumes and a comparable number of product offerings. At higher TSLs, it is more likely that manufacturers of traditional DHE would reduce the number of product lines they offer to keep their conversion costs at manageable levels. At higher TSLs, small business manufacturers would face increasingly difficult decisions on whether to: (1) Invest the capital required to be able to continue offering a full range of products; (2) cut product lines; (3) consolidate to maintain a large enough combined scale to spread the required conversion costs and operating expenses; or (4) exit the market altogether. Because of the high conversion costs at higher TSLs, manufacturers would likely eliminate their lower-volume product lines. Small business manufacturers might only be able to afford to selectively upgrade their most popular products and be forced to discontinue lower-volume products, because the product development costs that would be required to upgrade all of their existing product lines would be too high.

DOE's product line analysis revealed the potential for small businesses manufacturers to be disproportionately harmed by the proposed standard levels and higher TSLs. Additionally, DOE agrees with comments that small business traditional DHE manufacturers have less access to capital than their larger competitor. Larger manufacturers profit from offering a variety of products and have the ability to fund required capital and product conversion costs using cash generated from all products. Unlike large manufacturers, the small business manufacturers cannot leverage resources from other departments. With these considerations, it is more likely that the small businesses would have to spend an even greater proportion of their annual R&D and capital expenditures than shown in the industry-wide figures.

In addition, small business manufacturers have less buying power than their larger competitor. Traditional DHE is a low-volume industry, which can make it difficult for any manufacturer to take advantage of bulk purchasing power or economies of scale. The two small business manufacturers have approximately half the market share of their large competitor, which puts them at a disadvantage when purchasing components and raw materials. In addition, the large manufacturer has a parent company that manufactures products and equipment other than traditional DHE. This manufacturer's larger scale and additional manufacturing capacity (required for products and equipment other than DHE) also give the company more leverage with its suppliers as it purchases greater volumes of components and raw materials. During the manufacturer interviews, the small businesses manufacturers commented that to comply with amended energy conservation standards, they would likely need to buy more purchased parts instead of producing most of the final product in-house. Because the large manufacturer has an advantage in purchasing power that would likely allow it to buy purchased parts at lower

costs, an amended energy conservation standard that requires more purchased parts may differentially harm the profitability of the small business manufacturers.

Even though there is a potential for the small business manufacturers to be negatively impacted by today's final rule, DOE believes that manufacturers, including the small businesses, would be able to maintain a viable number of product offerings at TSL 2, the adopted standard level. A typical small business manufacturer of traditional DHE offers product families in the four product types that would meet or exceed the standard levels adopted in today's final rule. For example, over two-thirds of the product lines identified by DOE as currently on the market meet the standard established by today's final rule for gas wall gravity DHE, which comprise over 60 percent of the traditional DHE market. While recognizing that the product lines that currently meet the standard represent a minority of current revenue, the standard levels do not require manufacturers, including those that are small businesses, to completely redesign all their product lines. For those product lines that would need to be redesigned, DOE believes that small business manufacturers would offer fewer product lines in response to the amended energy conservation standards. However, DOE believes that the standards adopted in today's final rule will allow the small business manufacturers to selectively upgrade their existing product lines and maintain viable production volumes after the compliance date of the amended energy conservation standards.

Gas Hearth DHE

For gas hearth DHE in the IRFA, DOE used publicly-available information to estimate the conversion costs for a typical large and a typical small business manufacturer of gas hearth DHE as shown in the December 2009 NOPR. 74 FR 65852, 65984–92 (Dec. 11, 2009). DOE tentatively concluded that a typical small business manufacturer could be differentially impacted by amended energy conservation standards because of their smaller scale. However, DOE believed that a typical small business manufacturer would not face prohibitively large conversion costs and that the required changes would not require significant investments in product development. DOE tentatively concluded that because a typical manufacturer of gas hearth DHE already offers multiple product lines that meet and exceed the required efficiencies and because most product lines that did not meet the proposed standard could be upgraded with relatively minor changes, manufacturers, including the small business manufacturers, would be able to maintain a viable number of product offerings. 74 FR 65852, 65991 (Dec. 11, 2009). In this final rule, while DOE is adopting a different TSL for direct heating equipment (*i.e.,* TSL 2), the efficiency requirements are identical to the proposed amended energy conservation standard for gas hearth DHE. Additionally, because DOE did not receive any comments on the IRFA or the potential impacts on small business manufacturers of gas hearth DHE, DOE continues to believe that the analysis developed for the IRFA and presented in the December 2009 NOPR accurately presents the potential impacts on small business manufacturers of gas hearth DHE. (*See* 74 FR 65852, 65989–91 (Dec. 11, 2009) for additional details.) Therefore, for the FRFA detailed in today's final rule, DOE continues to believe that gas hearth DHE manufacturers, including the small business manufacturers, will be able to maintain a viable number of product offerings following the compliance date of the amended energy conservation standard.

Description of the Steps DOE Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

DOE acknowledges all the potential impacts highlighted by manufacturers and industry and updated its small business analysis for the impacts on traditional DHE manufacturers in light of these comments and additional information and analysis. The impacts on small business manufacturers of traditional DHE, as illustrated in public comments, contributed to DOE's ultimate determination that the TSL proposed in the December 2009 NOPR for traditional DHE (TSL 3) was not economically justified.

DOE discusses how it has considered the new information about the impacts on traditional DHE in section VI.D.3. Even though there is a potential for the small business manufacturers to be negatively impacted by today's final rule, DOE believes that manufacturers, including the small businesses, would be able to maintain a viable number of product offerings at TSL 2, the adopted standard level. For today's final rule, the small business manufacturers of traditional DHE have an average of 6.5 product lines out of 13 that already meet the required efficiencies. In total, 61 percent of the models offered by a typical small business manufacturer meet the amended energy conservation standards. DOE also reviewed the conversion costs required for each of the small business manufacturers to upgrade an average of approximately seven product lines for a capital cost totaling $1.35 million to offer replacements for all models that do not meet the standard. At the proposed standards in the December 2009 NOPR, DOE estimated small business manufacturers would be required to spend approximately 3.5 years worth of operating profit to convert every product line. For todays final rule, that estimate has fallen to 3.0 years despite changes to the analysis that lowered annual shipments and updates to the product line analysis to include new product lines. While DOE believes that this would still be a substantial undertaking, DOE has carefully reviewed the impact of the conversion costs on small business manufacturers and has carefully considered what would be required for these manufacturers to continue to offer a viable number of replacement models that are critical to their ability to remain in the market. In sum, DOE has concluded that adoption of a standard level at TSL 2 in this final rule (as compared to TSL 3 proposed in the NOPR) minimizes the impact on small business manufacturers to the extent possible, given EPCA's requirements for setting energy conservation standards.

Although the TSL lower than the adopted TSL would be expected to further reduce the impacts on small entities, DOE is required by EPCA to establish standards that achieve the maximum improvement in energy efficiency that are technically feasible and economically justified, and result in a significant conservation of energy, after considering a variety of factors. As explained earlier in the preamble, DOE rejected the lower TSL based on its analysis conducted pursuant to these EPCA requirements.

In addition to the other TSLs being considered, the December 2009 NOPR TSD included a regulatory impact analysis. For DHE, this report discusses the following policy alternatives: (1) No new regulatory action; (2) consumer rebates; (3) consumer tax credits; (4) manufacturer tax credits; (5) voluntary energy efficiency targets; (6) early replacement incentives; and (7) bulk government purchases. While these alternatives may mitigate the economic impacts on small entities compared to the adopted standards, the energy savings of these regulatory alternatives are significantly smaller than those expected to result from the adopted

standard levels. Thus, DOE rejected these alternatives and is adopting the standards set forth in this rulemaking.

C. Review Under the Paperwork Reduction Act of 1995

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act of 1995 (PRA) which has been approved by OMB under control number 1910–1400. As described in the December 2009 NOPR, public reporting burden for compliance reporting for energy and water conservation standards is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. 74 FR 65852, 65992 (Dec. 11, 2009). DOE did not receive any comments regarding this burden estimate, or any other aspect of this data collection in response to its proposals. DOE believes that the collection of information required by this final rule is the least burdensome method of meeting the statutory requirements.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

DOE prepared an environmental assessment (EA) of the impacts of today's final rule, pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and DOE's regulations for compliance with NEPA (10 CFR part 1021). This assessment includes an examination of the potential effects of emission reductions likely to result from the rule in the context of global climate change, as well as other types of environmental impacts. The final EA has been incorporated into the final rule TSD at chapter 16. DOE found the environmental effects associated with today's standard levels for water heaters, direct heating equipment, and pool heaters to be insignificant. Therefore, DOE is issuing a finding of no significant impact (FONSI) as part of the final EA. The FONSI is available in the docket for this rulemaking.

E. Review Under Executive Order 13132

DOE reviewed this rule pursuant to Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999), which imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined today's final rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) Therefore, no further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform" (61 FR 4729 (Feb. 7, 1996)) imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

As indicated in the December 2009 NOPR, DOE reviewed the proposed rule under Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) (UMRA), which requires each Federal agency to assess the effects of their Federal regulatory actions on State, local, and Tribal governments and the private sector. *See* 74 FR 65852, 65992–93 (Dec. 11, 2009). For a proposed regulatory action likely to result in a rule that may cause 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 (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects of the rule on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected State, local, and Tribal governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at *http://www.gc.doe.gov*). Although today's final rule does not contain a Federal intergovernmental mandate, it may impose expenditures of $100 million or more on the private sector.

DOE has concluded that this final rule would likely result in a final rule that could impose expenditures of $100 million or more between 2013 and 2045 in the private sector. For the final rule, DOE estimated annualized impacts for the final standards using the results of

the national impacts analysis. The national impact analysis results, expressed as annualized values, range from $1.55–$2.03 billion (at a 7-percent discount rate) and $1.90–$2.38 billion (at a 3-percent discount rate) in total annualized benefits from the final rule. The NIA also reports $1.28 billion (at a 7-percent discount rate) and $1.25 billion (at a 3-percent discount rate) in annualized costs, and $0.27–$0.75 billion (at a 7-percent discount rate) and $0.65–$1.13 billion (at a 3-percent discount rate) in annualized net benefits. Details are provided in chapter 10 of the TSD. Therefore, DOE must publish a written statement assessing the costs, benefits, and other effects of the rule on the national economy.

Section 205 of UMRA also requires DOE to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which UMRA requires such a written statement. DOE must select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the rule, unless DOE publishes an explanation for doing otherwise or the selection of such an alternative is inconsistent with law.

As required by EPCA (42 U.S.C. 6295(o)), today's energy conservation standards for residential water heaters, direct heating equipment, and pool heaters would achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified. DOE may not select a regulatory alternative that does not meet this statutory standard. A discussion of the alternatives considered by DOE is presented in the "Regulatory Impact Analysis" section of the TSD for this final rule. Also, section 202(c) of UMRA authorizes an agency to prepare the written statement required by UMRA in conjunction with or as part of any other statement or analysis that accompanies the proposed rule. (2 U.S.C. 1532(c)) The TSD, preamble, and regulatory impact analysis for today's final rule contain a full discussion of the rule's costs, benefits, and other effects on the national economy, and, therefore, satisfy UMRA's written statement requirement.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. In the December 2009 NOPR, DOE tentatively determined that this rulemaking would not have any impact on the autonomy or integrity of the family as an institution, and, accordingly, that it is not necessary to prepare a Family Policymaking Assessment. *See* 74 FR 65852, 65993 (Dec. 11, 2009). DOE received no comments concerning Section 654 in response to the December 2009 NOPR, and, therefore, has concluded that no further action is necessary in today's final rule with respect to this provision.

I. Review Under Executive Order 12630

DOE tentatively determined under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 18, 1988), that this rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution. 74 FR 65852, 65993 (Dec. 11, 2009). DOE received no comments concerning Executive Order 12630 in response to the December 2009 NOPR, and, therefore, has concluded that no further action is necessary in today's final rule with respect to this Executive Order.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA) at OMB, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has determined that today's rule, which sets energy conservation standards for residential water heaters, direct heating equipment, and pool heaters, is not a "significant energy action" within the meaning of Executive Order 13211, because the standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator of OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under the Information Quality Bulletin for Peer Review

In consultation with the Office of Science and Technology Policy (OSTP), OMB issued on December 16, 2004, its "Final Information Quality Bulletin for Peer Review" (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal government, including influential scientific information related to agency regulatory actions. The purpose of the Bulletin is to enhance the quality and credibility of the government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are "influential scientific information," which the Bulletin defines as "scientific information that agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions." 70 FR 2664, 2667 (Jan. 14, 2005).

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses, and has prepared a Peer Review Report on the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management

effectiveness of programs and/or projects. The "Energy Conservation Standards Rulemaking Peer Review Report" dated February 2007 has been disseminated and is available at the following Web site: *http://www1.eere.energy.gov/buildings/appliance_standards/peer_review.htm.*

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will state that it has been determined that the rule is a "major rule" as defined by 5 U.S.C. 804(2). DOE also will submit the supporting analyses to the Comptroller General in the U.S. Government Accountability Office (GAO) and make them available to each House of Congress.

VIII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, and Small businesses.

Issued in Washington, DC, on March 22, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

■ For the reasons set forth in the preamble, DOE amends part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, to read as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. In § 430.2, add the definitions "Direct heating equipment" and "Vented hearth heater," in alphabetical order and revise the definition "Vented home heating equipment," to read as follows:

§ 430.2 Definitions.

* * * * *

Direct heating equipment means vented home heating equipment and unvented home heating equipment.

* * * * *

Vented hearth heater means a vented appliance which simulates a solid fuel fireplace and is designed to furnish warm air, with or without duct connections, to the space in which it is installed. The circulation of heated room air may be by gravity or mechanical means. A vented hearth heater may be freestanding, recessed, zero clearance, or a gas fireplace insert or stove. Those heaters with a maximum input capacity less than or equal to 9,000 British thermal units per hour (Btu/h), as measured using DOE's test procedure for vented home heating equipment (10 CFR part 430, subpart B, appendix O), are considered purely decorative and are excluded from DOE's regulations.

Vented home heating equipment or *vented heater* means a class of home heating equipment, not including furnaces, designed to furnish warmed air to the living space of a residence, directly from the device, without duct connections (except that boots not to exceed 10 inches beyond the casing may be permitted and except for vented hearth heaters, which may be with or without duct connections) and includes: vented wall furnace, vented floor furnace, vented room heater, and vented hearth heater.

* * * * *

■ 3. In § 430.32, revise paragraphs (d), (i), (k) to read as follows:

§ 430.32 Energy and water conservation standards and their effective dates.

* * * * *

(d) *Water heaters.* The energy factor of water heaters shall not be less than the following for products manufactured on or after the indicated dates.

Product class	Energy factor as of January 20, 2004	Energy factor as of April 16, 2015
Gas-fired Water Heater	0.67 − (0.0019 × Rated Storage Volume in gallons).	For tanks with a Rated Storage Volume at or below 55 gallons: EF = 0.675 − (0.0015 × Rated Storage Volume in gallons). For tanks with a Rated Storage Volume above 55 gallons: EF = 0.8012 − (0.00078 × Rated Storage Volume in gallons).
Oil-fired Water Heater	0.59 − (0.0019 × Rated Storage Volume in gallons).	EF = 0.68 − (0.0019 × Rated Storage Volume in gallons).
Electric Water Heater	0.97 − (0.00132 × Rated Storage Volume in gallons).	For tanks with a Rated Storage Volume at or below 55 gallons: EF = 0.960 − (0.0003 × Rated Storage Volume in gallons). For tanks with a Rated Storage Volume above 55 gallons: EF = 2.057 − (0.00113 × Rated Storage Volume in gallons).
Tabletop Water Heater	0.93 − (0.00132 × Rated Storage Volume in gallons).	EF = 0.93 − (0.00132 × Rated Storage Volume in gallons).
Instantaneous Gas-fired Water Heater.	0.62 − (0.0019 × Rated Storage Volume in gallons).	EF = 0.82 − (0.0019 × Rated Storage Volume in gallons).
Instantaneous Electric Water Heater.	0.93 − (0.00132 × Rated Storage Volume in gallons).	EF = 0.93 − (0.00132 × Rated Storage Volume in gallons).

Note: The Rated Storage Volume equals the water storage capacity of a water heater, in gallons, as specified by the manufacturer.

* * * * *

(i) *Direct heating equipment.* (1) Vented home heating equipment manufactured on or after January 1, 1990 and before April 16, 2013, shall have an annual fuel utilization efficiency no less than:

Product class	Annual fuel utilization efficiency, Jan. 1, 1990 (percent)
1. Gas wall fan type up to 42,000 Btu/h	73
2. Gas wall fan type over 42,000 Btu/h	74

Product class	Annual fuel utilization efficiency, Jan. 1, 1990 (percent)
3. Gas wall gravity type up to 10,000 Btu/h	59
4. Gas wall gravity type over 10,000 Btu/h up to 12, 000 Btu/h	60
5. Gas wall gravity type over 12,000 Btu/h up to 15,000 Btu/h	61
6. Gas wall gravity type over 15,000 Btu/h up to 19,000 Btu/h	62
7. Gas wall gravity type over 19,000 Btu/h and up to 27,000 Btu/h	63
8. Gas wall gravity type over 27,000 Btu/h and up to 46,000 Btu/h	64
9. Gas wall gravity type over 46,000 Btu/h	65
10. Gas floor up to 37,000 Btu/h	56
11. Gas floor over 37,000 Btu/h	57
12. Gas room up to 18,000 Btu/h	57
13. Gas room over 18,000 Btu/h up to 20,000 Btu/h	58
14. Gas room over 20,000 Btu/h up to 27,000 Btu/h	63
15. Gas room over 27,000 Btu/h up to 46,000 Btu/h	64
16. Gas room over 46,000 Btu/h	65

(2) Vented home heating equipment manufactured on or after April 16, 2013, shall have an annual fuel utilization efficiency no less than:

Product class	Annual fuel utilization efficiency, April 16, 2013 (percent)
1. Gas wall fan type up to 42,000 Btu/h	75
2. Gas wall fan type over 42,000 Btu/h	76
3. Gas wall gravity type up to 27,000 Btu/h	65
4. Gas wall gravity type over 27,000 Btu/h up to 46,000 Btu/h	66
5. Gas wall gravity type over 46,000 Btu/h	67
6. Gas floor up to 37,000 Btu/h	57
7. Gas floor over 37,000 Btu/h	58
8. Gas room up to 20,000 Btu/h	61
9. Gas room over 20,000 Btu/h up to 27,000 Btu/h	66
10. Gas room over 27,000 Btu/h up to 46,000 Btu/h	67
11. Gas room over 46,000 Btu/h	68
12. Gas hearth up to 20,000 Btu/h	61
13. Gas hearth over 20,000 Btu/h and up to 27,000 Btu/h	66
14. Gas hearth over 27,000 Btu/h and up to 46,000 Btu/h	67
15. Gas hearth over 46,000 Btu/h	68

* * * * *

(k) *Pool heaters.* (1) Gas-fired pool heaters manufactured on or after January 1, 1990 and before April 16, 2013, shall have a thermal efficiency not less than 78%.

(2) Gas-fired pool heaters manufactured on or after April 16, 2013, shall have a thermal efficiency not less than 82%.

* * * * *

Appendix

[The following letter from the Department of Justice will not appear in the Code of Federal Regulations.]

DEPARTMENT OF JUSTICE, Antitrust Division

CHRISTINE A. VARNEY, Assistant Attorney General, Main Justice Building, 950 Pennsylvania Avenue, N.W., Washington, D.C 20530–0001, (202) 514–2401/(202) 616–2645 (Fax) E-mail: *antItrust.atr@usdoj.gov*, Web site: *http://www.usdoj.gov/atr*

February 12, 2010

Robert H. Edwards, Jr., Deputy General Counsel for Energy Policy, Department of Energy, Washington, DC 20585

Dear Deputy General Counsel Edwards:

I am responding to your letter seeking the views of the Attorney General about the potential impact on competition of proposed energy conservation standards for residential water heaters, direct heating equipment and pool heaters (collectively, residential heating products). Your request was submitted pursuant to Section 325(0)(2)(B)(i)(V) of the Energy Policy and Conservation Act, as amended, ("EPCA"), 42 U.S.C. § 6295(0)(B)(i)(V), which requires the Attorney General to make a determination of the impact of any lessening of competition that is likely to result from the imposition of proposed energy conservation standards. The Attorney General's responsibility for responding to requests from other departments about the effect of a program on competition has been delegated to the Assistant Attorney General for the Antitrust Division in 28 CFR § 0.40(g).

In conducting its analysis, the Antitrust Division examines whether a proposed standard may lessen competition, for example, by substantially limiting consumer choice, leaving consumers with fewer competitive alternatives, placing certain manufacturers of a product at an unjustified competitive disadvantage compared to other manufacturers, or by inducing avoidable inefficiencies in production or distribution of particular products.

We have reviewed the proposed standards contained in the Notice of Proposed Rulemaking ("NOPR") (74 Fed. Reg. 65852, December 11, 2009) and the supplementary information submitted to the Attorney General, and attended the January 7, 2010 public hearing on the proposed standards.

Based on this review, the Department of Justice does not believe that the proposed standard for residential hot water heaters or pool heaters would likely lead to a lessening of competition. Our review has focused upon the standards DOE has proposed adopting; we have not determined the impact on competition of more stringent standards than those proposed in the NOPR.

With respect to direct heating equipment (DHE), the Department does not see any competitive issue with gas hearth-heaters. The Department, however, is concerned that the proposed efficiency standards could adversely affect competition in the traditional DHE product categories: (1) gravity wall furnaces; (2) fan-forced wall furnaces; (3) floor furnaces; and (4) room heaters.

The Department notes that essentially only three manufacturers currently market products for each of these four traditional DHE categories. It appears from the record that meeting the proposed standards may require the manufacturers, even those currently producing models that meet the proposed standards, to make a substantial capital investment to convert or expand their production facilities. It also appears that each manufacturer will have to commit significant resources for research and development.

Based on our review, the proposed efficiency standards could affect competition by limiting the number of competitors in each category. Given the capital investments and research and development costs required to produce products meeting the standards, there is a significant risk that no more than one or two DHE manufacturers will choose to continue to produce products in anyone DHE category.

Although the Department of Justice is not in a position to judge whether manufacturers will be able to meet—or choose to make the capital expenditures to meet—the proposed standards, we ask the Department of Energy to take into account the possible impact on competition in determining its final energy efficiency standards for DHE.

Sincerely,

Christine A. Varney

[FR Doc. 2010–7611 Filed 4–15–10; 8:45 am]

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H.R. 4621/P.L. 111–155
Prevent Deceptive Census Look Alike Mailings Act (Apr. 7, 2010; 124 Stat. 1112)

H.J. Res. 80/P.L. 111–156
Recognizing and honoring the Blinded Veterans Association on its 65th anniversary of representing blinded veterans and their families. (Apr. 7, 2010; 124 Stat. 1114)

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